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The Constitutionalization of 'Religious Values' in Indonesia

Ahmad Rofii and Nadirsyah Hosen

Introduction

Much discussion on religion and the Indonesian Constitution has focused on Article 29, particularly the omitted famous seven words that stated '*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*' (with the obligation to carry out Islamic Shariah for its adherents) (Hosen 2005; Elson 2009; 2013; Basalim 2002). However, the amendment to the 1945 Constitution introduced another interesting phrase: '*nilai-nilai agama*' (religious values). Among other reasons, this has led the Constitution to be characterized as 'very religious and godly at the same time' (Asshiddiqie no date: 14), or as establishing a 'religious nation state' (Mahfud MD 2006: 30). Although during the amendment process (1999–2002) the phrase 'religious values' were introduced and supported by Muslim-based factions, which were implicitly aiming to advance Islamic aspirations, the phrase used was not 'Islamic values'. Their final adoption by all factions from different political ideologies and religious affiliations demonstrated the inclusiveness and generality of the meaning of the words 'religious values' (Hosen 2007: 128). However, 'religious values' could be ambiguous since it entails a different understanding from various religious worldviews, and their different schools or denominations.

The phrase 'religious values' is mentioned twice in the Constitution, first, in Article 28J(2) on the limitations of constitutional rights, and second, in Article 31(5) on the duty of the government to uphold these values in education. In this chapter, we examine the meaning and the application of 'religious values' by specifically asking how far the Court has endorsed the limitation on religious freedom based on 'religious values' as a constitutional requirement.

In order to answer the question above, first, we will evaluate the constitutional debate surrounding the phrase during the 1999–2002 amendment. Notably, we want to understand the meaning of 'religious' and 'values' and the socio-legal-political context at that period. Second, we will discuss how the Indonesian Constitutional Court (*Mahkamah Konstitusi*) has interpreted the phrase in related cases. We argue that the words 'religious values' represents a compromise position of state and religion in the Indonesian Constitution. In order to maintain harmony and unity, the rights to religion are protected. Still, the application of these rights could be limited by the law. Therefore, the constitutionalization of religious values demonstrates that the Indonesian Constitution is not secular, nor is it hostile to religion (Kuru 2009;

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Ahdar 2013; Hosen 2013). Rather, it is a constitution that is designed to accommodate a highly religious society.

Religious Values in the Constitution

The place of religion in the Constitution is important. After the amendment, there is an increasing number of references to words related to religion in the amended Constitution. There are four models of mentioning religious terms in the amendment to the 1945 Constitution. First, the Constitution refers to 'religion' (*agama*) in many places in the Constitution such as on religion, on the presidential oath, on the Regional Representative Council, on the Religious Courts or judiciary (*Pengadilan Agama*) (Arts 29(2), 9, 22D, and 24(2) respectively).

Second, the Constitution also refers to religious rights, namely the right to have and to practice religion and freedom of religion as a non-derogable right (Arts 28E and 28I(1)). Third, the constitutional provisions on religious values are mentioned in the limitation clause on human rights and the clause on national education (Arts 28J(2) and 31(5)). Fourth, the Constitution also uses 'faith and piety' (*keimanan dan ketakwaan*') without mentioning religion in Article 31(3) on national education.

As stated at the outset, this chapter will only focus on the phrase 'religious values' (the third model). In this section, we will evaluate the ideas and proposals during the constitutional amendment debate that led to the use of such phrases so we can understand their meaning in the historical context. Such a phrase was not included in the original 1945 Constitution.

In 2000, during the Second Amendment, the members of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) discussed Chapter XA on Human Rights. Previously, in 1998, the MPR issued Decree XVII/1998 on human rights. In 2000, the constitution-makers used the 1998 MPR Decree as a basis for their constitutional debate. Therefore, it is essential to understand the socio-political context of 1998 that led to the issuance of this important decree.

In May 1998, when President BJ Habibie took over the presidency, he faced significant pressure, at both national and international levels, to improve human rights conditions in Indonesia. Many NGO activists and constitutional experts urged Indonesia to amend its Constitution to guarantee human rights protection, since the original 1945 Constitution had no adequate provisions on human rights. At the international level, the demands for reform came from the World Bank, when it raised its concerns over the human rights situation in Indonesia and East Timor. In a letter to President Habibie, the World Bank stressed the need for reform 'for the international financial community to be able to continue its full support'. The World Bank urged Habibie to take significant steps (Clark 2002).

Those pressures forced Habibie, in his State Address before the MPR session of 15 August 1998 to give strong support to the idea of the universality of human rights. He stated, 'We have firmly abandoned the uncertainty phase, which earlier always considered human rights as a Western cultural product (*Kompas* 1998). In addition, he also said, 'We are determined to make human rights principles the yardstick in our life

as a nation and country. We will promote and safeguard human rights in accordance with our democratic and welfare-based approach' (Cassel 1998).

In order to deal with the protection of human rights, President Habibie issued Presidential Decree 129/1998 concerning the National Human Rights Plan. The Decree states that Indonesia, as a member of the international community, holds in high esteem the Universal Declaration of Human Rights, and the 1993 Vienna Human Rights Declaration and the Programme of Action. Article 1 of the Decree also states that the purpose of the National Action Plan is to increase the protection of human rights in Indonesia, by taking into account the values of indigenous and traditional communities, as well as national cultures and religions, based on the *Pancasila*, and the 1945 Constitution.

