

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137



RECHTSIDEE

PUBLISHED BY
UNIVERSITAS
MUHAMMADIYAH
SIDOARJO

ISSN 2443-3497
(online)



SCAN ME

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

Table Of Contents

Journal Cover	1
Author[s] Statement	3
Editorial Team	4
Article information	5
Check this article update (crossmark)	5
Check this article impact	5
Cite this article.....	5
Title page	6
Article Title	6
Author information	6
Abstract	6
Article content	8

Originality Statement

The author[s] declare that this article is their own work and to the best of their knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the published of any other published materials, except where due acknowledgement is made in the article. Any contribution made to the research by others, with whom author[s] have work, is explicitly acknowledged in the article.

Conflict of Interest Statement

The author[s] declare that this article was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Copyright Statement

Copyright © Author(s). This article is published under the Creative Commons Attribution (CC BY 4.0) licence. Anyone may reproduce, distribute, translate and create derivative works of this article (for both commercial and non-commercial purposes), subject to full attribution to the original publication and authors. The full terms of this licence may be seen at <http://creativecommons.org/licenses/by/4.0/legalcode>

EDITORIAL TEAM

Editor in Chief

Mochammad Tanzil Multazam, Universitas Muhammadiyah Sidoarjo, Indonesia

Scopus ID: [57200559335](#)

Researcher ID: [A-2135-2016](#)

ORCID: [0000-0002-6373-1199](#)

Managing Editor

Dr. Rifqi Ridlo Phahlevy, Universitas Muhammadiyah Sidoarjo, Indonesia

Scopus ID: [57205880567](#)

ORCID: [0000-0002-6684-1190](#)

Editorial Board

Regional Editor for Central Asia

Saydaxmedov Umid Murodovich, Associate Professor of Economic Law, Higher School of Judges under the Supreme Council of Judges of the Republic of Uzbekistan [[Google Scholar](#)]

Esanov Azamat Esirgapovich, Tashkent State University of Law, Uzbekistan [[Scopus](#)]

Dametken Medikhanovna Turekulova, Esil University, Kazakhstan [[Scopus](#)]

Regional Editor for Asia Pacific

Faizal Kurniawan, Universitas Airlangga, Indonesia [[Google Scholar](#)] [[Scopus](#)]

M. Zulfa Aulia, Universitas Jambi, Indonesia [[Google Scholar](#)] [[Scopus](#)]

Fradhana Putra Disantara, Institut Teknologi Bisnis Yadika, Indonesia [[Google Scholar](#)] [[Scopus](#)]

Dr. Noor Fatimah Mediawati, Universitas Muhammadiyah Sidoarjo, Indonesia [[Google Scholar](#)] [[Scopus](#)]

Regional Editor for America

Dinara F. Abdunayimova, University of Illinois College of Law, USA [[Google Scholar](#)]

Regional Editor for Middle East

(No data provided)

Complete list of editorial team ([link](#))

Complete list of indexing services for this journal ([link](#))

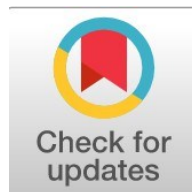
How to submit to this journal ([link](#))

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

Article information

Check this article update (crossmark)



Check this article impact (*)



Save this article to Mendeley



(*) Time for indexing process is various, depends on indexing database platform

Proportional Human Rights Protection in Democratic Transitions: Perlindungan HAM Proporsional dalam Transisi Demokrasi

Melkias Hetharia, hetariam@fh.uncen.ac.id (*)

Universitas Cenderawasih, Jayapura, Indonesia, Indonesia

(*) Corresponding author

Abstract

General Background Human rights protection is a constitutional foundation of democratic rule of law and a safeguard against authoritarian regression. **Specific Background** In democratic transitions, states must balance political stability, transitional justice, and human rights protection. **Knowledge Gap** Previous studies have not sufficiently compared how different legal systems shape institutional and judicial roles in protecting human rights during democratic transition. **Aims** This study analyzes human rights protection in transitional democracies through a normative comparative legal approach between Indonesia and the United States. **Results** The findings show that proportionality is the main standard for lawful rights limitation through legality, legitimate aim, suitability, necessity, and balancing tests. Non-derogable rights, including the right to life, freedom from torture, and freedom of religion, must remain absolutely protected. Indonesia's civil law system places courts within statutory frameworks, while the United States' common law system gives courts broader authority through judicial review. **Novelty** This study integrates proportionality and transitional justice in comparing civil law and common law models. **Implications** The findings emphasize institutional strengthening, judicial accountability, and state-society collaboration.

Highlights:

- Proportionality guides lawful limitation of rights.
- Non-derogable rights remain absolutely protected.
- Legal systems shape judicial authority differently.

