

Negotiating State, Religion and Human Rights:

Debate in the Indonesian Constitutional Court

R u m a d i

Syarif Hidayatullah

State Islamic University Jakarta, Indonesia

rumadi@uinjkt.ac.id

Abstract—One of the crucial issues in countries with a Muslim majority, not to mention Indonesia, is the relationship between the religion and the state. Although Pancasila and the Constitution (UUD 1945) are claimed final, it does not mean that the position of religion, state, and human rights is also final. Practically, the state, religion and human rights negotiate one another, and sometimes even create tension. Here, the negotiations between religion, state, and human rights are not only in political forums such as House of Representatives but also in the Constitutional Court sessions. Debate and argument contestation often occur in the forums. This article aims at identifying debate and argument contestation in the Constitutional Court. In theory, it focuses on two issues: 1) freedom of religion and belief; and 2) Marriage law. The result of the study argues that the Constitutional Court's decision, especially regarding the relationship among religion, state, and human rights, is based not only on legal considerations but also on non-legal considerations. According to this argument, negotiations and contestations among the three will always continue as Indonesia is neither one religion-based state nor a secular state that does not profess a religion at all.

Keywords—Negotiating State; Religion; Human Rights; Pancasila; Marriage Law; Indonesia;

I. INTRODUCTION

The issue regarding the relationship between religion and state has become a key point of debate since the beginning of Indonesian independence (Bahtiar Effendy 1998). Such debate may not explicitly happen, but its implications affect human rights. When some groups propose Islam as the basis of the State and another rejects the idea and proposes Pancasila, they essentially argue about the implications of both models on human rights. The two groups succeeded in negotiating the birth of the "Jakarta Charter" which was originally regarded as a meeting point. The charter which contained the obligation to enforce Islamic law for its followers was eventually crossed out due to the aspirations of a number of figures from Eastern Indonesia.

With the rejection of the Jakarta Charter, it does not mean that Indonesia is a secular state (Simon Butt, 2010). The first *sila* (principal) of Pancasila *Ketuhanan yang Maha Esa* (Belief in the One and Only God) which is understood as the philosophy of the State and the source of all sources of law makes it a reference to all laws in the State. This principle

prevents Indonesia from being called as a secular state. However, it cannot also be called as a religious state. This state-of-the-art understanding has a very solid history in Indonesia. Jeremy Menchik (2016) calls it as godly nationalism which distinguishes Indonesian nationalism from any model of nationalism in other countries.

This study focuses on reviewing the Constitutional Court's decision on two major themes, 1) freedom of religion and beliefs, which concerns blasphemy, the application of Islamic Criminal Law and the position of the believer in God Almighty; 2). The verdict concerning family law, in which it is related to the issue of polygamy, interfaith marriage, the status of a child born outside marriage, and a minimum age of marriage. These issues will, in turn, be analyzed by regulating the relations of religion and state. The questions in this study include to which extent the State accommodates religions and beliefs in Indonesia and how the Constitutional Court arranges the relationship between religions and human rights through the decisions it takes.

II. THE CONSTITUTIONAL COURT MANAGES TENSIONS WITHIN RELIGION, STATE, AND HUMAN RIGHTS

A. Freedom of Religion and Belief

Freedom of religion and belief is considered non-derogable rights. However, the implementation of this right leaves many problems both at the level of legislation and practical level.

1) Religion Column in KTP

The Constitutional Court's decision concerning the judicial review of the Law no. 23/2006 on Population Administration System which is amended by the Law no. 24/2013 (hereinafter referred to as the Adminduk Law) on to the religion column for groups of the believer is one of the most crucial decisions. The test instruments are submitted by the groups from various regions petition for a constitutional interpretation of the Article 61 paragraph (1) and annul the Article 61 paragraph (2) and the Article 64 paragraph (5) of the Adminduk Law.

Article 61 paragraph (1) says:

“Family Certificate (Kartu Keluarga) contains information including number, the full name of the head of family and family member(s), ID Number, gender, address, place of birth, date of birth, religion, education, occupation, marital status, family relations status, citizenship, immigration documents, name of parents”.

They request for a constitutional interpretation to include the word “religion” and belief in the article.