In 1998, the MPR, as the highest state institution, adopted Decree XVII/MPR/1998 on Human Rights. By this decree, for the first time in Indonesian history, an Indonesian Charter on Human Rights was introduced. Many of the clauses in this decree were drawn directly from the Universal Declaration of Human Rights (UDHR). For instance, Articles 19–21 of the decree protects citizens' rights to freedom of expression without interference and to seek, receive, and impart information and ideas through any media. In addition, the guarantee of the rights of assembly and association, if enforced, would end the president's ability to disband political parties. Presidents Soekarno and Soeharto banned certain parties and forced others to merge, as effective weapons against their political opponents.

On 23 September 1999, a month before the presidential election, President Habibie signed Law 39/1999 on Human Rights ('the Human Rights Law'). This law implemented MPR Decree XVII on Human Rights. The Human Rights Law sets out a long list of internationally recognized human rights, which Indonesia is obliged to protect. The law contains provisions on human rights and fundamental freedoms, the responsibilities and obligations of the government in the promotion and protection of human rights, and the plan to set up a Human Rights Court. The law also strengthens the powers of the National Commission on Human Rights (*Komnas HAM*), which had been established by presidential decision in 1993 to monitor and report on human-rights abuses. Most importantly for its future investigative role, the new law gave the National Commission on Human Rights the legal power to force the attendance of witnesses, including those against whom complaints have been made (Hosen 2002; Juwana 2003).

However, this law is not adequate to protect human rights since the legislature can easily replace or amend it. Laws and other regulations should be based on the Constitution, whereas too many of the key clauses of the original 1945 Constitution end with an injunction for further specification by laws, opening the door to subsequent manipulation by the legislature. The original Constitution also lacks guarantees of basic civil and political rights. We have shown that the human rights provisions in the Second Amendment were the result of a long process that started during the MPR Session of 1998.

For the drafters of the Chapter on Human Rights in the Amended Constitution, the acceptance of the universality of human rights should be balanced with limiting the application of human rights. Limitations on rights, including the right to freedom of religion, according to Article 28J(2), are legitimate provided that it is:

> determined by legislation, with the sole purpose of guaranteeing recognition and respect for the rights and freedom of others, and of meeting just requirements, based upon considerations of morality, religious values, security and public order, in a democratic society.

The text above is similar to Article 36 of the MPR Decree XVII/1998 on human rights with one difference, namely the addition of the phrase 'religious values'. Originally based on Article 36, the draft constitutional article did not initially provide for 'religious values' as a limitation on rights. The other legitimate bases of limitations on rights echo common limitations found in international human rights instruments (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010b: 519–520; see Universal Declaration of Human Rights, Article 29(2); International Covenant on Economic, Social and Cultural Rights, Article 4; International Covenant on Civil and Political Rights, Article 19(3) concerning limitations on the right to freedom of conscience, religion, and belief). The wording of the 1998 MPR Decree seems to be similar to the general limitations clause in the UDHR. Similar grounds for limitations on rights are found in regional human rights instruments, such as the European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9(2) concerning limitations on the right to freedom of thought, conscience, and religion), and most national bills of rights (Gardbaum 2006; Ahmed and Bulmer 2017). Unlike all these instruments, the Indonesian Constitution peculiarly adopts the consideration of religious values as grounds for limiting constitutional rights.

Before we discuss the debate on religious values in detail, it is necessary to introduce the main factions that participated in the debate. We classify the MPR factions with regard to the issue of religious values into three groups. First, secular-nationalist factions, which includes the faction of the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia-Perjuangan*, PDI-P), the Party of Functional Groups (*Partai Golkar*, PG), and the Armed and National Police Forces (*Tentara Nasional Indonesia/Kepolisian Republik Indonesia*, TNI/POLRI). Second, Islamist factions, consisting of the faction of the Crescent Moon and Star Party (*Partai Bulan Bintang*, PBB), the United Development Party (*Partai Persatuan Pembangunan*, PPP), and the Union of Muslim Sovereignty (*Perserikatan Daulat Umat*, PDU). Third, religious-oriented factions, including the faction of the National Awakening (*Kebangkitan Bangsa*, KB) and the *Reformasi* faction (*Reformasi*), which consisted of two parties, National Mandate Party (PAN) and Justice Party (PK). When the idea of human rights was first debated, following the discussions on citizens and residents, the *Reformasi* faction suggested the inclusion of religious values, in line with the first principle of the state basis (Pancasila), *Ketuhanan Yang Maha Esa* (belief in One Supreme God), as a limiter of human rights (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010b: 335–336). The first draft chapter, however, did not make any such reference to religious values. It was then proposed again on the basis that it would constrain the unbridled exercise of individual freedom and the excessive enjoyment of rights (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010c: 253, 296). The *Reformasi* faction initially proposed the inclusion of the words 'religious values' directly after legislation (*undang-undang*) as a limitation on rights. This could be understood as suggesting that religious values would have authority equivalent to that of a law in

limiting rights (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010c: 253, 305; Salim 2008: 110). Notwithstanding this, the matter of religious values was again left absent from the second draft chapter (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010c: 512).

Aware of this, AM Luthfi, of the *Reformasi* faction reminded other members of the MPR about 'religious values'. Instead of placing these words immediately after legislation, they suggested that 'religious values' be placed immediately after the word 'morality'. Some members from the secular-nationalist factions (TNI/POLRI and PDIP) opposed this inclusion, because the words 'religious values' had not been raised in the debates prior to the agreement on the draft. On the other hand, other members, particularly from the Muslim parties-based factions, supported the idea, arguing that the inclusion was a means to perfect the idea of morality, in accordance with the religious nature of the nation. Hamdan Zoelva (PBB Faction) specifically interprets this as 'no articles on human rights in the Second Amendment may contradict religious values' (Hosen 2007: 128). That is why his party accepted the human rights provisions in Chapter X of the 1945 Constitution. All factions, for their own reasons, finally agreed to the insertion of the term 'religious values' (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010b: 520–530).

