RELIGIOUS FREEDOM AND THE INDONESIAN CONSTITUTION: A CASE STUDY OF THE BLASPHEMY LAW, MARRIAGE LAW, AND CIVIL ADMINISTRATIVE LAW

Mahaarum Kusuma **PERTIWI**

Bachelor of Laws (Universitas Gadjah Mada), Master of Arts (Universitas Gadjah Mada), Master of Philosophy (University of Oslo)

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Summary

This thesis examines the approach of the Indonesian law makers to religious freedom. This thesis topic is significant because it offers a comprehensive understanding of the lawmaking process in relation to the issue of religious freedom. This thesis draws upon the idea that politics influences law making to analyse the debate over religious freedom in Indonesia and the extent to which the law is used to protect religious freedom. My research question is 'How religious politics influences lawmaking during constitutional debates, legislation process, and constitutional review?'. I will explore this question through doctrinal analysis and a case study approach. Throughout this thesis, I will show how the regulation of religious freedom has been contested through the lawmaking process, both in the legislature and the Constitutional Court. I explain the debate on the drafting and amendment of the articles on religious freedom in the 1945 Constitution, and the latter 1955-1959 and 1999-2002 Constitutional debate, arguing that there is a legal gap in regard to the protection of religious freedom in Indonesia. The gap is between the Constitutional Articles guaranteeing religious freedom and laws that potentially interfere with religious freedom for minorities such as the Blasphemy Law, the Marriage Law, and the Civil Administrative law. These laws were judicially reviewed before the Constitutional Court for testing their conformity with the Constitution. Through the case study of the judicial review of the Blasphemy Law, the Marriage Law, and the Civil Administrative Law, I show how claims about religious freedom are still debated and resolved in the Constitutional Court. I suggest that the Constitutional Court has resolved disputes over religious freedom in ways that compromises the rights of religious minorities in the cases on blasphemy and the marriage law, but in ways that ensure tolerance for those who do not hold a religion in the case of the civil administrative law. Overall, this study offers a new perspective to understand religious freedom in Indonesia by looking at the discourse surrounding the law-making process.

Keywords: Religious Freedom, Human Rights, Indonesia, Constitution

Statement of Originality

This thesis is being submitted to Macquarie University and Universitas Gadjah Mada in accordance with the Cotutelle agreement dated 25 May 2017.

To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Glossary

This glossary includes terms from Arabic (A), Batak (B), Dutch (D), French (F), Bahasa Indonesia (I), Javanese (J), Latin (L), and Sanskrit (S).

adat (I)	local customs and traditions
agama (I)	religion
amar putusan (I)	verdict
amicus curiae (L)	friends of the court. Referring to interveners in court proceeding
Ahmadiyya (A)	international religious community (minority)
aliran (I)	sect
asas (I)	principle
beleidsregel (D)	mix of decree and regulation
berkebudayaan (I)	cultured (adjective)
Bhinekka Tunggal Ika (S)	Indonesian motto meaning Unity in Diversity
Boedi Oetomo (I)	regarded as the first Indonesian (native) political movement (establish 1927)
budaya (I)	culture
causa materialis (L)	the origin
causa prima (L)	the prime cause
cogitationis poenam nemo patitur (L)	nobody endures punishment for thought
coup d'etat (F)	coup (overturning the government/ regime)
error in objecto (L)	mistake to identify the object (of a case law)
fatwa (A)	Islamic legal opinion
fiqh (A)	Islamic jurisprudence
forum externum (L)	external dimension
forum internum (L)	internal dimension
hadits (A)	source of law in Islamic law taken from the saying and action of Prophet Muhammad
hak (I)	right
hak asasi manusia (I)	human rights
hakim (I)	judge
halal (I/A)	permissible

Indische Staatsregeling (D)	Dutch-East Indies Constitution
ke-Indonesiaan (I)	Indonesianness
kejawen (J)	Javanese local belief
kekeluargaan (I)	kinship
kepercayaan (I)	belief
ketuhanan (I)	things related to God
kodifikasi (I)	codified
Kompilasi Hukum Islam (I)	Compilation of Islamic Law
Konstituante (I)	Elected body to draft new constitution (1955-1959)
lex certa (L)	legal certainty
lex speciale/ lex specialis (L)	specific law
Mahkamah Agung (I)	Supreme Court
Mahkamah Konstitusi (I)	Constitutional Court
Marapu (I)	local belief community
Masyumi (I)	Islamic party
men(d)jiwai (I)	inspiring
Muhammadiyah (I)	Islamic organisation (moderate)
musyawarah mufakat (I)	deliberation and consensus
nabi (I/A)	prophet
nebis in idem (L)	the same case cannot be proceeded twice (double jeopardy)
niet ontvankelijk verklaard (D)	inadmissible (case)
negara (I)	state
obiter dicta (L)	non-binding legal reasoning
Orde Baru (I)	New Order. Referring to Soeharto's regime
Pancasila (I)	Indonesian national ideology
paripurna (I)	plenary (meeting), completed, perfect
Pengadilan Agama/ Peradilan Agama (I)	Islamic Court
penodaan agama/ penistaan agama (I)	blasphemy, insulting, or dishonouring religion
Piagam Jakarta (I)	Jakarta Charter (The Preamble of Indonesian Constitution)
pihak terkait (I)	intervener (in court). See amicus curiae

philosofische grondslag (D)	philosophical foundation
Quran (A/I)	Islamic holy book
ratio decidendi (L)	binding legal reasoning
reformasi (I)	reformation period in Indonesia (1998)
Sapto Darmo (J)	name of local belief community
Sarekat Dagang (I)	Commercial Union. Regarded as the first Islamic movement in Indonesia (establish 1905)
Sarekat Islam (I)	Islamic Union (Islamic party)
sharia (A)	Islamic law
Shia (A)	(minority) Islamic sect
Staatsblaad (D)	Official Gazette
Sunni (A)	(majority) Islamic sect
surah/ surat (A/I)	chapter in Quran
syariah/ syariat (I)	Islamic law (Bahasa/ Indonesian language)
talak (A/I)	divorce in Islam (by husband)
Tuhan (I)	God
Ugamo Bangso Batak (B)	Religion of the Batak people
ulama (I)	religious leader
Undang-Undang (I)	Law/ Act/ Statute

Abbreviations

The abbreviations are taken from Indonesian terms. English translation is provided.