In the meantime, the Article 61 paragraph (2) and article 64 paragraph (5) regulate the religion column on ID card and the procedures to fill it for the people whose religion has not been acknowledged. Such unacknowledged religion is the key issue of a petition for cancellation.

Upon the request, the Constitutional Court has granted the entire application and issued the Decision No. 97/PUU-XIV/2016. This decision is regarded as an important breakthrough regarding the status of groups of a believer who have been discriminated for which one of the reasons is their inability to list their belief in the ID.

Such decision can be seen as a continuation of the Constitutional Court’s opinion to its previous decision. In the Decision No. 19 /PUU-VI/2008 on the judicial review of the Religious Courts Act, for example, it viewed its understanding on Indonesia as a state in regard to its relationship with religion. As the result, it confirms that Indonesia is not a state of religion which is based only on one particular religion. However, it is also not a secular state that does not profess any religion and leave religious affairs entirely to individuals and society.

Further, the Constitutional Court also clarifies that freedom of religion and belief includes the right to embrace the belief in God Almighty and the right to get public service. In this regard, such freedom is a constitutional right of every citizen, not offered by the State and it comes from the concept of natural rights. In a democratic country, the state is present and established to protect, respect and fulfill those rights as stated in the Article 28E paragraph (1) and (2) and the Article 29 paragraph (2) of the 1945 Constitution.

In regard to the Article 28E paragraph (1) and (2) and the Article 29 paragraph (2), the articles address religion as a belief, in which the religion is indeed a belief. However, according to the Constitutional Court, by reading and understanding the existence of Article 28E Paragraph (1) and (2) of the 1945 Constitution, religion and belief are very likely to be understood as two different things, and both are equally acknowledged. Here, the interpretation of the Constitutional Court appears because Article 28E Paragraph (1) textually speaks of *“right to profess a religion and to worship according to the religion”*. In the meantime, Article 28E Paragraph (2) regulates the right to choose a belief. Further, the Constitutional Court also interprets the phrase: *“.....and to worship according to the religion and belief”* in the Article 29 of the 1945 Constitution, using *and* as a connector.[1] This means *belief* is equal to *religion*. By placing religion and belief in two different norms, the 1945 Constitution basically positions belief in a different place from religion.

According to the Constitutional Court, the formulation of norms in the Article 61 paragraph (1) and paragraph (2) and Article 64 paragraph (1) and paragraph (5) of the Population Administration Act means that the articles construct freedom of religion, which indeed is a belief in God Almighty, as a gift from the State. In fact, freedom to profess a religion (including the belief in God Almighty) is an inherent right which is derived from natural rights, not a gift from the state. Since it is one of the most basic human rights, it consequently brings the State to be responsible for ensuring the citizens truly and happily embrace it in practice.

Furthermore, it argues that the absence of the term *religion* including *belief* in the Article 61 paragraph (1) and the Article 64 paragraph (1) of the Adminduk Law means the norms in these articles do not give as just and equal a recognition, guarantee, protection, certainty and treatment before the law for the citizens who believe in God Almighty as the citizens who are called professing *“a religion recognized as the acknowledged religion by the provisions of legislation”* according to the Adminduk law. With such legal constructions, groups of the believer are not granted fair recognition, protection, and legal certainty. The recognition will only be obtained if the belief is included in the meaning of “religion”.

The existence of the Article 61 paragraph (1) and (2) and the Article 64 paragraph (1) and (5) of the Adminduk Law, has, in fact, caused uncertainty, different interpretation, and inconsistency with other norms in the law as stated in Article 58 paragraph (2). In turn, it affects the citizens who believe in God to have difficulties in obtaining the Family and ID cards. With the absence of religion column, it brings an impact on the fulfillment of other rights, such as marriage and public services. Consequently, believers are not granted certainty and equality before the law and the government.