Keywords: Human rights protection, democratic transition, transitional justice, proportionality, comparative law

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

Published date: 2026-05-12

Introduction

Human rights are an essential universal foundation for every country in the world because they serve as the main pillar in the development of a democratic rule of law[1]. This is because a democratic rule of law cannot be separated from the recognition and protection of human rights as its fundamental foundation. Human rights are both a prerequisite and the ultimate goal of a democratic rule of law because they protect the dignity of the individual as a legal subject—including the right to life, freedom of expression, and access to justice guaranteed by the constitution—so that democracy without human rights yields only a false freedom[2].

The development of the concept of human rights was reinforced by the 1948 Universal Declaration of Human Rights, adopted by the UN General Assembly, which affirmed that human rights are inherent, inalienable, and apply to all peoples regardless of national borders, religion, or ideology[3]. All nations remain morally and legally bound through the ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which reinforce each country's national constitution[4]. The importance of human rights for all nations is reflected in their ability to promote social stability through the recognition of the rights of ethnic, religious, and gender minorities, which in turn reduces internal conflict, fosters tolerance, and strengthens the legitimacy of government,

In the era of globalization, human rights have become a crucial diplomatic tool for developing countries to attract foreign investment, join international alliances such as ASEAN or the European Union that require high human rights standards, and avoid sanctions from bodies like the UN Human Rights Council or international courts such as the ICC [5]. Massive human rights violations such as genocide or torture not only damage a country's image but also hinder economic growth through trade boycotts and the loss of investor confidence[6]. Without a commitment to human rights, a country is vulnerable to authoritarianism, endemic corruption, and widespread humanitarian crises. Therefore, for all nations worldwide, human rights are not merely normative rhetoric but an imperative prerequisite for achieving collective well-being, distributive justice, and lasting peace, requiring governments, judicial institutions, and civil society to collaborate on effective implementation through human rights education, independent oversight, and progressive legal reforms, so that the world can move toward an international order based on universal human values[7].

Human rights play a crucial role for countries undergoing democratic transition, as they serve as the foundation for preventing the resurgence of authoritarianism and establishing the legitimacy of the new government. During the transition from an authoritarian regime to democracy[8], human rights function as a check on power by guaranteeing civil rights such as freedom of expression and assembly, which enable public participation without repression. The enforcement of human rights also supports transitional justice to address past violations, ensuring that victims receive recognition and reconciliation without compromising national stability[9]. This study aims to analyze the protection of human rights in countries undergoing democratic transition through a comparative legal analysis between Indonesia and the United States.

A legal comparison between Indonesia and the United States regarding human rights protection in countries undergoing democratic transition is necessary to identify best practices in building strong institutions following an authoritarian regime. This is particularly relevant for countries with different legal systems, such as Indonesia, which is dominated by a civil law system, and the United States, which operates under a common law system. This study addresses two legal issues: (i) the concept of human rights protection in democratic transitions: a transitional justice perspective, and (ii) a comparative analysis of human rights protection in democratic transitions between Indonesia and the United States.

Method

This study, which focuses on analyzing the protection of human rights in countries undergoing democratic transition through a legal comparison between Indonesia and the United States, is a normative legal study. As a normative legal study, the use of legal principles, concepts, and theories is fundamental to this research[10]. The approaches used are comparative, conceptual, and statutory. The primary legal sources used are the 1945 Constitution of the Republic of Indonesia, the United States Constitution, and other relevant laws and regulations. The secondary legal sources used include books, journal articles, and research findings discussing democratic transition, transitional justice, and the protection of human rights. The non-legal source used is a legal dictionary. The analysis in this study is conducted in a prescriptive manner that is evaluative and normative, in which the researcher not only outlines existing legal rules (descriptive) but also provides an assessment (justification) of the legal solutions that should be implemented[11].

Results and Discussion

A. The Concept of Human Rights Protection in Democratic Transition: A Transitional Justice Perspective

The concept of human rights has long been a subject of discourse, particularly in relation to the existence and nature of humanity itself. The natural law perspective, rooted in the works of philosophers such as Thomas Aquinas, John Locke, and Thomas Hobbes, views human rights as inherent and universal rights that are inseparable from human dignity from birth, based on natural reason or the will of God, thus rights such as the right to life, liberty, and property are considered to pre-exist the state or positive law and cannot be revoked by any authority[12]. Locke emphasized that a government is legitimate only if it protects these natural rights, and their violation justifies a popular revolution[13]. Significant developments regarding human rights occurred particularly after the adoption of the 1948 Universal Declaration of Human

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

Rights, which declared these rights to be “inherent in all members of the human family” regardless of state jurisdiction, implying that natural law provides supranational moral legitimacy to criticize authoritarian regimes that violate fundamental rights such as genocide or slavery[14].