The word 'values' was not crafted accidentally. It was deliberately chosen so that all MPR factions could agree with the insertion of the term 'religion'. By employing the word 'values', the consideration of the permissible limitations on rights can refer to general doctrines and principles of religion, rather than its rules and practical norms. This interpretation is consistent not only with the textual meaning of the word 'values' as 'important or beneficial qualities for humanity' (Pusat Bahasa Departemen Pendidikan Nasional 2001), but also its historical significance, as it was used during the amendment process. In the draft amendment proposed by the *Partai Golkar* Faction, for instance, religious doctrines are distinguished in terms of the values, norms, and laws of religion (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010b: 421–422: 566). Moreover, *Kebangkitan Bangsa* Faction, in its suggestions for amending Article 29, suggested that religious doctrines could be understood in four ways: creeds, rituals, social relations, and universal values and morality. Religious values, as used in this context, was understood as the most abstract and universal teachings of a religion, such as matters of honesty and kindness, and as providing the ethical foundations for the state (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010b: 423; 2010d: 427). Nonetheless, if religious values are understood in such an inclusive, general way, and therefore would include morality, public order, and all other considerations for limiting constitutional rights in accordance with Article 28J(2), the inclusion of the words 'religious values' would be repetitive and thus unnecessary. For this reason, these words could reasonably be taken to refer to the values of religion(s) other than those already mentioned. The phrase 'religious values' is placed alongside justice, morality, security, public order, and the concept of a democratic country.

Religious law, Islamic law in particular, could potentially have different roles, in the face of the religious values clause. It could act as an object of rights limitation. The exercise of the right to manifest religious freedom in the form of the implementation of Islamic law might be subject to state restrictions, whose legitimacy is determined by its consistency with, among others, religious values as the values of all religions. In

the internal Islamic legal tradition, the application by Muslims of Islamic law is constitutionally confined by its compliance with the values and objectives of Islamic law itself (*maqāṣid al-sharīʿah*), namely to establish and maintain *maṣlaḥah* (the common good) which includes the preservation of religion, life, intellect, lineage, property, justice, liberty, equality, human dignity, social cooperation, and environment (Auda 2007; Duderija 2014).

In 2002, during the Fourth Amendment, members of the MPR discussed Article 31. After establishing the right to education for every citizen, Article 31(5), stipulates: 'The state advances science and technology by upholding religious values and national unity for the advancement of civilization as well as prosperity of mankind.' The original Article 31 consisted of only two paragraphs: the first guaranteed citizens' right to education and the second stipulated the establishment of a national educational system. Although no reference to religion was made in the article, the framers of the 1945 Constitution were certainly aware of the significance of religion in education. This can be read from the 'Broad Guidelines', a statement made by the subcommittee on education and teaching of the Committee to Investigate Preparations for Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan,* BPUPK) on 17 July 1945. The second paragraph of the Guidelines provided that: 'In line with the morality of humanity, as contained in all religious teachings, national education and teaching are founded on religion and national culture, and [directed] towards the safety and happiness of the people' (Kusuma 2009: 458). Furthermore, one might imply the connection of education with religion from the preamble. Its fourth paragraph provides that one of the objectives was 'to advance the intelligent life of the nation' (*mencerdaskan kehidupan bangsa*). It presumably has high relevance to education (*Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945* 2010: 9–22). According to the preamble, the objective shall be based on, among others, the belief in One Supreme God.[1]

The idea of acknowledging the role of religion in education in a provision of the Constitution was raised in the course of debates regarding the goals of education during the process of the Second Amendment. The position of the MPR factions in many ways was an extension of their stance on the place of religious values in Article 28J(2). In 2002, two years after the Second Amendment of Article 28J(2), the debate appeared again in the Fourth Amendment.

The Islamist factions also proposed the inclusion of religious values as a limit to the advancement of education. A draft of paragraph 5 then would stipulate the government's responsibility for the development of science and technology 'that do not contravene (*yang tidak bertentangan dengan*) religious values'. This proposal resembled the Islamist factions' proposal regarding the limitation on human rights, as discussed earlier. Against the proposal, secular nationalist factions argued that the

[1] Attempts to ground education on religious values has in fact been made by way of pre-constitutional amendment legislation. For instance, the Law of the National Education System of 1989 stipulated in Art 4 that 'national education aims at advancing the intelligent life of the nation and developing Indonesian people as a whole, namely human beings who have faith in and piety towards One Supreme God and have noble characters …'

formulation was against the principle of neutrality and universality as the nature of science, and, as a result, would constrain the development of science. Furthermore, Article 29 has already provided religion as a guide for all matters relating to the state. They proposed a draft that only mentioned the 'advancement of civilisation and unity' without mentioning religion (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010a: 129–132; *Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945 2010*: 118, 181–187).

Concerning the proposal to install religious values as a limit in draft paragraph 5, Ahmad Zacky Siradj of the *Utusan Golongan* Faction (F-UG) proposed a refinement to the words 'that do not contravene' which according to him assumed a mistaken conflict between science and religion. Instead of this negative wording, he suggested the positive words, namely 'with the highest respect for' (*dengan menjunjung tinggi*) (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010e: 53–54). This suggestion was accepted by the factions that had previously refused the addition of the words. Furthermore, together with religious values, the words 'national unity' were added. This addition aimed to make the advancement of science and technology have the highest respect for national interests. Yusuf Muhammad of the *Kebangkitan Bangsa* Faction proposed a formulation of draft paragraph 5 which eventually became an agreed draft of paragraph 5 (*Majelis Permusyawaratan Rakyat Republik Indonesia* 2010e: 269–275; 2010f, 8).