To this end, the Constitutional Court affirms that the word “religion” in Article 61 paragraph (1) and Article 64 paragraph (1) is considered contradictory to the 1945 Constitution if it is interpreted as “belief”. In the meantime, the Article 61 Paragraph (2) and the Article 64 Paragraph (5) elaborate the word “religion” in the Article 61 Paragraph (1) and the Article 64 Paragraph (1) which according to the Constitutional Court is interpreted as “belief”. As a consequence, the articles are irrelevant and contradictory to the 1945 Constitution and have no binding legal force.[2]

2) The Law on Blasphemy

The law on blasphemy in Indonesia is regulated under two laws: the Law no. 1/PNPS/1965 on the Prevention of Misuse and/or Blasphemy (hereinafter referred to as the Law on Blasphemy) and the Article 156a of the Criminal Code. Such Law was reviewed twice by the Constitutional Court. The first review was conducted in 2009 by a number of freedom of religion and belief activists; and the second occurred in 2012 by the Syiah, Tajul Muluk, and co., who become the “victims” of the law on blasphemy.

In the first review, the petitioners argued that the whole articles regarding the Law on blasphemy contradicted the human rights as guaranteed in the Article 28 of the 1945 Constitution. During the trial, the Constitutional Court was

crowded with demonstrations provoked by those who refused to revoke the law. The parties who filed the judicial review ranging from legal counsels, expert witnesses, and alike were under extreme pressure and intimidation.

Under decision No. 140/PUU-VII/2009, the Court rejected the entire petition. The Constitutional Court declared although the law on blasphemy was consistently constructed due an emerging issue in 1965, it has until now been considered relevant and does not contradict the 1945 Constitution. Here, The Court believes that if the law is lifted, there will be social turmoil due to the legal vacuum. In addition, the Law is also deemed to have nothing to do with freedom of religion, but it is related to religious blasphemy. Suffice to say, this law provides general protection and anticipates conflict in the midst of society.

The Court considered that the Law on blasphemy is legally valid, confirming that everyone is restricted to disseminate and is suggested to interpret activities that deviate from the basic teachings of religion. Such argument does not only concern the constitution but also considers sociological-political issues. It is clearly stated in the Court's statement if this law is revoked, there will be chaos, unrest, disunity and public enmity due to legal vacuum.

Here, the Court interprets the first principle *Belief in the One and Only God* under the condition that the state can create laws and regulations to interfere with the religious beliefs which are not considered believing in the One and Only God. This decision grants legal procedures for the state to intervene on the life of religious people which is not only related to the external forum but also an international forum, according to the Article 28J of the 1945 Constitution.

Two years after the Constitutional Court issued a verdict, the Law on Blasphemy of the Criminal Code was again reviewed for its constitutionality. Unlike the previous review, the latter argued that the Law and the Article 156a of the Criminal Code were considered contradictory to Article 28D of the 1945 Constitution, which says: "Everyone is entitled to the recognition, guarantee, protection, and fair legal certainty and equal treatment before the law".

Although the judicial review petitioners have argued that the Law on Blasphemy and Article 156a of the Criminal Code annunciate many problems because of some norms that cause legal uncertainty, the Court rejects them. In the Decision No. 84/PUU-X/2012, there is actually no new argument to the previous decision. Such decision recalls the argument presented in the decision No. 140/PUU-VII/2009 that Indonesia as a religious country is not separated from the state. It has the Ministry of Religious Affairs that serves and protects the growth and development of religion.

3) *The Implementation of Islamic Criminal Law through Religious Courts*

The desire to apply Islamic criminal law has become one of the key issues since the early days of Indonesian independence. Unlike Islamic civil law, the Indonesian government has little room for the implementation of the Islamic criminal law. Given the fact that the State does not enforce the Islamic criminal law, Suryani has filed a judicial

review of the Law No. 3/2006 on Religious Courts. He has sued the Article 49 paragraph (1) in which Islamic criminal law does not become a part of the Religious Court competencies.

He adds the Islamic laws along with all its branches including Islamic criminal law should be enforced in Indonesia as it is a country based on Belief in the One and Only God. To this end, he requests the Article 49 Paragraph (1) of the Religious Courts Act to revoke.

He further argues the implementation of the Article 49 Paragraph (1) has impaired its constitutional rights to implement Islamic Sharia. According to him, the Islamic Criminal Law is a unity of Islamic Sharia in which its implementation should also be facilitated by the State. This Article is deemed to be contradictory to the Article 28E paragraph (1), the Article 28I paragraph (1) and (2), and the Article 29 paragraph (1) and (2) of the 1945 Constitution.