BAKORPAKEM/ PAKEM	Badan Kordinasi Pengawas Aliran Kepercayaan/ Pengawas Aliran Kepercayaan	Government Body to monitor religious sect/ local beliefs
BIN	Badan Intelijen Negara	Indonesian Intelligence Agency
BPUPKI	Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia	Independence-Preparation Investigation Commission established by Japanese occupation government
DDII	Dewan Dakwah Islamiyah Indonesia	Islamic organisation (relatively radical)
DPD	Dewan Perwakilan Daerah	Similar to the concept of Senate, is the second (high) chamber in the Indonesian parliament to check and balance the DPR
DPR	Dewan Perwakilan Rakyat	(the lower house of the) Indonesian Parliament
FKUB	Forum Kerukunan Umat Beragama	Religious-Harmony Forum
GBHN	Garis-Garis Besar Haluan Negara	Outline of State Policy
GOLKAR	Golongan Karya	Functional Group Party. Soeharto's regime-party
HOCI	Huwelijks Ordonatie Christen Indonesia	Indonesian Christian Marriage Law
KK	Kartu Keluarga	Family Card
KTP	Kartu Tanda Penduduk	National Identity Card
KHI	Kompilasi Hukum Islam	Compilation of Islamic Law
KOMNAS HAM	Komisi Nasional Hak Asasi Manusia	Indonesian Human rights Commission

Komnas Perempuan	Komisi Nasional Perempuan	Indonesian Women (protection) Commission
KUA	Kantor Urusan Agama	Religious Affairs Office. Used for Islamic marriage registration
MLKI	Majelis Luhur Kepercayaan Terhadap Tuhan Yang Maha Esa	Council of the Belief in One and Only God
MPR	Majelis Permusyawaratan Rakyat	People Consultative Assembly (Indonesian Parliament, once the highest state institution)
MUI	Majelis Ulama Indonesia	Indonesian Ulama Council (non-governmental organisation)
NASAKOM	Nasionalisme, Agama, Komunis	Nationalism, Religion, Communism
NU	Nahdlatul Ulama	Islamic organisation (moderate)
PBB	Partai Bulan Bintang	Moon and Star Party (Islamic party)
PDI	Partai Demokrasi Indonesia	Indonesian Democratic Party
PKB	Partai Kebangkitan Bangsa	Nation-Awake Party (Islamic party)
PKI	Partai Komunis Indonesia	Indonesian Communist Party
PN	Pengadilan Negeri	District Court
PNI	Partai Nasional Indonesia	Indonesian Nationalist Party
PPKI	Panitia Persiapan Kemerdekaan Indonesia	Preparatory Committee for Indonesian Independence (established by Japanese occupation government to take over the work of BPUPKI
PPP	Partai Persatuan Pembangunan	Unity-Development Party (Islamic Party created under

		Soeharto regime to merge previous Islamic parties)
PT	Pengadilan Tinggi	Appellate/ High Court
PSI	Partai Sosialis Indonesia	Indonesian Socialist Party
TAP MPR	Ketetapan Majelis Permusyawaratan Rakyat	Parliamentary Decree
TNI	Tentara Nasional Indonesia	Indonesian Army
UUD 1945	Undang-Undang Dasar Negara Republik Indonesia Tahun 1945	The 1945 Indonesian Constitution

Chapter 1: Introduction

This thesis draws from one idea of the relationship between law and politics:[1] that politics influences law. In the Indonesian context, the idea that politics influences law was popularised by Mahfud MD, a prominent constitutional scholar who served as chief of the Constitutional Court from 2008–2013. Studying the politics of lawmaking in his doctoral thesis, Mahfud argued that politics, not only influences, but determines law. This is because, according to him, law is not an independent variable[2] and political intervention in lawmaking is beyond doubt.[3] Starting from this conception, this thesis narrows the politics of lawmaking to the issue of religious freedom in Indonesia.

Indonesia is a Muslim-majority country, so the relationship between law and Islam and the parameters of religious freedom are important. Religious freedom has been an issue of concern for religious minorities over many decades and remains a topic of contemporary relevance. In this regard, this thesis examines the Indonesian legal framework of religious freedom under the Indonesian Constitution and its derivative laws, including the Constitutional Court's interpretation of the religious freedom guarantees in the Constitution.

Before exploring the Constitutional Articles on religious freedom, it is important to note that Indonesia possesses a distinct feature of state ideology: *Pancasila*. Legally speaking, *Pancasila* is mentioned in the preamble of the Constitution; thus, it is part of the Constitution. However, *Pancasila* is also viewed as a philosophical foundation of the state (*Philosofische Grondslag*).[4] It consists of five principles: the one and only God (*Ketuhanan Yang Maha Esa*);[5] just and

[1] The relationship between law and politics has been explored by various scholars with different perspectives: see eg, Larry Alexander, 'Law and Politics: What Is Their Relation' (2018) 41(1) *Harvard Journal of Law & Public Policy* 355; Mirro Cerar, 'The Relationship between Law and Politics' (2009) 15(1) *Annual Survey of International & Comparative Law* 19; David Feldman (ed), *Law in Politics, Politics in Law* (Oxford Hart Publishing, 2013). Mostly, these studies focus on how politics affects law, including in the drafting or making of law, and the judicial process—examining the court as lawmakers and the relevant political environment. See Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira, 'Overview of Law and Politics the Study of Law and Politics' in Robert E. Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press, 2018) 1, 1.