The positivist perspective also positions human rights as a vital aspect of the rule of law, even while rejecting metaphysical claims of natural law by asserting that human rights are merely a construct of positive law that is valid only if recognized and regulated through formal legal sources such as statutes, government regulations, or court decisions derived from state sovereignty[15]. Bentham even referred to natural rights as “nonsense upon stilts” because rights do not exist without enforcement sanctions by the state. In general, both the natural law perspective and legal positivism view the state as playing a crucial role in the fulfillment of human rights[16].

The state’s obligation to protect, respect, and fulfill human rights is a fundamental principle of law that has been enshrined in various global and regional instruments, whereby the state, as the primary holder of sovereignty, bears full responsibility for the fulfillment of its citizens’ basic rights[17]. This is as outlined in the 1948 Universal Declaration of Human Rights, which serves as the foundation for the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), where the obligation to respect requires the state to refrain from actions that directly violate human rights through its agents or institutions, such as avoiding torture, arbitrary detention, or discrimination by state officials[18]. The state’s obligation to protect human rights involves preventing violations by third parties, such as non-state actors including private companies, militia groups, or individuals who may commit domestic violence, child labor exploitation, or environmental destruction that threatens the right to life and health—obligations often implemented through criminal laws, oversight mechanisms, and effective sanctions. One of the state’s priorities in formulating human rights-based policies is ensuring access to fundamental rights such as free basic education, adequate health services, decent housing, and social protection for vulnerable groups, guided by the principles of non-discrimination, gender equality, and community participation[19].

The concept of human rights protection is a key aspect focused on ensuring the fulfillment, respect, and protection of every individual’s fundamental rights against violations by the state, non-state actors, or social dynamics, as codified in international instruments such as the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[20]. A key element of the concept of human rights protection is the state’s obligation to respect these rights, which prohibits state institutions such as the police, military, or public officials from committing acts that directly violate human rights—for example, through torture, arbitrary arrest, news censorship, or racial discrimination—which must be prevented through the doctrine of non-refoulement and the principle of legality[21].

The next element related to the concept of human rights protection is the duty to protect, which requires the state to establish preventive mechanisms against violations by third parties, such as corporations that exploit child labor, terrorist groups that commit acts of violence, or other human rights violations. This is achieved through the enforcement of effective criminal laws and the provision of compensation for victims[22]. The next element is the progressive and maximum obligation to fulfill, wherein the state must actively provide facilities for affirmative rights such as access to free education, universal health care, adequate housing for refugees, and social protection for persons with disabilities, with a minimum standard budget allocation. Another element that must be considered is access to effective legal remedies, including the right to a fair trial, free legal aid, victim compensation, and complaint mechanisms such as the National Commission on Human Rights (Komnas HAM) or independent and prompt UN treaty bodies. The elements of public participation and accountability, where civil society, NGOs, and the media are involved in monitoring and advocacy campaigns. The next element is human rights education and outreach to build a culture of human rights in society through school curricula, training, and public campaigns to prevent intolerance.

Generally, the concept of human rights protection is often formulated when a country is in a normal or secure state. These conditions generally facilitate the implementation of human rights protection because, in theory, it simply involves enforcing existing laws and regulations. However, under certain circumstances, human rights protection also faces challenges in abnormal situations, such as emergencies or transitional periods. Generally, a legal state of emergency is an abnormal situation that threatens the safety of the state or society, thereby justifying the implementation of extraordinary rules and powers that deviate from ordinary law, though these remain subject to specific conditions, time limits, and oversight[23]. A state of emergency is known as a “state of danger” or “state of emergency” when the government cannot function normally, necessitating extraordinary measures to save the state[24]. A democratic transition refers to the transitional period or interval between an authoritarian regime and a democratic regime, characterized by the collapse of the old power structure and the establishment of new political institutions and rules under the umbrella of democracy. Terminologically, this is the process of power transition from an authoritarian system to a democratic system, often referred to as a political “transition”[25]. The transition phase typically begins after liberalization (the release of political prisoners, freedom of the press, and opportunities for political competition), followed by the establishment of new institutions, and culminates in a longer-term consolidation of democracy to prevent regression. In this context, the rule of law is key to building public trust through constitutional changes and institutional reforms.

The fulfillment of human rights faces challenges, particularly regarding efforts to protect them during a democratic transition, because while such a transition essentially proceeds under normal conditions (not a state of emergency), it still requires specific legal measures that distinguish it from the fulfillment of human rights under normal circumstances. In general, whether under normal conditions, during a democratic transition, or in a state of emergency, the fulfillment of human rights must be guided by the concepts of non-derogable rights and derogable rights.

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

The main difference between derogable rights and non-derogable rights lies in the flexibility with which states may fulfill them in certain situations, particularly during emergencies such as war, insurrection, or national crises[26]. Derogable rights are human rights that may be limited or temporarily suspended by the state in a proportionate, lawful, and temporary manner, as provided for in Article 4 of the ICCPR, provided that such measures are not discriminatory and are officially announced. Non-derogable rights are absolute and may not be curtailed under any circumstances because they constitute the core of human dignity[27].