In our view, the meaning of the religious values clause in paragraph 5, like the religious values as a limiter of human rights, should be viewed inclusively and generally to include the values and principles of all religions, despite the fact that the clause was proposed and defended by the Muslim-based factions. Such values are acceptable in so far as they would be reasonably accepted by all religions. Upon this consideration, Islamic values as developed in the Islamic legal tradition, for instance, cannot be set as the sole consideration in the national education system. They rather have to be in harmony with values of other religions. Moreover, the reference to religion here should be read on the basis of the supremacy of the Constitution in which the preamble lies at the foundation of the Constitution. In other words, we suggest that religious values are not standalone values. Their legitimacy is derived from their consistency with the fundamental values and principles established in the preamble. In the current provision, the reference to religious values is inseparable from the consideration of national unity. This does not mean that 'the highest respect' is limited to these two values. They merely represent part of the values system, in which the Pancasila lies at its heart (Law 20/2003 on National Educational System, Art 2), that is considered by the drafters of the amendment to be important in the state's advancement of science and technology.

Analysis of Constitutional Cases

This constitutionalization of religious values implies the acknowledgment and support of religion by the state. How far has the Constitutional Court used the phrase 'religious values' in their interpretations of the Constitution and decisions in constitutional

court cases to endorse the state's policy on religion? This section will analyse the related constitutional cases on this issue.

Religious Values and the Blasphemy Law Cases

It might not be an exaggeration to state that the current challenge to the constitutional right to freedom of religion is in the implementation of Law 1/1965 on the 'prevention of misuse and/or defamation of religion' (*penyalahgunaan dan/atau penodaan agama*), which is known as the Blasphemy Law. It is the law that laid the basis for state recognition of some religions and criminalization of minority religions or beliefs that are considered deviant from the religious orthodoxy, and of any person allegedly insulting religion. The Constitutional Court decisions on the constitutionality of this law in many respects legitimize this practice.

Prior to the issuance of the Blasphemy Law, the matter of religious deviation had been governed by some other regulations (for instance, Law 15/1961 on Provisions of the Public Persecution, Art 2(3); Presidential Decree 2/1962 on the Prohibition of Organizations which do not correspond to the Identity of Indonesia). These regulations targeted local beliefs (*aliran kepercayaan*) and organizations deemed contrary to the Revolution and national identity (for instance, the ban on Rotary Club and Baha'i organization as regulated in Presidential Decision 264/1962). In late January 1965, President Sukarno issued the Blasphemy Law as a Presidential Decree (*Penetapan Presiden*). In 1969, during the early years of Suharto, it was then promulgated as a law.

The purpose of the Blasphemy Law was made explicit in its Consideration part and the general section of its Elucidation. In the Elucidation, the Blasphemy Law was first explained in the context of the national ideology entrenched in the preamble of the Constitution, in which the first principle 'belief in One Supreme God' implied that religion constituted a basis for national unity and was part of the state's nation-building. In this sense, the law was arguably aimed at protecting religion for the purpose of maintaining state interests. It is under this consideration that the emergence of local beliefs, what the law calls mystical organizations (*kepercayaan/kebatinan*) were to be assessed. According to the decree, local beliefs were in conflict with the recognized teachings of religions. Their beliefs and activities allegedly abusive to those teachings were considered as contributing to national disunity and 'seriously endangering the existing religions' (Blasphemy Law, General Elucidation, para 2).[2] The objective of the regulation was to secure religious harmony, to guarantee freedom of 'religion', and to maintain national unity and security.

There are four constitutional cases related to this Blasphemy Law. It was in 2009 that the first historic attempt to test the constitutionality of the Blasphemy Law in the Constitutional Court was made. Since then, the law has been the subject of three

[2] Another issue that concerns the law is pertaining to hostility to and insulting religion. This related to the aggressive campaigns of the Indonesian Communist Party (PKI) between 1963 and 1965 prior to the law's promulgation that was considered as insulting the religious beliefs of Muslim communities. There were some incidents involving the PKI that presumably served as the background of the issuance of the law (see Zuhri 1987: 508–509, 517–518). This consideration was then accommodated in Art 4 of the Blasphemy Law.

consecutive challenges before the Court. All of them failed to strike down the law. The first decision delivered in 2010 constituted the main source of reasoning for the subsequent decisions.[3] This case drew huge attention both nationally and in the international fora. It has become a landmark case in matters of religious freedom (Isnur 2012; Crouch 2012; Butt and Lindsey 2012: 234–240; Menchik 2014). Two years later, a similar challenge to the law was brought before the Court, which decided the case mainly by quoting the arguments in the 2010 decision.[4] In 2018, the third and fourth cases were decided. This latter case made frequent references to the Court's arguments in the first and third cases.[5]

The Constitutional Court takes the position that Indonesia is a 'religious nation, not an atheist nation'.[6] The Court translated the principle 'belief in One Supreme God' as religious beliefs or religious values. It placed particular emphasis on the religiosity of the state on the basis of this principle and other constitutional provisions, including Article 28J(2) which stipulated 'religious values'. In the Blasphemy Law case No 1 (2009), the Court asserted that the Pancasila's first principle was a supreme principle that attested no separation of state and religion. It even suggested that religious values should be the basis of state policies, lawmaking, government, and the life of the people. The principle of belief in God and religious teachings and values should 'become a measuring instrument in determining [not only] good law from bad law but even constitutional law from unconstitutional law'.[7] It means the Court will not ignore God's law, as it is also reflected in the first pillar of Pancasila as a state ideology. In other words, the court decision is to justify the position of Indonesia as neither an Islamic state, nor a secular state. It should be understood that no law should contradict Pancasila, which is mentioned in the preamble to the Constitution.