The Constitutional Court rejects the petition; the arguments presented are legally groundless. The Article 49 Paragraph (1) of the Religious Courts Act is not contradictory to the Constitution. Under the Decision No. 19/PUU-VI/2008, the Constitutional Court states: First, the Court is not authorized to add absolute competencies for the Religious Courts as stipulated in Article 49 paragraph (1), as it only has the authority to examine the constitutionality of laws and can only act as a negative legislator. Here, it is not authorized to add regulatory norms (positive legislators).

Second, the petition to include Islamic criminal law under the authority of the Religious Courts is inconsistent with the state's understanding of the relationship between state and religion. The Constitutional Court has declared Indonesia as neither a religious state based on only one religion nor a secular country that does not pay attention to any religious affairs.

Third, the provisions of the Article 49 Paragraph (1) of the Religious Courts in no way diminish the petitioner's right and freedom to embrace religion and worship according to his/her religion as guaranteed in the Article 28E paragraph (1), the Article 28I paragraph (1) and (2), and the Article 29 paragraph (2) of the 1945 Constitution.

These arguments show the ideological-political position of the Constitutional Court in regard to that of Islamic criminal law is in disagreement with setting special criminal law for Muslims. Here is the limit of tolerance to the application of Islamic law in the State. This is different from the Islamic civil law which all has become a part of the law in the State.

B. *Marriage Law*

1) *Polygamy Regulations*

In the Marriage Law, the regulation on polygamy is stated in the Article 3 paragraph (1) and paragraph (2); the Article 4 paragraphs (1) and (2); the Article 5 paragraph (1); the Article 9; the Article 15; and the Article 24. The articles are reviewed for their constitutionality by M. Insa, SH, as they have taken freedom of religion and belief guaranteed in the Article 29 paragraphs (1) and (2); the Article 28B paragraph (1); the

Article 28E Paragraph (1); the Article 28I paragraph (1) and (2) of the 1945 Constitution. The articles are guarantees of human rights to practice religion and belief. According to the petitioners, polygamy is a part of the Sharia. They think they feel harmed by the articles on the Marriage Law that regulates polygamy. With this arrangement, their religious right to worship is absent. Therefore, they request the Constitutional Court to restrict the articles and regulate polygamy.

The Article 3 Paragraph (1) and (2) of the Marriage Law basically affirms that a man may only have one wife, and a woman may only have one husband. However, the court allows a husband to take more than one wife if he is willing to. Thus, this article regulates that a husband seeking polygamy should get permission from the court (Article 4 paragraph [1]). The Court shall only grant the permission if: a) the wife cannot perform her duties as a wife; b) she suffers from a disability and incurable diseases, and c) she cannot bear the offspring (the Article 4 Paragraph 2). In the Article 5 Paragraph (1) a number of requirements are added: a) approval from the wife; b) an assurance that he can guarantee the necessities of life of his wife and children; c) a guarantee that he can be fair.

In the meantime, the Article 15 and 24 of the Marriage Law say people who are still bound by marriage are prevented to go for any new marriage and the cancellation of marriage in which one party bound by another marriage is possible. Such provisions are seen as an obstacle to fulfill human rights, especially concerning the rights to worship and act according to the respective religion and belief.

Under the Decision Number 12/PUU-V/2007, the Constitutional Court rejects all petitions. A number of articles regulating polygamy such as Law no. 1/1974 are not considered to be contradictory to the Constitution, especially with respect to the rights to start a family, freedom of religion and belief and the right to be free from any discriminatory treatment as stated in the Article 28B Paragraph (1), the Article 28E Paragraph (1), the Article 28I Paragraph (1) and (2), the Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution. The principle of monogamy and limiting polygamy in Marriage Law does not go against Islamic teachings. Here, the Constitutional Court does not only talk about the constitutionality of an article and the Marriage Law but also feel the need to confirm if the provisions contradict Islam and its teachings.