In general, human rights that are considered derogable rights may be subject to restrictions on their fulfillment and implementation, particularly during states of emergency and periods of democratic transition. Derogable rights include rights related to procedural or public freedoms, such as the right to freedom of movement (Article 12 of the ICCPR), the right to assembly and association (Articles 21–22), or the right to privacy and correspondence (Article 17), which may be restricted, for example, during a pandemic or during a conflict with travel restrictions for the sake of public safety. Non-derogable rights are rights that are absolute even under extreme emergency conditions. Human rights classified as non-derogable rights, as stipulated in Article 4(2) of the ICCPR, protect the right to life, the prohibition of torture, and others—even during a public emergency—[28]. During democratic transitions or emergency situations, as discussed earlier, these rights remain absolute to uphold human dignity.

The concept of human rights protection during democratic transition emphasizes the principle of proportionality as a mechanism for reasonable restrictions on rights, while ensuring that non-derogable rights remain absolutely applicable to safeguard the foundations of humanity and prevent a regression to authoritarianism. Democratic transition is a phase of transition from an authoritarian regime to a democratic system, as experienced by Indonesia following the 1998 Reform, where human rights protection serves as the primary foundation for building an inclusive and participatory rule of law. During this period, the state often faces a tension between the need for stability (for example, through temporary restrictions on civil rights) and the guarantee of human rights, so the concept of proportionality emerges as a condition for restrictions to prevent systemic violations. Restrictions on human rights are only permitted if they meet the proportionality test: namely, they must be based on legality (in accordance with the law), the legitimacy of the purpose (for the public interest), the appropriateness of the means, necessity (no less restrictive alternatives), and balance (benefits outweigh the harms).

The principle of proportionality in the restriction of human rights ensures that state interventions during a transition—such as the regulation of demonstrations or security surveillance—are not excessive, while still respecting essential rights[29]. This can be illustrated by the fact that during a transition, the rights to assembly or expression may be restricted for the sake of political stability, but such restrictions must be proportional so as not to suppress the voices of the opposition, as upheld through judicial review by the Constitutional Court. Non-derogable human rights—such as the right to life, the prohibition against torture, the right to freedom of religion, the right not to be enslaved, and the right to equality before the law—must not be curtailed under any circumstances, including during conflict-prone transitions. In a democratic transition, this principle serves as the final safeguard against abuse of power, where even a state of emergency may not diminish the applicability of non-derogable human rights, in accordance with ICCPR Article 4.

The concept of human rights protection during democratic transitions emphasizes the principle of proportionality, which aligns with the idea of transitional justice, where restrictions on rights are imposed reasonably to ensure stability while addressing past violations fairly. Transitional justice is a comprehensive approach to addressing systematic or massive human rights violations that occurred during authoritarian regimes or conflicts, with the aim of building peace, reconciliation, and sustainable democracy. Transitional justice is defined as a series of societal processes and mechanisms to uncover the truth, hold perpetrators accountable, provide redress to victims, and reform institutions to prevent the recurrence of similar violations, particularly during the transition from authoritarianism to democracy. The goal is not merely retributive punishment, but rather holistic restoration that encompasses criminal justice, reparations, and reconciliation to break the cycle of impunity.

The International Center for Transitional Justice (ICTJ) emphasizes the four pillars of transitional justice, which include: (i) truth-telling in the form of fact-finding investigations into past violations through truth commissions, (ii) criminal justice in the form of prosecuting perpetrators through ad hoc human rights courts, (iii) reparations for victims, including material and symbolic compensation as well as rehabilitation for victims, and (iv) institutional reform, which involves changes to the legal, military, and law enforcement sectors to prevent recurrence[30]. These four pillars of transitional justice align with the application of the principle of proportionality in the protection of human rights during the democratic transition era.

The concept of human rights protection in democratic transition, from the perspective of transitional justice, positions the principle of proportionality as a mechanism for reasonable restrictions on rights while ensuring that non-derogable rights remain absolute, in order to preserve the foundations of humanity and prevent democratic regression due to authoritarianism. Democratic transition is a phase of transition from an authoritarian regime to a democratic system that demands a balance between state stability through temporary restrictions on civil rights—such as the rights to assembly or expression—and the guarantee of human rights, where proportionality becomes a crucial requirement through tests of legality, the legitimacy of the general objective, the appropriateness of the means, the absence of a less burdensome alternative, and a balance of benefits and costs. This principle of proportionality aligns with transitional justice, a holistic approach to addressing systematic human rights violations during the authoritarian era through the restoration of peace, reconciliation, and sustainable democracy, rather than mere retribution. Transitional justice encompasses the processes of uncovering the truth, prosecuting perpetrators, restoring victims, and reforming institutions to end impunity.