Within this approach, religion is considered very special. The theocratic implications of this stand seem to have no limits. For the Court, the state had the duty to protect religions, their holy books, and teachings from decline, misuse, and defamation, as the impugned law aims to do. The state should make a campaign of freedom from religion impossible; international conventions and instruments should be read in light of religious values; and, above all, religion embodies the uniqueness of the Indonesian rule of law.[8] The Court in the Blasphemy Law case No 4, with reference to the 2010 decision, came to a similar view of the Indonesian model of religious freedom.[9]

This theocratic reading of the Pancasila and the 'radiating effect' of the principal belief in One Supreme God the Court demonstrated are problematic. Despite the inherent ambiguity of the meaning of the reference to religion, we argue that such reading would be an inaccurate implication of the historical and systematic interpretation of the Pancasila and principally contrary to the values contained in the preamble as a whole. The principle 'belief in One Supreme God' is qualified and limited by other Pancasila's principles. For instance, it is to be understood in line with the principle of

[3] Decision 140/PUU-VII/2009.
[4] Decision 84/PUU-X/2012.
[5] Decision 76/PUU-XVI/2018.
[6] Decision 140/PUU-VII/2009, 273, para 3.34.3, 274–275, para 3.34.8.
[7] Ibid 275, para 3.34.11.
[8] Ibid 273–275, para 3.34.4-11.
[9] Decision 76/PUU-XVI/2018, 30, para 3.15.

just civilized humanity. Upon this understanding, no theocratic reading could be concluded from reading the Pancasila's first principle. Moreover, the principle could not be understood in isolation from other values of the preamble, particularly the idea of a unitary state which protects and covers all people with no exceptions and guarantees the equality of all groups and individuals without regard to their religions and beliefs.

The Court in the Blasphemy Law case No 1 referred to the 'religious values' consideration of Article 28J(2) of the Constitution for limiting the right to freedom of religion. The limitation based on religious values was used by the Court as a principal justification for the constitutionality of the impugned law. The Court in the Blasphemy Law case No 4 again mentioned this consideration, although in a more modest way than previously.[10] How could religious values provide a basis for the law's constitutionality? In the Blasphemy Law case No 1, the majority of justices did not elaborate on what this reference meant. Which values? Whose religion(s)? The Court equated religious values with religious teachings and norms as in the state implementation of Islamic private law, or with the communal values of the society.[11] In another instance, the Court differentiated those values from the principle of separation of state and religion and pure individualism or collectivism.[12] One may argue that values are like principles and should be distinguished from rules. Values, therefore, are the most abstract and universal tenets of a religion. Moreover, they are not standalone values, because their acceptability requires their consistency with the Constitution.

In its defence of the impugned law's consistency with the right to religious freedom, the Court frequently made reference to the celebrated distinction within religious freedom, namely between internal (*forum internum*) and external aspects (*forum externum*) of religion.[13] The *forum internum* concerns the right to have, adopt, or change one's religion or belief that cannot be limited under any circumstances and cannot be criminalized because this aspect of freedom lies in the minds and hearts of people. The *forum externum*, on the other hand, is related to the right to manifestation and expression of religion that might be restricted for a specific reason. It is related to the rights of others and the interests of society and the state. This oft-quoted distinction became the main justification for the Court to restrict religious freedom.

In the Blasphemy Law case No 2, the Court agreed that religious interpretation was a part of the right to freedom of religion. It belonged to the *forum internum*. Nevertheless, the observance of religious freedom cannot be unrestrained. As the Court pointed out, 'freedom to interpret a religion is not absolute', because such an interpretation should abide by fundamental teachings of religion and its received methodology and have its basis in the holy books.[14] For the Court, this does not mean that the *forum internum* was limitable. In Blasphemy Law case No 1, the Court argued that a religious interpretation, even if it was deviant, would absolutely be protected if it was exercised internally and individually. The religious interpretation would potentially be restricted if it was manifested externally by making it known to others in the

[10] Ibid 29, para 3.13, 31, para 3.15.
[11] Decision 140/PUU-VII/2009, 275, para 3.34.8, 295, para 3.58.
[12] Ibid 275, para 3.34.10.
[13] Decision 56/PUU-XV/2017, 531, 532, para 3.16.5. See also Decision 140/PUU-VII/2009, 288, para 3.51; Decision 76/PUU-XVI/2018, 30–31, para 3.15.
[14] Decision 56/PUU-XV/2017, 531–532, para 3.16.5; Decision 140/PUU-VII/2009, 289, para 3.52.

public forum.[15] The Court's view in this case of the inevitable limitation of the *forum externum* and its absolute contrast to the *forum internum* would lead to unduly wide restriction on religious freedom. In our view, the *forum externum* is arguably inseparable from the *internum* freedom. A restriction on the former might result in severe impairment of the latter (Bielefeldt, Ghanea, and Wiener 2016: 85; Petkoff 2012).