The Constitutional Court's decision refers to the following arguments: first, the provision regulating polygamy for a citizen whose religious law permits polygamy is fair, considering that a marriage according to the Article 2 Paragraph (1) of Marriage Law is considered legal in accordance with religion and belief. In contrast, it is considered unnatural if the Marriage Law regulates polygamy for the people whose religious law does not acknowledge it. In conclusion, this arrangement is not discrimination as nothing is distinguished here. It is set according to what is needed.

Second, the articles in the Marriage Law which contain reasons, terms and procedures of polygamy are to ensure the fulfillment of rights of the wife and the prospective wife that become the obligation of the polygamous husband. In the end,

the purpose of marriage is eventually realized. Therefore, the arrangement cannot be interpreted as a means to exclude provisions that allow polygamous marriage.

2) The Status of Children Born Outside Marriage

The provisions concerning the legal status of illegitimate children; the Article 2 Paragraph (2) and the Article 43 Paragraph (1) of the Marriage Law are questioned by Machica Mochtar (MM) along with her son Muhammad Iqbal Ramadan (MIR). MIR is a child of the unregistered marriage between her and Moerdiono, the Minister of State Secretary of the New Order era. However, until his death, he had never admitted that MIR is his son. He only has a civil relationship with his mother. Here, she sues and rejects the norms stated in the Article 2 Paragraph (2) and the Article 43 Paragraph (1) of the Marriage Law as she thinks they have impaired her constitutional rights.

Article 2 Paragraph (2) states, *"Every marriage shall be recorded according to the prevailing laws and regulations"*. This Article, according to her, has impaired her constitutional right as guaranteed by the 1945 Constitution the Article 28B Paragraph (1) and (2), and the Article 28D Paragraph (1). The articles on which review is made are articles that guarantee human rights, particularly the right to start a family and bear offspring through legitimate marriage; children are also entitled to survival, growth, and development as well as protection from violence and discrimination. She adds the Constitution has guaranteed every person to have the right to carry out marriage in accordance with his/her religion and belief. In this connection, she has performed a marriage which is in accordance with Islamic religious norms. The norms in the Article 2 Paragraph (2), she said, have reduced religious norms. Consequently, her marriage that she had according to the Sharia is neither recognized nor registered.

Due to the reduction of religious norms by legal norms, not only does her marital status become unclear, but it also results in the status of the child from the marriage. This is according to the Article 43 Paragraph (1) saying that a child born outside marriage has only a civil relationship with his/her mother and mother's family. Referring to the article, her child has only a civic relationship with her. This is considered unfair because she has made a legal marriage according to Islam.

In its decision, the Court accepts some of the petitions. However, In relation to the Article 2 Paragraph (2) regulating marriage registration, it rejects some other. This means it argues that marriage recording is not contradictory to the constitution and cannot be regarded as the reduction of religious norms by legal norms. By citing the General Explanation of Law no. 1/1974, it is believed that marriage registration is not a factor that determines the legal requirements of marriage. Marriage recording is, indeed, an administrative obligation required by the law.

According to the State marriage, registration is important to enforce the function of the State in providing protection, promotion, enforcement, and fulfillment of human rights. In the meantime, according to the society, marriage is a legal action that has implications for extensive legal consequences.

The State must, therefore, protect and serve the rights arising from it.

Regarding the Article 43 Paragraph (1), the Constitutional Court declares that it is considered contradictory to the 1945 Constitution if it means eliminating civil relation which can be proven by science and technology to find a biological father. Therefore, the Article 43 Paragraph (2) should say, *“A child born outside marriage has a civil relationship with his/her mother and mother’s family and connection with his father which can be proven by science and technology and/or other evidence showing that she/he is bound by blood with his/her father as well as father’s family”*.

The subject on the legal status of a child born outside marriage is the legal meaning of the phrase “born outside marriage”. Naturally, it is impossible for a woman to become pregnant if an ovum and spermatozoa do not meet. Therefore, according to the Constitutional Court, it is inappropriate and unfair if the law stipulates that a child born outside of marriage only has a relationship with his/her mother. It is unfair if the law frees men who fertilize and cause pregnancy from responsibility and abolish the rights of the child.