[2] Mahfud MD, *Politik Hukum di Indonesia* (Rajawali Press, 2012) 7.

[3] Ibid 9.

[4] Sudjto Atmoredjo, *Ideologi Hukum Indonesia, Kajian tentang Pancasila dalam Perspektif Ilmu Hukum dan Dasar Negara Indonesia* (Lingkar Media, 2016) 5.

[5] '*Ketuhanan*' in Indonesian is a complex noun from the word '*Tuhan*' (noun), which literally means 'God'. Thus, *Ketuhanan* means 'God' or 'things related to God'. '*Yang*' is a relative adjective in Indonesian, meaning 'that (is)' or 'which (is)'. '*Maha*' means 'really', 'very' or '(the) most'. '*Esa*' means 'One'. Therefore, a literal translation for '*Ketuhanan Yang Maha Esa'* is 'God that is really one'. Some English translations (eg, Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) use the phrase 'Almighty God' to translate

civilised humanity (*Kemanusiaan Yang Adil dan Beradab*); the unity of Indonesia (*Persatuan Indonesia*); government-based wisdom in representative democracy (*Kerakyatan Yang Dipimpin Oleh Hikmah Kebijaksanaan Dalam Permusyawaratan Perwakilan*); and social justice (*Keadilan Sosial Bagi Seluruh Rakyat Indonesia*).

The first principle of *Pancasila* is a statement for adopting monotheism in Indonesia. It is further stated under Article 29(1) of the Constitution: 'The State shall be based upon the belief in the One and Only God'. Later, Chapter 3 of this thesis will reveal the construction behind such endorsement for monotheism: that it was a product of political negotiation between the Islamist and the nationalist representatives during the 1945 constitutional drafting.

Further to the statement of the monotheistic state, four dedicated articles protect religious freedom under the Indonesian Constitution: Articles 28 E(1), 28 E(2), 28 I(1) and 29 (2):[6]

1. Article 28 E (1): 'Every Person shall be free to hold a religion[7] and to worship according to their religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place to reside in the territory of the state and to leave it, as well as be entitled to return.'[8]

2. Article 28 E (2): 'Every person shall be entitled to freedom to possess conviction and belief,[9] to express thought and attitude in accordance with their conscience.'[10]

'*Ketuhanan Yang Maha Esa'*. Such translation is acceptable given certain contextual interpretation—that 'Esa' (literally 'one' in English) is understood to be the 'sovereign'. However, I provide the literal translation to show how the literal meaning of the term in Bahasa Indonesia can be read differently. While 'almighty' provides a more qualitative appearance, 'one' is more quantitative. Thus, I use the words 'The One and Only God' to translate '*Ketuhanan Yang Maha Esa'.*

[6] The translation I use for these constitutional articles is taken from the Indonesia Constitutional Court's English translation of the Constitution, available online at https://mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf. Some of the terms used in the translation may not be accurate; thus, I have changed it accordingly. I provide a specific footnote on the changed term to explain it further.

[7] The translation provided by Constitutional Court uses 'free to embrace religion' instead of 'free to hold a religion'. However, the Indonesian version of the Constitution is '*berhak memeluk agama'*. The literal English translation would be 'have the right to hold religion'. Even in Indonesian, this term is subject to multiple interpretations because it can be understood as 'the one being protected' is when someone holds religion. This means that the Constitution does not protect those who do not hold religion. However, if we use the framework of religious freedom and focus on the 'right' instead of 'religion', then everyone has the right to either hold or not hold religion.

[8] *Constitution of the Republic of Indonesia*.

[9] The translation provided by the Constitutional Court uses 'freedom to be convinced of a belief'. The Indonesian version of the Constitution is '*berhak atas kebebasan meyakini kepercayaan'*, which will be more relevant translated aa 'freedom to possess conviction and belief'.

[10] *Constitution of the Republic of Indonesia* (n 8).

3. Article 28 I (1): 'The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to hold religion,[11] the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever.'[12]

4. Article 29 (2) 'The State guarantees freedom of every inhabitant to embrace his/her respective religion and to worship according to his/her religion and belief as such.'[13]

Along with these articles, there is also one other significant related article on the issue of religious freedom, that is Articles 28 J(2):

> Article 28 J (2): In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedom of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.[14]

There are two dimensions of religious freedom: internal and external. The internal dimension (*forum internum*) of freedom of religion is the right to hold religion. It is set as an absolute right under Articles 28 E(1) and 28I (1) of the Indonesian Constitution. This right may not be limited under any circumstances. The external dimension (*forum externum*) of freedom of religion is the exercise or manifestation of the right. It may be limited by law, according to Article 28 J(2), strictly for the sole purpose of guaranteeing recognition and respect of the rights and freedom of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society. However, in this thesis, I will demonstrate that in practice, such constitutional protection of religious freedom is not well articulated within the derivative laws.

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[11] The translation provided by Constitutional Court uses 'the right of religion' instead. However, the Indonesian version of the Constitution is '*hak beragama'*. The literal English translation would be 'have the right to hold religion'. Using 'the right of religion' in this regard will overgeneralise the right to freedom of religion by claiming all aspect of religious freedom—including the manifestation (*forum externum*)—to be protected under the article, whereas the original version written in Bahasa Indonesia only addresses the right to hold religion. This is because Article 28 I(1) is designed to set absolute rights in Indonesia. In the sense of religious freedom, it is only the right to hold religion that is set as absolute, while the manifestation aspect of freedom of religion is not absolute and may be limited under the clause provided for under Article 28 J(2).