B. A Comparison of Human Rights Protection Laws During the Transition to Democracy Between Indonesia and the United States

The comparative legal approach in normative legal research is a systematic and in-depth method of analysis used to compare legal norms, fundamental principles, and legal constructs across various national and international legal systems in order to identify similarities, differences, strengths, weaknesses, and the potential for relevance or adaptation between these systems, with the aim of addressing specific normative legal issues[31]. Peter de Cruz classifies types of comparative law into several main categories—micro and macro—focusing on the level of analysis and comparative objectives[32]. This study focuses on micro-comparison, emphasizing the substance of human rights protection during the democratic transition between Indonesia and the United States. Comparing human rights protection during democratic transitions between Indonesia and the United States is significant because it not only involves comparing two distinct legal systems—where Indonesia predominantly follows a civil law system and the United States a common law system—but also examines how democratic transitions unfold in a Global South country like Indonesia compared to a Global North country like the United States.

The protection of human rights during Indonesia’s democratic transition was a crucial process following the 1998 Reformasi, which marked the shift from the authoritarian New Order regime toward an inclusive constitutional democracy[33]. The state is obligated to balance political stability with the guarantee of human rights through the principle of proportionality in restricting derogable rights while safeguarding absolute non-derogable rights. Law No. 26 of 2000 as amended by Law No. 27 of 2004 on Human Rights Courts represents one of the state’s efforts to protect human rights in the pursuit of transitional justice. Prosecution of serious human rights violations (genocide, crimes against humanity such as mass killings, systematic torture, and enforced disappearances) through ad hoc human rights courts within the general court system, established by the President upon the recommendation of the House of Representatives based on investigations by the National Commission on Human Rights (Komnas HAM) for cases prior to November 23, 2000[34]. Additionally, efforts to ensure legal protection during the democratic transition include non-judicial reconciliation to end impunity from the New Order era. Obstacles to human rights protection in Indonesia’s democratic transition include structural impunity regarding severe violations committed during the New Order era. The weaknesses of the Komnas HAM institution—whose recommendations are non-binding, lack coordination with the courts, and suffer from systemic corruption—hinder the enforcement of the law and the protection of human rights.

The protection of human rights during the United States’ democratic transition must be understood within the historical context of the American Revolution (1776–1787), which marked a fundamental “transition” from British colonial monarchy to a democratic constitutional republic[35]. The Founding Fathers of the United States designed a federal system of checks and balances through the U.S. Constitution of 1787, supplemented by the Bill of Rights (the first 10 amendments of 1791), as the absolute foundation of human rights, such as Amendment I (freedom of speech, religion, and assembly), Amendments V–VIII (the right to due process, the prohibition against self-incrimination, the right to a jury trial, and the prohibition against cruel and unusual punishment), as well as the Fourteenth Amendment (the Equal Protection Clause of 1868, enacted after the Civil War to protect former slaves), which are non-derogable and subject only to narrow limitations through strict scrutiny judicial review by the Supreme Court[36].

Human rights protection in the United States emphasizes proportionality through tiered scrutiny. In this context, the courts play a crucial role in ensuring human rights protection during periods of transition, particularly regarding the enforcement of non-derogable human rights during democratic transitions. The following table outlines the differences in human rights protection during democratic transitions between Indonesia and the United States.

Table 1. Differences in Human Rights Protection During Democratic Transitions Between Indonesia and the United States.

Comparison Aspects	Indonesia	United States
Context of Democratic Transition	The actual post-1998 Reform process from the authoritarian New Order to an inclusive constitutional democracy, marked by student demonstrations and the fall of Suharto.	The historical revolution of 1776–1787 from the British colonial monarchy to a democratic republic; there is no contemporary modern transition.
Constitutional Basis of Human Rights	Chapter XA of the 1945 Constitution (Articles 28A–28J post-amendments 1999–2002); explicit non-derogable rights under Article 28I(1).	U.S. Constitution of 1787 + Bill of Rights (Amendments 1, 5-8, 14: freedom of speech/religion, due process, equal protection).
Principle of Proportionality	Proportionality of restrictions on derogable rights (Article 28J of the 1945 Constitution); balance between stability and human rights.	Tiered scrutiny (strict scrutiny for fundamental rights; Supreme Court judicial review).
Transitional Justice Mechanisms	Law No. 26/2000 as amended by Law No. 27/2004: Ad hoc Human Rights Court for serious violations prior to November 23, 2000 (genocide, mass murder, torture); non-judicial reconciliation.	No formal ad hoc courts; Reconstruction Era (Amendments 13–15), Congressional investigations, civil rights commissions.
Human Rights Protection Institutions	The National Commission on Human Rights (non-binding recommendations); an ad hoc court established by the President upon the recommendation of the House of Representatives.	Supreme Court (judicial review), DOJ Civil Rights Division, state federalism.
Major Obstacles	Structural impunity (lenient sentences in Tanjung Priok/East Timor cases), weaknesses of the National Human Rights Commission, corruption, elite politics.scholarhub.	Rarely relevant (without a modern transition); historical issues such as the 1944 internment of Japanese Americans (Korematsu, later overturned).