On that basis, the relationship between children and their father is not solely due to a marriage bond, but can also be based on the proof that they share bond by blood with their father. Regardless of marriage administration, they must have legal protection. Otherwise, they will be harmed in any way, whereas being born is not their own will. The law must provide fair protection and certainty to their status.[3]

Religious figures have questioned this decision.[4] They even consider this as legalized adultery. A child born outside legitimate marriage cannot be related to his/her father. To this end, the former Chief of the Constitutional Court, Mahfud MD, has come to many *pesantren* to explain the decision, a rare step taken by a Supreme judge. Luckily, his fatwa could handle the society in turmoil.

3) Interfaith Marriage

The judicial review on the arrangement of interfaith marriage is proposed by four legal consultants, Damien Agata Yuvens, Ranga Sujud Widigda, Anbar Jayadi, and Luthfi Sahputra. The norm being reviewed is the Article 2 Paragraph (1) of the Marriage Law which states: *“Marriage is considered legal if it is completed according to religion and belief”*. The understanding to this norm, as they delivered, consists of 2 (two) levels: 1) the validity of marriage established by national law based on the law of each religion; 2) the review of the validity is conducted by each religion and belief. These two levels are essentially one unit, in which religious law has “changed its color” to State law.

A further implication is the illegality of marriage which is undergone outside the interpretation of the State on each religion with each belief. In other words, the State insists that every citizen is subject to the state’s interpretation of each religion/belief. They further add this arrangement causes legal uncertainty for persons seeking marriage which consequently violate freedom of religion as stated by the Article 28B Paragraph (1), the Article 28E Paragraph (1 and 2), the Article

28I Paragraph (1) and the Article 29 Paragraph (2) of the 1945 Constitution.

To this end, they ask the Constitutional Court to clarify that the norm in the Article 2 Paragraph (1) of the Marriage Law is considered contradictory to the 1945 Constitution and has no binding legal force if it is not interpreted. The interpretation of the religious law and belief is, in turn, given to each prospective bride and groom.

The petition is divided into two categories: the arguments during the judicial review and the arguments during the formal review. The arguments for the judicial review, for example, are partly due to the judgment of the State against its citizens who have married under the Article 2 Paragraph (1) of the Marriage Law. According to them, such restriction is deemed to have violated the right to establish a legal marriage and to start a family as written in the Article 28B Paragraph (1) of the 1945 Constitution. The norm in the Article 2 Paragraph (1) is likely to open a wide zone of interpretation and causes conflict between norms, which are consequently unable to guarantee the fulfillment of the right to a fair legal certainty as regulated in the Article 28D Paragraph (1) of the 1945 Constitution.

Formally, the review refers to the application of the Article 2 Paragraph (2) of the Marriage Law which causes violating various marriage laws; the norms do not meet the standards to be claimed as legislation and contradict their own purpose that each marriage is based on the law of each religion and belief.

The Constitutional Court decides to completely refuse their petition which is deemed to be legally groundless. This means the Article 2 Paragraph (1) remains in force and does not contradict the Constitution as they argue.

The Constitutional Court’s decision is based on several arguments. First, in relation to the arguments delivered by the petitioners, the idea that their constitutional right to marry and start a family is violated by the provision in Article 2 Paragraph (1) is not legally proven. According to the Court, in obtaining rights and freedom, every citizen is to obey the restrictions stipulated by the law in the Article 28J of the 1945 Constitution.

Second, in regard to their arguments, the Article 2 Paragraph (1) which imposes every citizen to obey the law of their religion and belief does not go against the constitution. According to the Court, marriage is one of the areas governed in the legal order in Indonesia, which means all actions and acts committed by citizens must be subjected to the legislation.

Lastly, their argument on the freedom of religion is violated by the enactment of the Article 2 Paragraph (1) as it is considered to confuse administrative provisions with the implementation of religious teachings is also incorrect. According to the Court, the State has an interest in ensuring the legal certainty of marriage ties. To that end, marriage cannot only be seen from formal aspects, but also spiritual and social aspects. Religion establishes the validity of marriage, while the State establishes the validity of administration.[5]

III. THE CONSTITUTIONAL COURT'S DECISION AND ITS IMPLICATION

Based on the above description, it appears that the ways the Constitutional Court interpret the constitution and views some issues are not always the same. Regarding the law on blasphemy, for example, the Court is very restrictive and considers various aspects of the constitution. However, in reviewing the Marriage Law, its decision tends to be conservative. In response to the Islamic criminal law in the Religious Courts, the Court tends to avoid elaborating the freedom of religion discourse under formal argumentation that does not have any authority.[6]