[12] *Constitution of the Republic of Indonesia* (n 8).

[13] Ibid.

[14] Ibid.

1.1 The Problem

The Constitution is the highest law applicable in Indonesia; therefore, any laws and regulations must conform to the Constitution. However, there is a legal gap in protection of religious freedom in Indonesia because several laws (*Undang-Undang*) are not in line with the idea of religious freedom. In this regard, this thesis argues that the Blasphemy Law, Marriage Law and Civil Administrative Law violate the religious freedom guaranteed under the Constitution, particularly by favouring a certain concept of religiosity and disregarding religious minorities.

1.1.1 Blasphemy Law

Article 1 of the 1965 Indonesian Blasphemy Law stipulates:

> Every individual is prohibited in public from intentionally conveying, endorsing or attempting to gain public support in the interpretation of a certain religion embraced by the people of Indonesia or undertaking religious-based activities that resemble the religious activities of the religion in question, where such interpretation and activities are in deviation of the basic teachings of the religion.[15]

Article 2(1) provides that the minister of religious affairs, the Attorney General and minister of home affairs may issue a Joint Ministerial Decree to warn a person who has violated Article 1 by promoting deviant teaching.[16] Article 2(2) stresses if the violation is committed by a religious organisation, the president has the power to ban the group on the recommendation of the three authorities listed above.[17] Following, Article 3 provides that anyone convicted of breaching Article 1 after the warning or ban can be imprisoned for a maximum of five years.[18]

Further, Article 4 of the Blasphemy Law provides:

> By a maximum imprisonment of five years shall be punished for whosoever in public deliberately expresses their feelings or engages in actions that: (a) in principle is hostile and

[15] Undang-Undang No 1/PNPS/1965 tentang Pencegahan penyalahgunaan dan/atau Penodaan Agama [Law No 1/PNPS/1965 on Blasphemy] (Indonesia) art.1. The English translation is taken from Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Laws* (webpage, 2014) https://www.amnestyusa.org/.../ index-asa_210182014.pdf
[16] Ibid.
[17] Ibid.
[18] Ibid.

considered as abuse or defamation of a religion embraced in Indonesia; (b) has the intention that a person should not practice any religion at all that is based on belief in Almighty God.[19]

The problem with these provisions in the Blasphemy Law is that religious minorities who are exercising their religious freedom may be perceived as blaspheming the beliefs of the religious majority. This is the case of *Ahmadiyya* and *Shia* in Indonesia, who were accused by Sunni Muslims of blaspheming Islam because they share different interpretations and manifestations of Islam.[20] The different perception of religion in these two cases (Ahmadiyya and Shia) is a form of horizontal conflict in society. The Indonesian government uses Blasphemy Law to overcome these horizontal conflicts. However, the approach discriminates against the Ahmadiyya and Shia.

In the case of Ahmadiyya, the government established a Joint Ministerial Decree to limit the Ahmadis' right to manifest religion (spread their belief in Mirza Ghulam Ahmad) to prevent them being attacked by people who perceive their teaching to be deviant and blasphemous.[21] In the case of Shia, Tajul Muluk was sentenced to two years' imprisonment under Indonesian Blasphemy Law because he was a Shia cleric, considered blasphemous to Sunni Islam.[22]

The government in these two cases emphasised that there were people who claimed that the teaching of Ahmadiyya and Shia blasphemed their religion (Islam). However, it failed to acknowledge that the Ahmadis and Shia community also have their right to religious freedom, including the right to manifest religion protected under the Constitution. Although the right to manifest religion may be limited, the limitation should be strictly for the sole purpose of guaranteeing the recognition and respect of the rights and freedom of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

[19] Ibid.
[20] Such as the belief in Mirza Ghulam Ahmad as a prophet in Ahmadiyya teaching, the Sunni majority believes there should be no new prophet after Muhammad; the Asyura commemoration by the Shia community is not acknowledged as a worship by Sunni.
[21] Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republic Indonesia Nomor 3 Tahun 2008; Nomor KEP-033/JA/6/2008; Nomor 199 Tahun 2008 tentang Peringatan dan Perintah kepada Penganut, Anggota, dan/ atau anggota pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat [Joint Decree by Minister of Religious Affairs, Attorney General, and Minister of Home Affairs of the Republic of Indonesia on the matter of Warning and Order to the Followers, Members, and/or Leaders of the Indonesia Ahmadiyya Jama'at (JAI) and to the General Public] (Indonesia).
[22] Pengadilan Negeri Sampang [Sampang District Court/ Magistrate], No 69/Pid.B/2012/Pn.Spg., 12 July 2012.

In this regard, the limitation of minorities' rights to manifest religion under Blasphemy Law needs to be examined to determine whether it conforms to Article 28 J(2) of the Constitution. This is what my thesis proposes to do in Chapter 4.

1.1.2 Marriage Law

The second issue my thesis will consider is the Marriage Law. Several provisions under the 1974 Marriage Law are controversial because they incorporate Islamic values that are forced on all Indonesians, including non-Muslims, in the matter of marriage. This includes the clause on polygamy and the status of a child born out of wedlock.

The provision under the Marriage Law that endorses Islamic law is Article 3 (2): 'The Court may grant permission to a husband to have more than one wife, if all the parties concerned so wish'.[23] This article is problematic for two reasons: (1) the lack of gender equality that it gives to men and women; and (2) its origins from Islamic teaching of polygamous marriage, which may not be acceptable to other religions, particularly religions that prohibit polygamy. Although the article does not force people to engage in polygamy, the mention of polygamy in this article—which later was confirmed by the Constitutional Court as taken from Islamic teaching—is evidence of the Marriage Law's preference for Islam.