The vulnerable guarantee of the external forum of religious manifestation in the case of religious interpretation would endanger minority interpretations. For the Court, a religious interpretation was called deviant and accordingly could be prohibited when it was not in line with the fundamental teachings of a religion. These fundamental teachings constituted the undisputed essence of a religion. They were the parameters and the basis of a 'controlling mechanism' in each religion. Because there is no further provision of how the fundamental teachings should be, the notion of fundamental teachings would be inevitably unclear and ambiguous in their form and content. Who should then define these parameters? According to the Court, it was the internal religious authorities, or *ulama* in the case of Islam, who would determine those teachings and the boundaries of religion by reliance on the holy books through a recognized methodology.[16] These authorities were the ones who would decide whether or not religious interpretation was acceptable. The state, as the Court pointed out, 'cannot by itself dictate the fundamental teachings of a religion, but rather will decide on the basis of the agreement from the relevant internal religious authorities'.[17]

The Court's decisions, according to Melissa Crouch, expose the state's practice of religious deference, which she defines as the court's deference to the leaders and institutions of the six religions recognized by the state. She argues that this practice of religious deference exists because the state 'seeks to capitalise on the legitimacy and moral authority that religious leaders generate in Indonesia' (Crouch 2016: 197). Religious deference is a concept that explains 'why religious leaders and religious texts have an influence over legal proceedings and practices in Indonesia'. In her study of two cases of the Blasphemy Law brought before the Court, Crouch argues that such deference is maintained through the Court's articulation of the constitutional limitation principles over public order and religious values, and by giving the authority to define religious identity to conservative religious leaders (Crouch 2012; Crouch 2016; Fenwick 2017). This means that 'religious values' seems to be taken in this context not only as morality but also as orthodoxy (ie correct theology) (Bagir, Suhadi, and Arianingtyas 2020: 39–56).

Whether the values of religion(s) may justify the criminalization of 'deviant' religious interpretations is contentious. How to deal with dissent or unorthodox interpretations is a controversial matter not only between different religions but also within each religious tradition (Chambers and Nosco 2015). Particularly in Islam, intramural diversity (*ikhtilāf*) is the rule rather than exception. This applies not only in the realm of law (*fiqh*) but also in the realm of creeds (*'aqīdah*). Muslim scholars have suggested what they consider to be the core tenets indisputable within Islam that determine whether someone would continue to be called Muslim. However, there

[15] Decision 140/PUU-VII/2009, 292, para 3.55.
[16] Decision 56/PUU-XV/2017, 532–534.
[17] Ibid 533. The Court here referred to the 2010 decision, Decision 140/PUU-VII/2009, 289.

is no agreement on most contents of these tenets (Modarressi 2016). Many scholars might argue that the first value of Islam according to the paradigm of the objectives of Islamic law (*maqāṣid al-sharīʿah*), namely the preservation of religion (*ḥifẓ al-dīn*), requires both the state's positive obligation to facilitate Muslims' observance of their religion and negative protection of religion by suppressing and punishing any Muslim whose beliefs are outside the core tenets of Islam (al-ʿĀlim 1994: 226–270; March 2011).[18] This is also the position generally held by the Indonesian Council of Ulama (*Majelis Ulama Indonesia*, MUI).[19] The view that deviants should be criminalized, including those accused of blasphemous acts, however, has been disputed by Muslim jurists of the classical period as well as the modern age. While those deviants might be considered theologically wrong, they would only be responsible before God in the hereafter (al-ʿAwwā 2006: 190–204; Kamali 1992; al-ʿAlwānī 2014; Saeed and Saeed 2017). We have argued in accordance with this latter stance that the state should not interfere in matters of religious interpretation considered deviant from the orthodoxy. Our stance is also consistent with the protection of the right to freedom of religion and belief. On this basis, instead of justifying the Blasphemy Law, the religious values consideration understood in combination with other constitutional principles would be appropriately employed to invalidate the law.

Religious Values and Zakat Management Law

We also discuss how the phrase 'religious values' has been used by the Court to decide on the constitutionality of Law 23/2011 on Zakat Management. Zakat is the obligation of almsgiving, which is an essential doctrine in the Islamic faith. It is due on Muslims' property for the benefit of the poor, the needy, and other beneficiaries.

The 2011 law contained provisions that significantly changed the previous administration of zakat particularly with regard to the role of the National Zakat Board (*Badan Amil Zakat Nasional*, BAZNAS). The law created a limited space for private zakat agencies. It even criminalized zakat committees traditionally found in parts of the country. It was because of these concerns that an application was made to the Constitutional Court to review those provisions of the law.

The Zakat Management Law was made by reliance on several articles of the Constitution including the Parliament's power to make laws and the President's assent (Art 20), the right of members of the Parliament to submit a bill (Art 21), the religious basis of the state and religious freedom (Art 29), and the state's duty to care for the poor and destitute children (Art 34(1)). The state's guarantee of a Muslim's right to religious freedom constitutes the main basis of the Zakat Management Law. With forty-seven articles and their elucidations, the new zakat law of 2011 disrupted the status

[18] According to the majority of Muslim jurists—even for many scholars, this is the consensus—a Muslim whose beliefs contrast with the core tenets of Islam would be considered to be an apostate (*murtadd*) and as a consequence would be punished by death. (Ibn Rushd 1982: 1:459; Abū Zahrah, no date: 154–155; Peters 2005: 64–65).

[19] In its recent fatwas concerning groups holding deviant religious interpretation, the MUI proposed recommendations for the government to ban and close down the deviant groups and punish their leaders.

quo of zakat management in Indonesia, even though it preserves the voluntary nature of the replaced law.