Rechtsidee

Vol. 14 No. 1 (2026): June
DOI: 10.21070/jihr.v14i1.1137

State of Emergency	Article 12 of the 1945 Constitution; State of Emergency Act; absolutely non-derogable.	National Emergencies Act of 1976 (congressional oversight); Posse Comitatus Act; strict scrutiny.
--------------------	--	---

The similarities in the protection of human rights during democratic transitions between Indonesia and the United States lie in the constitutional commitment to absolute, non-derogable rights that are subject only to proportional limitations— as affirmed in Article 28J in Indonesia and the doctrine of tiered scrutiny in the United States. In Indonesia, as a civil law country, the role of the courts is only fully realized when regulated by legislation. In the United States, the role of the courts is very broad because, as a common law country, the courts play a crucial role in maintaining the balance between stability and human rights during the transition phase from authoritarianism. This study recommends that improvements needed for Indonesia in protecting human rights during the democratic transition must focus on addressing structural impunity through the revision of Law No. 26 of 2000 to strengthen the jurisdiction of ad hoc courts, as well as strengthening the National Commission on Human Rights (Komnas HAM) with recommendations for strict sanctions if these measures are not implemented. The United States also needs to address gaps in federalism, such as strengthening the DOJ Civil Rights Division's oversight of police brutality and expanding the Supreme Court's tiered scrutiny.

Conclusion

The concept of human rights protection in democratic transition from a transitional justice perspective affirms that the principle of proportionality serves as the main pillar of reasonable restrictions on rights through tests of legality, the legitimacy of the general objective, the appropriateness of the means, the absence of a less severe alternative, and a balance of benefits and harms, while safeguarding non-derogable rights such as the right to life, the prohibition of torture, and the right to freedom of religion remain absolute to prevent a regression to authoritarianism. This approach balances the state's need for stability during the transitional phase from an authoritarian regime to democracy with an inclusive guarantee of human rights, wherein temporary restrictions on civil rights such as the right to assemble or express opinions must not be excessive. Synergy with holistic transitional justice through truth-telling, criminal justice, reparations for victims, and institutional reforms that break the cycle of impunity for past systematic violations ensures the restoration of peace and sustainable reconciliation toward a substantive democratic rule of law. Thus, the integration of these two concepts not only strengthens the foundations of humanity but also serves as a guarantee for a successful and enduring democratic transition.

A comparison of human rights protection laws during democratic transitions between Indonesia and the United States reveals significant differences in terms of legal systems; in Indonesia, as a civil law country, the role of the courts is only fully realized when governed by legislation. In the United States, the role of the courts is very broad because, as a common law country, the courts play a vital role in maintaining a balance between stability and human rights during the transition from authoritarianism. Both Indonesia and the United States are strengthening the protection of human rights during democratic transitions by emphasizing the crucial role of all parties, from state institutions to the general public.

Acknowledgments

This section expresses gratitude to those who played a role in the conduct of the research, such as the laboratory where the research was conducted. The roles of donors or those who supported the research are briefly described.

References

1. S. Daniels, "Incorporating The Convention On The Rights Of The Child In Scottish Education," *Human Rights Education Review*, vol. 5, no. 1, pp. 1–20, 2022, doi: 10.7577/hrer.4771.
2. D. E. Prasetyo, M. A. Masnun, A. Nugroho, and D. Ikram, "Discrimination Related To Labour Age Limitation In Indonesia: A Human Rights And Comparative Law Perspective," *Jurnal Suara Hukum*, vol. 6, no. 2, pp. 228–254, 2024. [Online]. Available: <https://journal.unesa.ac.id/index.php/suarahukum/article/view/35170>
3. S. H. Sinombor, "The Status Of The Universal Declaration Of Human Rights (UDHR) In The Indonesian Legal System," *Jurnal Al-Wasath*, vol. 3, no. 1, pp. 1–12, 2022, doi: 10.47776/alwasath.v3i1.330.
4. Y. Shany, "The Road Taken: ICCPR And Discriminatory Restrictions On Religious Freedom," *Harvard Human Rights Journal*, vol. 34, no. 1, pp. 305–313, 2021. [Online]. Available: <https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2021/06/34HHRJ305-Shany.pdf>
5. H. Katsui and S. Chalklen, Eds., *Disability, Globalization And Human Rights*. London, U.K.: Taylor & Francis, 2020, doi: 10.4324/9781351043939.
6. M. Ghazali, C. Afra, D. Agusriadi, M. Yusufani, and Bahraini, "The Position And Role Of The International Criminal Court (ICC) In International Crime Resolution," *International Journal Of Law, Social Science, And Humanities*, vol. 2, no. 1, pp. 111–116, Feb. 2025, doi: 10.70193/IJLSH.V2I1.160.
7. M. C. Van Hout, R. Kaima, V. Mhango, S. Kewley, and T. Mariniello, "Judicialization Of The Mentally Ill And/OR Mentally Incapacitated In The Malawi Criminal Justice System: Gaps And Flaws In Human Rights Protection," *Forensic Science International: Mind And Law*, vol. 4, p. 100121, Dec. 2023, doi: 10.1016/j.fsimpl.2023.100121.
8. M. Crouch, "The Challenges For Court Reform After Authoritarian Rule: The Role Of Specialized Courts In Indonesia," *Constitutional Review*, vol. 7, no. 1, pp. 1–25, 2021, doi: 10.31078/consrev711.
9. L. P. V. A. Pujayanti, Z. Z. Nugrahyu, E. I. Rahim, M. H. Muhtar, and C. Yassine, "Indonesia's Constitutional Court: Bastion Of Law Enforcement And Protector Of Human Rights In The Reform Era," *Pamator Journal*, vol. 17, no. 1, 2024, doi: 10.21107/pamator.v17i1.24128.
10. M. A. Masnun and D. E. Prasetyo, "Reconstruction Of The Normative Legal Research Paradigm In Responding To Global Challenges: An Epistemological Analysis," *Novum: Jurnal Hukum*, vol. 12, no. 3, pp. 372–384, 2025, doi: 10.21107/pamator.v17i1.24128.