Another article taken from Islamic teaching is 43(1): 'A child born out of wedlock has only civil relationship to his/her mother and her relatives'.[24] This provision is also taken from Islamic (*hadits*) saying, 'A child has a civil relation with his legitimate husband of the mother, and those commit adultery gets nothing'.[25] The Islamic teaching has been articulated in Indonesian Marriage Law by stipulating that when a child is born out of wedlock, the child will be exclusively affiliated to his mother's family. This means, for example, that a father may have no obligation to support his child. Further, the article is problematic because the father can deny responsibility for child maintenance payments to the mother. Here, an exercise of religious freedom in the sense of practising Islamic teaching may conflict with other human rights, particularly children's rights, which are protected under the Indonesian Constitution.

Another problem arising from the Marriage Law is that it does not allow interfaith marriage. The prohibition of interfaith marriage is not explicit under the Marriage Law. Article 2(1) states

[23] Undang-Undang Nomor 1 Tahun 1974 tentang Perwakinan [*Law No 1 1974 on Marriage*] (Indonesia), art 3(2).
[24] Ibid, art 43(1).
[25] Hadits by Bukhari No 6760 and Muslim No 1457.

that, 'A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned'.[26] This article is problematic because it is presumed that the couple shares the same religion. If couples are of a different religion and these religions do not allow interfaith marriage, they would not be permitted to marry.

The highlighted issue form the Marriage Law is the importance of balancing conflicting rights when determining the framework of religious freedom. Even when the state proclaims its religiosity to adopt certain religious values (in this case, Islamic law) in the state law, it should balance other rights that may conflict with these values, such as the rights of children and women's rights. Chapter 5 of this thesis will analyse the balancing of these rights under the Constitutional Court decisions on the judicial review of the Marriage Law.

1.1.3 Civil Administrative Law

Not all aspects of the Civil Administrative Law are related to religious freedom. This thesis focuses on discussion of Civil Administrative Law in regard to the religion column in the identity (ID) card (family card and electronic ID card/ KTP) stipulated under Law No 23 2006 as amended by Law No 24 2013 on Civil Administration:

> Article 61 (1): A family card contains the following column of information: Family Card number; full name of the patriarch and the members of the family; Civil Registration Number; sex; address; place of birth; date of birth; religion; education; occupation; marital status; relationship status within the family; citizenship; immigration document; and parents' name.[27]
>
> Article 61 (2): Information regarding religion as referred to in (1), for residents whose religions have not been recognised by the Law or for residents with local beliefs; is not required to be filled in and can be left blank but is still served and recorded in the population database.[28]
>
> Article 64 (1): Electronic Identity Card with a picture of Garuda *Pancasila* and the map of Indonesian territory; contains these elements of civil administrative data: Civil Registration Number; name; place and date of birth; sex; religion; marital status; blood type; address;

[26] Law No 1 1974 on Marriage (n 23), art 2(1).
[27] Undang-Undang No 23 Tahun 2006 tentang Administrasi Kependudukan, Pasal 61 ayat (1) [Law No 23 2006 on Civil Administration] (Indonesia) art 61(1).
[28] Ibid art 61(2).

> occupation; citizenship; passport photo; validity period; place and date of issuing the Electronic Identity Card; and the signature of the owner of the Electronic Identity Card.[29]
>
> Article 64 (5): Element of civil administrative data regarding religion as referred to in (1) for residents whose religions have not been recognised by the Law or for residents with local beliefs; is not required to be filled in but is still served and recorded in the population database.[30]

The problem with these stipulations relates to the government position—that it will only recognise official or recognised religions. While the law seems to acknowledge 'unrecognised religions' by allowing them to be recorded in the database, the policy of leaving the column blank instead of writing the exact name of the unrecognised religion is still discriminatory. Chapter 6 of this thesis will further elaborate on the discriminatory nature of this article and how the Constitutional Court decision on the judicial review of this law failed to address the issue of official religions.

The government, following the Constitutional Court decision in 2017, at last allowed the mention of traditional belief on the ID card by a uniform title of 'Believe in one and only God'. However, I argue that such simplification reflects the narrow definition or concept of belief in Indonesia. Although Article 29 A(9) of the Constitution endorses the concept of monotheistic belief, it should not be read as not allowing other types of belief to exist because this would violate the *internum* dimension of religious freedom guaranteed under Articles 28 E(1) and 28 I(1) of the Indonesian Constitution.

1.2 Significance of the Study: Scope and Framework

This thesis topic is significant because it offers a comprehensive understanding of the lawmaking process in relation to religious freedom that shows a logical sequence of an interpretation of religious freedom in Indonesia. This is because during the judicial review hearing, the law made by the Parliament will be reviewed and interpreted by constitutional judges. The judges, through their decisions, can affirm the Parliament's framework of religious freedom, develop it further or offer its own interpretation.

[29] Ibid art 64(1).
[30] Ibid art 64(5).

In the process of lawmaking, both the Parliament and the Constitutional Court are not immune from the influence of political interests. The members of Parliament and constitutional judges are political actors who negotiate their values and interests to be incorporated within the legal text. Such negotiation can be observed during the parliamentary debate and court hearings. Constitutional and parliamentary debates provide detailed reasoning for the making of the law by the legislature, in which members of Parliament negotiate their interests regarding the proposed law. When it comes to religious freedom, religious values and interests significantly influence the law. Throughout this thesis, I will demonstrate how Islamic values and interests were influential in the lawmaking process during negotiations between lawmakers that consist of what I refer to as 'Islamists' and 'Nationalists'. The term 'Islamist' in this study is not interchangeable to 'Muslim'. What it means by Islamists are those parties proposing the use of Islamic law under the Indonesian Law, while the Nationalists are those parties proposing the use of a more nationalist approach. In this sense, nationalist may be a Muslim who does not want to adopt Islamic law under the Indonesian state law.