On that basis, Simon Butt concludes the Constitutional Court's decision regarding religious matters seems ambiguous and inconsistent.[7] Concerning the Religious Courts, for example, it refuses to give additional authority on Islamic Criminal Law considering that only national law applies. Meanwhile, regarding the issue of polygamy and Religious Courts, the Court shows a clear and firm attitude although it has recognized that Islamic law is one of the sources to formulate the national law. However, its implementation through the authority of the State is limited. Surprisingly, although some Muslims believe Islamic crime is a part of Islamic teachings, the doctrine cannot necessarily be implemented and become the state law. When it comes to polygamy and the implementation of Islamic criminal law, the Court appears to be more secular, but in the case of the law on blasphemy and religious marriage, its decision appears to be more religious and tends to side with religion.

The Constitutional Court's Decisions are generally conservative, merely reinforcing the norms written in the Constitution. However, there are at least two decisions that can be said to be progressive; the decision on the status of children born outside marriage; and the status of groups of believers in the religion column on ID card. These two decisions are significant to take notes because they show a breakthrough indicating the direction of legal reform.

Regarding the status of a child born outside marriage, for instance, the Constitutional Court declares that the Article 43 Paragraph (1) is unconstitutional and does not have legal force if it eliminates civil relations with his/her biological father. Until now, a child born outside marriage has not obtained relationship whatsoever with his/her biological father although his/her parents have performed a legal marriage according to the Sharia; even though they are not registered in the State administration. Suffice to say, this decision is "half recognition" on the legality of unregistered marriage.

The term *Half Recognition* happens because the Court's decision does not equate such marriage with the marriage registered at the Religious Affairs Office (*Kantor Urusan Agama/KUA*). On the other hand, if the child is born of a relationship which is not tied to a marriage, this decision is likely to use as a form to acknowledge a child of adultery. However, the Court has deeply considered the aspects of justice for the child. He/she should not get consequence of injustice because of what his/her parents do. This decision is regarded as a brave decision in the midst of conservatism in Indonesia which continues to strengthen.[8] The Court boldly

steps out of the rigidity of legal positivism towards a more substantial human rights protection.

Similarly, the decision on the religion column on ID card is regarded as a very important decision in managing the relationship between religion and the State, especially for the groups of the believer. The existence of followers of local beliefs commonly called *believer* cannot be denied. They live in almost all parts of Indonesia. However, they are always seen as "the others" who continue to be discriminated against. They are regarded as unreligious people and some even think of them as heretical groups. Unfortunately, the existence of religious identity politics seems to keep them away.

Seeing these developments, two important currents in Indonesia are categorized. In social life, a steady stream of conservatism occurs which is marked by the growth of radical groups. On the other hand, summer breeze flows to strengthen the protection of human rights. All judicial review of a number of laws concerning religious subjects always prioritizes human rights as regulated in the 1945 Constitution as a foundation.

It shows the position of religion with all of its aspects in the State will always be the arena of contestation.[9] In such contestation, Indonesian legal politics through the Constitutional Court applies the principle of limiting the implementation of religious teachings. In the case of polygamy, the Court justifies the limitation of polygamy through administrative rules. Similarly, its decision to strengthen the Religious Courts Act which only solves marriages, inheritance, *waqf* and Islamic economics disputes, does not include Islamic crime. This indicates some restrictions. However, in regard to the regulation of blasphemy and the ban on interfaith marriage, the Court delivers religious point of view. There is no definite formulation of which religious aspects can be included in the State's regulation. It will always be a subject of contestation among various social and political forces and Political Authorities in Indonesia. Consequently, the contestation and negotiation of State, religion, and human rights will continue to occur in the future.[]