ISSN 2443-3497 (online), <https://rechtsidee.umsida.ac.id>, published by [Universitas Muhammadiyah Sidoarjo](https://www.umsida.ac.id)

Copyright © Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY).

- 10.2674/novum.v12i03.74364.
11. M. M. Rohman, N. Mu'minin, M. Masuwd, and E. Elihami, "Methodological Reasoning In Law Through Normative Studies: Theory, Approach, And Analysis Of Legal Materials," *MAQASIDI: Jurnal Syariah And Law*, vol. 4, no. 2, pp. 204–221, Dec. 2024, doi: 10.47498/maqasidi.v4i2.3379.
 12. F. De Micco and R. Scendon, "Three Different Currents Of Thought To Conceive Justice: Legal, And Medical Ethics Reflections," *Philosophies*, vol. 9, no. 3, p. 61, Apr. 2024, doi: 10.3390/philosophies9030061.
 13. L. Vrapca, "John Locke's Political Philosophy," *Balkan Journal Of Interdisciplinary Research*, vol. 10, no. 2, pp. 90–98, 2024, doi: 10.2478/bjir-2024-0019.
 14. R. K. R. Hammar, "Exploring The Intersection Of Common Law And The Criminal Justice System: Implications For Protecting Freedom Of Speech In Indonesia," *International Journal Of Criminal Justice Sciences*, vol. 17, no. 2, pp. 299–311, 2022, doi: 10.5281/zenodo.4756126.
 15. K. Kouros, R. Toivanen, and T. Kasa, "The Finnish National Human Rights Institution's Approach To Human Rights Education," in *Nordic Perspectives On Human Rights Education: Research And Practice For Social Justice*, A. Osler and B. Goldschmidt-Gjerlow, Eds. Abingdon, U.K.: Routledge, 2024, pp. 44–58, doi: 10.4324/9781003340676-8.
 16. S. Salam, L. O. M. Karim, L. Gurusi, K. Kaswandi, F. Tonny, and R. Dewi, "The Concept Of Austin And Jeremy Bentham And Its Relevance To The Construction Of Indigenous Peoples," *Jurnal Transcendental Law*, vol. 6, no. 1, pp. 32–43, Jun. 2024, doi: 10.23917/jtl.v6i1.4153.
 17. I. P. Purba, R. Wijaya, A. N. Hilmi, I. L. Nabilah, and A. Widiyanti, "The Fulfillment Of Human Rights Of Persons With Disabilities In Surabaya City," *IJCAH*, vol. 1, no. 1, pp. 120–136, 2023, doi: 10.2991/978-2-38476-008-4_16.
 18. D. E. Prasetyo, M. A. Masnun, and H. Widodo, "Affirmative Action For Persons With Disabilities To Ensure The Right To Be Elected In General Elections," *Nusantara Science And Technology Proceedings*, vol. 1, no. 1, pp. 205–210, May 2025, doi: 10.11594/nstp.2025.4824.
 19. N. E. Eneh, S. S. Bakare, A. O. Adeniyi, and C. U. Akpuokwe, "Modern Labor Law: A Review Of Current Trends In Employee Rights And Organizational Duties," *International Journal Of Management And Entrepreneurial Research*, vol. 6, no. 3, pp. 540–553, Mar. 2024, doi: 10.51594/ijmer.v6i3.843.
 20. M. Jones, "No Right Without A Remedy: Integrating Human Rights Protection Into Sports Dispute Resolution," *Australian And New Zealand Sports Law Journal*, vol. 15, no. 1, pp. 1–28, 2022.
 21. S. Kanwel, M. I. Khan, and U. Asghar, "In The Shadow Of Justice: Human Rights Implications Of Criminal Acts," *Journal Of Asian Development Studies*, vol. 13, no. 1, pp. 578–585, Feb. 2024, doi: 10.62345/jads.2024.13.1.48.
 22. I. Kamalludin, A. Purwanti, R. B. Sularto, V. Berezniak, and Valentyn, "Designing A Digital Trust Fund For Justice For Victims Of Sexual Violence Based On Islamic Criminal Law," *Jurnal Hukum Islam*, vol. 23, no. 2, pp. 459–500, Dec. 2025, doi: 10.28918/jhi.v23i2.04.