Religious freedom is an extremely broad topic, and I will not cover every aspect of it. The focus of this thesis is the constitutional framework of religious freedom in Indonesia as set out in the relevant human rights articles of the Constitution and as interpreted by the Constitutional Court. I exclude from the scope of my thesis issues such as religious courts in Indonesia, sharia law and cases in the general courts regarding the Blasphemy Law, marriage and identity card.

The lawmaking process analysed in this study is not limited to the work of Parliament, but also concerns the work of the Constitutional Court when it judicially reviews laws that are challenged for infringing religious freedom. Accordingly, this thesis will examine lawmaking in relation to the issue of religious freedom in three arenas:

1. the debates over constitutional reform in the 1940s–50s and again in the 1990s–2000s, which includes discussion on the drafting and amendment of the Constitution regarding religious freedom clauses;
2. the making, interpretation and implementation of the Blasphemy Law, Marriage Law and Civil Administrative Law;
3. the Constitutional Court's approach to the judicial review cases concerning the Blasphemy Law, Marriage Law and Civil Administrative Law.

First, the constitutional debates are significant to reveal the original intent of the religious freedom clause in the Indonesian Constitution and to discuss the constitutional framework of religious freedom in Indonesia, such as *Pancasila*, the Jakarta Charter and the notion of monotheism. This discussion will be elaborated upon in Chapter 3 to deepen understanding of the contextual background of this study of Indonesian laws. Such an original approach is important because both the Parliament and Constitutional Court referred to the discussion during the constitutional drafting in 1945 when arguing for the framework of religious freedom in Indonesia, particularly in the issue of Islam and the state.

The second arena to be discussed is the making and development of the Blasphemy Law, Marriage Law and Civil Administrative Law. Here, I will show that the work of the Parliament (DPR) and executive (president and related ministries, particularly the Ministry of Religion and Ministry of Home Affairs) during the lawmaking process were influenced by several interest and pressure groups, mainly vocal Islamic groups such as *Majelis Ulama Indonesia* (MUI). Further, I will analyse the Blasphemy Law, Marriage Law and Civil Administrative Law as the case studies because these three laws are the most influential laws to be judicially reviewed before the Constitutional Court in relation to the issue of religious freedom.

Other laws with a religious dimension have been judicially reviewed before the Constitutional Court, such as the Law on Halal Product Guarantee (*Undang-Undang tentang Jaminan Produk Halal*)[31] and the Law on Islamic Court (*Undang-Undang Peradilan Agama*).[32] However, discussion on these laws was not directly related to the issue of religious freedom. The Law on Halal Product Guarantee indeed gives preference to Islam because this state law regulates and facilitates the interest of Muslims. However, it does not affect religious freedom because the law does not force Muslims or Non-Muslims to use Islamic products (halal). The Law on Islamic Court is relevant to the discussion of religious freedom and I incorporate this discussion in Chapter 5 regarding Marriage Law. Judicial Review of Islamic Court (Case No 99 Year

[31] Undang-Undang Nomor 33 Tahun 2014 tentang Jaminan Produk Halal [*Law No 33 2014 on Halal Product Guarantee*] (Indonesia); Putusan Mahkamah Konstitusi Nomor 8/PUU-XVII/2019 [Constitutional Court Decision No 8/PUU-XVII/2019] (Indonesia).

[32] Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama sebagaimana telah diubah dengan Undang-Undang Nomor 3 Tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 tahun 2989 tentang Peradilan Agama [*Law No 7 1989 as amended by Law No 3 2006 on Islamic Court*] (Indonesia); Putusan Mahkamah Konstitusi Nomor. 99/PUU-XV/2017 [Constitutional Court Decision No 99/PUU-XV/2017] (Indonesia).

2017) was focused more on the administrative procedure (of marrying foreigners without any issue of religious difference) instead of religious freedom,[33] so it would not be included.

The third arena in which I will analyse is the Constitutional Court hearing in the judicial review cases. The Constitutional Court hearing is relevant in this study because the Blasphemy Law, Marriage Law and Civil Administrative Law were judicially reviewed before the Court, emphasising the issue of religious freedom protected under the Constitution. Comparable to the political contest during constitutional debates and parliamentary debates, the Constitutional Court hearings were also influenced by religious values and interests. The discussion regarding the judicial review of Blasphemy Law, Marriage Law and Civil Administrative Law will be incorporated in Chapters 4, 5 and 6 respectively when discussing the case studies.

Remembering the position of the Constitutional Court as the sole interpreter of the Constitution in Indonesia,[34] and that the Indonesian Constitution embraces human rights, particularly religious freedom after its amendment in 2000, there is a need for a richer understanding of religious freedom as a counter-academic argument to the Constitutional Court's decisions. To have a rich understanding of religious freedom, I use the provided reference of religious freedom from international law norms and philosophical understanding of the concept of religious freedom in Chapter 2 of this thesis, to analyse the politics of 'religion-making' in the Court decisions regarding Blasphemy Law, Marriage Law and Civil Administrative Law in Chapters 4–6 respectively.

1.3 Research Question and Objectives

Focusing on the three arenas of explained above, the central question of this thesis is: 'How religious politics influences lawmaking during constitutional debates, legislation process, and constitutional review?'.

[33] See Nano Tresna Arfana, 'Uji UU Peradilan Agama: Terjadi Perubahan Halaman yang Diperbaiki' in MKRI.id, 10 January 2018 <https://mkri.id/index.php?page=web.Berita&id=14219>.