REFERENCES

- [1] Constitutional Decision 97/PUU-XIV/2016, p. 140-141.
- [2] Constitutional Court Decision 97/PUU-XIV/2016, h. 148-153
- [3] See Constitutional Court Decision 46/PUU-VIII/2010.
- [4] <https://news.detik.com/berita/d-1866192/mui-nilai-keputusan-mk-soal-status-anak-di-luar-nikah-overdosis>.
- [5] <https://nasional.tempo.co/read/392913/mui-tak-akan-cabut-fatwa-kedudukan-anak-luar-nikah>.
- [6] Constitutional Court Decision 68/PUU-XII/2014, p. 150-153.
- [7] Ismail Hasani (editor), *Dinamika Perlindungan Hak Konstitusional Warga*, (Jakarta: Setara Institute, 2013), p. 319.
- [8] Simon Butt, "Between Control and Appeasement: Religion in Five Constitutional Court Decisions" in Tim Lindsey and Helen Pausacker (ed.), *Religion, Law and Intolerance in Indonesia*, (London: Routledge, 2016), p. 60-61.
- [9] Martin van Bruinessen (Ed.), *Contemporary Developments in Indonesian Islam, Explaining the Conservative Turn*, (Singapore, ISEAS, 2013).

- [10] Simon Butt, "Islam, the State and the Constitutional Court in Indonesia", in *Pacific Rim Law and Policy Journal*, 2010, p. 279-301.
- [11] Asshiddiqie, Jimly, *Konstitusi dan Konstitusionalisme Indonesia*, 2010, Sinar Grafika, Jakarta.
- [12] Bruinessen, Martin van (Ed.), *Contemporary Developments in Indonesian Islam*, 2013, ISEAS Singapore.
- [13] Butt, Simon, "Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003-2005", Ph.D. Dissertation, 2007, Law Faculty, Melbourne University.
- [14] Butt, Simon "Islam, the State and the Constitutional Court in Indonesia", in *Pacific Rim Law and Policy Journal*, 2010.
- [15] Cristina R, Dri Utari dan Ismail Hasani (editor), *Masa Depan Mahkamah Konstitusi: Naskah Konferensi Mahkamah Konstitusi dan Pemajuan Hak Konstitusional Warga*, 2013, Setara Institute, Jakarta.
- [16] Efendy, Bahtiar, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia*, 1998, Paramadina, Jakarta.
- [17] Hasani, Ismail (editor), *Dinamika Perlindungan Hak Konstitusional Warga, Mahkamah Konstitusi sebagai Mekanisme Nasional Baru Pemajuan dan Perlindungan Hak Asasi Manusia*, 2013, Pustaka Masyarakat Setara, Jakarta
- [18] Hirschl, Ran, *Constitutionalism Theocracy*, 2010, Harvard University Press, Harvard.
- [19] *Jurnal Konstitusi* Volume 10 No. 2, June 2013.
- [20] *Jurnal Konstitusi* Volume 10 No. 4 December 2013.
- [21] *Jurnal Konstitusi* Volume 10 No. 2, June 2013.
- [22] Lindsey, Timothy dan Simon Butt, *The Indonesian Constitution: A Contextual Analysis*, 2012, Hard, Oxford.
- [23] Tim Lindsey and Helen Pausacker (ed.), *Religion, Law and Intolerance in Indonesia*, 2016, Routledge, London.
- [24] Mahfud MD, Moh., *Politik Hukum di Indonesia*, 2012, RajaGrafindo Persada, Jakarta.
- [25] -----, *Membangun Politik Hukum, Menegakkan Konstitusi*, 2011, Rajawali Pers, Jakarta.
- [26] Menchik, Jeremy, *Islam and Democracy in Indonesia, Tolerance without Liberalism*, 2016 Cambridge University Press, Cambridge.
- [27] Constitutional Court's Decision No. 97/PUU-XIV/2016
- [28] Constitutional Court's Decision No. 68/PUU-XII/2014
- [29] Constitutional Court's Decision No. 84/PUU-X/2012
- [30] Constitutional Court's Decision No. 46/PUU-VIII/2010
- [31] Constitutional Court's Decision No. 140/PUU-VII/2009
- [32] Constitutional Court's Decision No. 19/PUU-VI/2008
- [33] Constitutional Court's Decision No. 12/PUU-V/2007
- [34] Sidharta, *Hukum Penalaran dan Penalaran Hukum*, 2013, Genta Publishing, Jakarta.