The former zakat law of 1999 introduced how the state articulates its power over the administration of zakat by, among other things, setting up governmental zakat agencies and requiring the involvement of the Ministry of Religious Affairs (MORA) in government and private zakat management. The Zakat Management Law of 2011 has further bureaucratized the management of zakat. It centralizes zakat management in the hands of BAZNAS. While the 1999 law equalized the power of both government supported *zakat* agencies (*Badan Amil Zakat*, BAZ(and private zakat agencies (*Lembaga Amil Zakat*, LAZ) so that they 'have the primary duty to collect, distribute and utilise zakat in line with the dictates of religion (Islam)' (Art 8), the law empowers the government to establish BAZNAS exclusively to deal with zakat management nationally (Arts 5(1) and 6). BAZNAS, located in the capital city, is an independent government institution that is responsible to the president through the Minister of Religious Affairs (Art 5(2) and (3). The functions of BAZNAS include planning the collection, distribution, and utilization of zakat, their implementation, supervision, and reporting, and being responsible for the application of zakat management (Art 7(1)). These comprehensive functions make BAZNAS both the regulator of zakat and operator of zakat management.

The law also provides that BAZNAS should provide a written report to the president through the Minister of Religious Affairs and the legislature at least once a year (Art 7(3)). In exercising its duty, BAZNAS can enter into cooperation with other related parties (Art 7(2)). The law also regulates membership of BAZNAS (Arts 8–13), its structure (Art 14), and the creation of BAZNAS in provinces and regencies/cities (Art 15). BAZNAS, either in the capital city, a province, or in a regency/city, can create a Zakat Collecting Unit (UPZ) to help them to collect zakat (Art 16). The law makes reference only to BAZNAS in cases where zakat payers (*muzaki*) cannot calculate their zakat (Art 21(2)). As part of the government, BAZNAS is funded by the state budget (Art 30).

Similar to the 1999 law, the Zakat Management Law of 2011 regulates non-governmental zakat agencies (LAZ), of which there are many in Indonesia. However, there are some differences in the institutional arrangement of LAZ between the two laws. First, in the former, provisions on LAZ are briefly formulated leaving its specification to the Minister (Art 7), but in the latter the law makes detailed provisions on LAZ. For instance, approval of the Minister or his/her appointed officials is required for the creation of LAZ (Art 18(1)). Article 18(2) stipulates that approval will be given if LAZ has fulfilled all minimum requirements: (a) registered as an Islamic mass organization that manages education, propagation of Islam, and social matters; (b) taken the form of a legal institution; (c) granted a recommendation from BAZNAS; (d) has Sharia supervisor(s); (d) has technical, administrative, and financial capabilities; (e) is a non-profit organization; (f) has a programme to manage zakat for the welfare of Muslim communities; and (g) is subject to regular Sharia and financial audits. In addition, LAZ should regularly submit a report of its activities to BAZNAS (Art 19) and 'regional government' (Art 29(3)). Secondly, unlike the previous law, the 2011 law makes LAZ subordinate to BAZNAS. The law stipulates that 'in order to *assist BAZNAS* in implementing the collection, distribution, and utilisation of zakat,

society may found LAZ' (Art 7). This provision, together with other provisions on the centrality of BAZNAS as previously mentioned, seems to subordinate LAZ to the all-encompassing power of BAZNAS.

On 16 August 2012, several zakat organizations, including Yayasan Dompet Dhuafa and Yayasan Rumah Zakat Indonesia, two major national private zakat agencies, and several individuals applied to the Constitutional Court for review of some provisions of the Zakat Management Law of 2011. They challenged the provisions concerning the powers of BAZNAS, LAZ, and the provisions on criminal offences, arguing that these articles have injured or would injure the applicants' constitutional rights as they were not only discriminatory but also subjected the applicants as private zakat bodies to marginalization or even criminalization.

The Court unanimously held some of these provisions to be conditionally unconstitutional, while considering all the rest to be constitutional. For the Court, the provisions concerning the central role of BAZNAS in zakat management as both a regulator and an operator and the marginal role of LAZ did not represent a constitutional problem. On the other hand, the provision of the cumulative requirement of LAZ as both an Islamic mass organization and a legal entity (Art 18(2)(a) and (b)) is considered unconstitutional and not legally binding unless it is understood as an alternative ('or'), so that LAZ can be registered as an Islamic mass organization or alternatively be a legal entity only (a foundation). Moreover, the Court ruled that the provision should not bar traditional zakat agencies that are unreachable by BAZNAS or LAZ from managing zakat collected from their communities as long as they inform the authority of their activities.

With regard to the requirement that LAZ must be an Islamic mass organization (Art 18(2)(a), the Court referred to the Mass Organization Law (17/2013), in which the law stipulates that a mass organization could take the form of an association or foundation and it would be registered as such since its legality was authorized. This means that, in contrast to the impugned law, a LAZ established as a foundation was not required to change itself to be registered as a mass organization. The Court held that the cumulative requirement of Article 18(2)(a), as challenged by the applicants, and (b) (the requirement of being a legal entity) violated constitutional rights as stipulated in Article 28C(2), 28D(1), and 28E(2) and (3).[20] Instead of striking the provision down entirely, the Court stated that the requirement of being an Islamic mass organization was merely an alternative to the requirement of being a legal entity. Here, the Court employed the conditional unconstitutionality test to the impugned provision.

Furthermore, the Court found that the provision limited the right of individual Muslims or traditional zakat agencies to collect and distribute zakat as has long been the practice in Muslim societies. The limitation, however, was considered constitutionally unjustified according to Article 28J(2).[21] The Court suggested that the article would be unconstitutional unless it was amended so as to allow the traditional agencies to collect and distribute zakat provided that they resided in areas where no local BAZNAS or LAZ existed and provided they have informed the authorities of their activities. While the problem of the constitutionality of the limitation on traditional agencies might be raised, their inclusion in the (amended) article that particularly

[20] Decision 86/PUU-X/2012, 99–100, para 3.17.2–3.
[21] Ibid 100, para 3.17.4–5.

concerns the requirements of LAZ seems to be out of context. By making such an amendment, the traditional zakat agencies would be unduly required to fulfil all other requirements in the article.