[34] *Constitution of the Republic of Indonesia* (n 8) art 24 C(1): 'The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections'. This gives the Constitutional Court sole authority to conduct judicial reviews or check the constitutionality of a law. With such authority, the Court may interpret any constitutional articles and deliver a final and binding decision.

Practically, this thesis aims to unveil the influence of religious politics in law-making process in Indonesia during constitutional debates and the making and judicial review of Blasphemy Law, Marriage Law and Civil Administrative Law that will be discussed in Chapters 3–6. The thesis has five objectives:

1. Elaborating the key theoretical concepts used to locate this study within academic debates about religious freedom. This includes discussion on the concept of 'religion-making', religious freedom and its limitations, and the balancing of conflicting rights regarding religious freedom.
2. Examining the influence of religious politics in law-making process, specifically on the issue of the Islamic values in the three important constitutional debates (1945, 1959 and 2000) to understand the constitutional framework of religious freedom conceptualised by the drafter. Discussion of *Pancasila* and the *Jakarta Charter* are central to this objective.
3. Examining the influence of religious politics in the making of Blasphemy Law and how this law is being used to discriminate against religious minorities. This includes discussion of the Constitutional Court decisions affirming the constitutionality of Blasphemy Law.
4. Examining the influence of religious politics in the making of Indonesian Marriage Law and Constitutional Court decisions on the judicial review of the Marriage Law, particularly on the issue of polygamy, children born out of wedlock and interfaith marriage because these three issues are closely intertwined with religious freedom.
5. Examining the influence of religious politics in the making of the Civil Administrative Law and the policy of mentioning religion on the ID card. This objective is important to reveal the unresolved issue of official religions and the concept of local belief after the Constitutional Court decision on the ID card case.

1.4 Methodology

This study analyses the idea of religious freedom in Indonesia. Thus, it combines the doctrinal aspect of the legal text and the broader sociolegal aspect of the politics of lawmaking processes on the issue of religious freedom. This thesis is doctrinal in its framework. This means that it explains, makes coherent or justifies a segment of the law as part of a broader system of law.[35]

[35] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2013) 21(3) *Legal Education Digest* 32, 83, 83.

Specifically, this study explains the concept of religious freedom in the Indonesian Constitutional legal framework. However, I do not stop at explaining the Indonesian legal framework of religious freedom as constructed by lawmakers. A purely doctrinal analysis would be insufficient for this study because I find the Indonesian legal construction of religious freedom problematic. Thus, this study builds a more persuasive doctrinal analysis. As Emerson Tiller and Frank Cross stated, 'a persuasive doctrinal analysis could show the judiciary the error of its ways and provoke [a] new course of legal reasoning'.[36] The persuasive doctrinal analysis is conducted by embracing a sociolegal approach. David N Schiff explained that in a sociolegal approach, 'analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance, and/or change of the situation'.[37]

This thesis is accordingly domestically focused on key cases and legal provisions. Theoretically, this study departs from the concept of 'religion-making' outlined by Dressler and Mandair[38] to analyse the political discourse surrounding the making of law regarding religion. 'Religion-making' focuses attention on the extent to which the category of 'religion' is constructed and defined through the lawmaking and law-applying activities of state institutions.[39] One of the concepts of religion-making is religion-making from above. As explained in Chapter 2 of this thesis:

> religion-making from above' refers to 'authoritative discourses and practices that define and confine things (symbols, languages, practices) as 'religious' and 'secular' through the disciplining means of the modern state and its institutions (such as law making, the judiciary, state bureaucracies, state media, and the public education system).[40]

I argue that the concept of religion-making, particularly the idea of 'religion-making from above', can help build an understanding of religious freedom in Indonesia beyond the legal text.

Theoretically, this thesis learns from a liberal conception of religious freedom to offer a richer understanding of religious freedom. This is because the liberal perspective has shaped much

[36] Emerson H Tiller and Frank B Cross, 'What is Legal Doctrine' (2006) 100 *Northwestern Law Review* 517, 518.
[37] David N Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 (3) *The Modern Law Review* 287, 287.
[38] Markus Dressler and Arvind-Pal S Mandair, *Secularism & Religion-Making* (Oxford University Press, 2011).
[39] Ibid 1.
[40] Ibid 21–2.

discourse and practice on religious freedom.[41] Its distinctive features include an emphasis on individual autonomy,[42] state neutrality,[43] and public reasoning.[44] However, the thesis argues that there is a need to reach beyond the liberal perspective in Indonesia, despite its appeal for some Indonesian scholars and those writing on Indonesia.[45] Indonesia has a different perspective on the place of religion in public life, manifested most evidently in the absence of state neutrality set by *Pancasila* and the Constitution.

1.5 Literature Review

Sections 1.5.1–1.5.3 provide a brief literature review relevant to this study to understand the existing discourse of religious freedom in Indonesia Constitutional law study. I begin with a brief discussion on constitutionalism in South-East Asia to understand the regional framework of the issue, followed by discussion on the politics of the Constitutional Court, and then examine two prominent studies on *Pancasila* and religious freedom in Indonesia by Notonagoro and Yudi Latif.