 23. E. Fahamsyah and F. P. Disantara, "The Dignified Justice Perspective On The Enigma Of COVID-19 Health Protocols As A Code Of Ethics," *Jurnal Pembaharuan Hukum*, vol. 9, no. 1, pp. 1–15, 2022, doi: 10.26532/jph.v9i1.17413.
 24. E. Sinta and A. Kosasih, "Amnesty And Abolition In The Indonesian Constitutional Law System: A Critical Study Of The Cases Of Hasto Kristiyanto And Tom Lembong," *Staatsrecht: Journal Of Constitutional Law And Political Islam*, vol. 5, no. 2, Dec. 2025, doi: 10.14421/staatsrecht.v5i2.4471.
 25. R. Southall, "Unraveling The Amnesty Issue In South Africa: A Review Article," *Transformation: Critical Perspectives On Southern Africa*, vol. 115, no. 1, pp. 120–139, 2025, doi: 10.1353/trn.2025.a968437.
 26. D. E. Prasetyo, "Ius Constituendum Legal Standing For Foreign Nationals Regarding Judicial Review Proceedings At The Constitutional Court From A Human Rights Perspective," *HUNILA: Jurnal Ilmu Hukum Dan Integrasi Peradilan*, vol. 2, no. 1, pp. 125–138, 2023. [Online]. Available: <https://ejournal.iainfmpapua.ac.id/index.php/hunila/article/view/723>
 27. M. A. Salemot, "Non-Derogable Rights During A State Of Emergency: Evaluation Of The Ethiopian Legal Framework In Light Of International Standards," *Hawassa University Journal Of Law*, vol. 5, no. 1, p. 177, 2021. [Online]. Available: <https://journals.hu.edu.et/hu-journals/index.php/hujl/article/view/421>
 28. M. I. Firdaus, "The Legalization Of Interfaith Marriage In Indonesia: Between Universalism And Cultural Relativism," *The Easta Journal Law And Human Rights*, vol. 1, no. 2, pp. 64–72, 2023, doi: 10.58812/eslhr.v1i02.52.
 29. G. Gunatilleke, "Justifying Limitations On The Freedom Of Expression," *Human Rights Review*, vol. 22, no. 1, pp. 91–108, Mar. 2021, doi: 10.1007/s12142-020-00608-8.
 30. F. Momodu and M. Yilmaz, "Restorative Justice In The South African Truth And Reconciliation Commission," *Journal Of Customary And Religious Law*, vol. 2, no. 1, pp. 205–215, 2025. [Online]. Available: <https://journals.unizik.edu.ng/index.php/jocar/article/view/5423>
 31. R. Lukito, "Compare But Not To Compare: A Comparative Study Of Law In Indonesia," *Undang: Jurnal Hukum*, vol. 5, no. 2, p. 273, 2022.
 32. P. De Cruz, *Comparative Law In A Changing World*, 4th ed. London, U.K.: Routledge, 2015.
 33. Mahmuzar, "The Model Of The Unitary State Of The Republic Of Indonesia In The Reform Era," *Jurnal Hukum & Pembangunan*, vol. 50, no. 2, p. 303, 2020, doi: 10.21143/jhp.vol50.no2.2590.
 34. M. M. Haque, "The Role Of National Human Rights Institutions: The Case Of The National Human Rights Commission In Bangladesh And Komnas HAM In Indonesia," *Journal Of Conflict And Peace Studies*, vol. 3, no. 1, pp. 38–61, 2024.
 35. M. S. Bilder, "The Soul Of A Free Government: The Influence Of John Adams's A Defence On The Constitutional Convention," *Journal Of American Constitutional History*, vol. 1, no. 1, pp. 1–40, 2023, doi: 10.59015/jach.axbf8835.
 36. A. Sethi, "Sub-Constitutionally Repairing The United States Supreme Court," *Common Law World Review*, vol. 52, no. 4, pp. 128–149, 2023, doi: 10.1177/14737795231205324.