The conclusion of unconstitutionality was also made for the provisions of offences in zakat management (Arts 38 and 41). According to the Court, the articles were in principle legitimate considering that they protected the right of zakat payers. In other words, they are generally justifiable not because they protect the enforcement of zakat as an Islamic institution as such. Nonetheless, for the Court, the words 'any person' were too general so as to criminalize the long-established practice of zakat by traditional zakat agencies.[22] By including them, the provisions have ignored the social reality embedded in the practice of zakat.[23] The Court then decided that the impugned provisions were unconstitutional unless they were interpreted as to exclude these agencies, as long as they informed the authority of their zakat-related activities. It argued that since BAZNAS or LAZ might not be present in some localities, it would be 'unreasonable' to force potential *muzaki*s who live in these localities to come to a nearest BAZNAS or LAZ to pay zakat. The absence of a local BAZNAS and LAZ together with the criminalization of unregistered zakat collectors (traditional zakat agencies) would prevent potential *muzaki*s from exercising their obligation to pay zakat. This, according to the Court, violated the constitutional right to religious freedom enshrined in Articles 28E(2) and 29(2).[24]

From the aforementioned examination, we notice that the Court's argument on the illegitimacy of the limitation on traditional zakat agencies is because of its inconsistency with the limitation clause (Art 28J(2)) and violation of religious freedom. The Court's reference to morality, religious values, safety, and public order unfortunately provides no further explanation on how the impugned provision has not satisfied each or one of those considerations. For instance, in what sense is the restriction on the right of traditional zakat agencies inconsistent with religious values? Do the values of Islam authorize individual Muslims to collect and distribute zakat? While it was agreed by traditional Muslim jurists that zakat administrators (*al-ʿāmilīn ʿalayhā*) are to be appointed by the government (al-Qarāḍāwī 1973: 579–580; Singer 2008: 45–50), contemporary jurists allow non-governmental zakat committees to collect and distribute zakat (al-Hay'ah al-Sharʿiyyah li Bayt al-Zakāt 2019: 173–174; al-Zuḥaylī 2012: 463–468). Within this discourse, there is no religious right granted to individual Muslims to collect and distribute zakat in the name of a zakat agency.

Conclusion

This chapter has demonstrated how the religious values limitation in the Constitution, based on historical debate and socio-political context during the constitutional

[22] Ibid 104–105, para 3.19.1–2.

[23] The Court earlier in its decision stated: 'In any arrangement in any form of law, the state must pay attention to matters that are sociologically effective. With due regard to such conditions, each arrangement according to the Court cannot be justified if it negates the existing social institutions. [T]he state through legislation instruments is obliged to guide and foster it so that it can coincide with the dynamics of progress of a nation that has become a state.' Decision 86/PUU-X/2012, 91, para 3.13.3.

[24] Ibid 105–106, para 3.19.3–5.

amendment, should reasonably be understood in general and universal terms. Consequently, we argue that these values should reasonably be accepted by various religious traditions. Some specific contexts, however, should be put into consideration, for example when legislation is made by reference to laws of a certain religion, such as Islamic law. Moreover, because religious values are not standalone values, in understanding the significance of religious values it is necessary to refer to the basic values and principles established in the Constitution, particularly those found in the preamble. The fact that religious values are not the highest values in the rights limitation and that they submit to the principle of constitutional supremacy suggests that the Constitution should not be treated as a religious constitution.

The constitutional cases on 'religious values' discussed above are all about Article 28J(2) on limitations of constitutional rights. At the time of writing, we have not found any cases related to Article 31(5) on the duty of government to uphold 'religious values' in education. Therefore, most interpretations of the Court are on how to use 'religious values' in endorsing government law and policy that may infringe on religious freedom. While the arguments can vary, we found at least four meanings of 'religious values' from the cases above.

The first meaning is that the Court treats religious values as the basis of state policies, lawmaking, government, and the life of the people. The Court did not interpret the phrase only as a limitation on human rights as originally stipulated in Article 28J(2). The Court went further by connecting the phrase to the concept of God and religion in Pancasila, the state's ideology, and other references to religion in the constitutional provision, while ignoring other values contained in the preamble.

Second, the Court has used the phrase 'religious values' to limit the interpretation of the right to religious freedom and religious interpretation. This position would significantly impact minority groups who have different religious interpretations to mainstream groups. The Court effectively failed to protect religious freedom in giving the meaning and application of 'religious values'. This leads to the third meaning of 'religious values' discussed in the above cases: the correct theology. The universality of 'religious values' has been reduced to orthodoxy. The Court seems to have the power to determine which religion or institution is correct, and which one is incorrect, in terms of the correct theology. In other words, the Court has protected religious orthodoxy against unorthodox interpretation and teachings and justified the criminalization of the latter.

Finally, the Court seems to take the phrase 'religious values' for granted without the need to explain how the impugned laws are inconsistent with 'religious values'. The phrase 'religious values' is ambiguous, and the Court has used it as a panacea to validate or invalidate law, whichever suits the Court. This unclear explanation did not assist our understanding of which values and whose religion(s) the Court refers to. The Court did not distinguish religious values from religious teachings and norms as in the state implementation of Islamic law, or with the communal values of the Indonesian society.

While it is sometimes exploited in the decisions of the Court, there is no clear pattern of how the phrase 'religious values' has been used in the Court's reasoning. The Court also justified state interference in determining religious deviation and in prosecuting religious minorities. We hope in future cases, when dealing with the phrase

'religious values' in national education, stipulated in Article 31(5), that the Court will have the chance to revisit its position and provide further clarification on the meaning of this important term.

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