1.5.1 Constitutionalism in South-East Asia

Considering the uniqueness of South-East Asia in understanding human rights, and religious freedom in particular, some scholars have begun stepping outside the liberal framings for religious freedom. Li-Ann Thio's study on constitutionalism in illiberal polities shows the variation of illiberal constitutionalism, from theocratic to communitarian constitutionalism, mostly in Asia. She argued, 'Liberal constitutionalism's commitment to equality is incompatible with a system where religious affiliation governs membership and capacity to

[41] Liberalism recognises religion on certain terms: when it is individualistic (typically) and considered 'reasonable', by which is meant it adheres to certain public law norms (like equality) and will not attempt to use public power to further its claims. In this way, liberalism demands that religion 'shape up' to its norms. It will not recognise, for example, a religion that wants the public to commit to its doctrines and practices. (See eg, Nicholas Wolterstorff, 'Liberalism and Religion' in Steven Wall (ed), *The Cambridge Companion to Liberalism* (Cambridge University Press, 2015) 293. This is a potential criticism of liberalism because it cannot manage religions that view themselves as thoroughly engaged in shaping the public sphere. See Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2013).
[42] See Ahdar and Leigh (n 41) 54.
[43] Ibid 56.
[44] Ibid 61.
[45] Indonesian Islamist liberal academic Budhy Munawar-Rachman's book, *Argumen Islam untuk Liberalisme* (Islamic argument for liberalism), tries to provide Islamic foundation for liberalism in Indonesia by promoting a new interpretation of Muslim political culture. Reviewing the appeal of liberalism in Indonesia, Farabi Fakih stressed reasons for its failure: (1) liberals have failed to historicise their position in Indonesia; (2) Islamist revivalism brings the Muslim back to the forefront of Indonesian history; (3) Indonesian exceptionalism, rooted in *Pancasila*, which negates the other contradictory character in the Indonesian history, such as fascism. This discussion will be further elaborated up Chapter 3 of the thesis when I discuss the historical development of the Indonesian Constitution in regard to the issue of religious freedom.

participate in a polity'.[46] The problem, according to Thio, is that in practice, 'members of the recognized religion may treat other religionists unequally'.[47] Thio further argued, 'the inability to accord full citizenship to all would perpetuate tensions in plural societies and constitute religious tyranny, not religiously grounded constitutionalist government'.[48] In South-East Asia, Jaclyn Neo's study on Singaporean secularism discussed four characteristics of secularism that must be fulfilled in an illiberal state to ensure protection of religious freedom: the rejection of political dominance by any religion; citizenship unconditioned by religious identity; recognition of an individual's right to religious freedom; and religious freedom as a public good.[49] She reasoned that religious freedom is, on these terms, possible without having to embrace a liberal perspective.

The political construction in Indonesia and South-East Asia in general does not closely engage with the liberal concept. In Indonesia, a requirement of state neutrality poses a clear problem: The Constitution itself enshrines a public commitment to monotheism. The question is consequently whether neutrality is necessary to protect religious freedom (as many liberal writers contend) or whether a non-neutral state can maintain religious freedom, particularly for minorities that may share different conceptions of religion from the regime in power. The key to that answer is to maintain a balance for both religious and secular arguments during the lawmaking process to incorporate the wider interests of a plural society.

Interestingly, other studies on constitutionalism in South-East Asia show the emergence of 'sophisticated authoritarianism'[50] and 'autocratic legalism'.[51] Under these perspectives, seemingly democratic procedures can actually facilitate authoritarianism. Arguing that authoritarian rule has been a mainstay of political life in South-East Asia,[52] Lee Morgenbesser defined an authoritarian regime as sophisticated insofar that it possesses most indicators and sufficiently mimics the fundamental attributes of democracy.[53] With the development of democratic elements in Indonesia such as the establishment of Constitutional Court and

[46] Li-Ann Thio, 'Constitutionalism in Illiberal Polities' in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, 2012) 8.
[47] Ibid.
[48] Ibid.
[49] Jaclyn L Neo, 'Secularism Without Liberalism: Religious Freedom and Secularism in a Non-Liberal State' (2017) *Michigan State Law Review*, 333.
[50] Lee Morgenbesser, *The Rise of Sophisticated Authoritarianism in Southeast Asia* (Cambridge University Press, 2020).
[51] See Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *The University of Chicago Law Review*, 545, 545.
[52] Morgenbesser (n 50) 1.
[53] Ibid 8.

democratically elected members of Parliament, it may facilitate coercion by using a secure rule of law.[54] The coercion occurs when democratically elected politicians make laws according to their own interests, disregarding the interests and values of others. The use of Blasphemy Law against religious minorities is an example of how sophisticated authoritarianism uses defamation or libel laws against its opposition.[55] In this sense, the concept of defamation is being used for authoritarian purposes.

Autocratic legalism is similar and connected to sophisticated authoritarianism. Autocratic legalism occurs when electoral mandates plus constitutional and legal change are used in the service of illiberal agenda.[56] The use of law to oppress people, particularly minorities, is the practice of autocratic legalism. These autocrats use constitutional or legal methods to accomplish their aims and hide autocratic designs in the pluralism of legitimate legal forms.[57]

Autocratic legalism via sophisticated authoritarianism can also be the case in the issue of religious freedom. In this regard, a religion-based party (eg, an Islamic party) began the democratic procedure by registering to participate in the election. Once the party won seats in Parliament, it infiltrated its religious values within the law and then the law applied to everyone, regardless of their religious values. This could be a violation of religious freedom because the state law has the power to force on everyone certain religious values that may contradict their own convictions.

1.5.2 The Politics of the Constitutional Court

With the establishment of the Constitutional Court in Indonesia in 2003, it was hoped that the Court could provide checks and balances on the work of the legislature and executive by judicially reviewing the law made by the other two branches of government. However, recent studies show that the Indonesia Constitutional Court is not immune from political intervention. The politics of the Constitutional Court has received extensive attention from legal scholars. An important study on the Indonesian Constitutional Court was written by Simon Butt—*The Constitutional Court and Democracy in Indonesia*. Butt explained the Court as an institution from a legal perspective. He began the discussion with the idea of establishing a Constitutional Court in Indonesian post-reform era: the structure of the Court, including decision-making and

[54] Ibid 21.
[55] Ibid 22.
[56] Lane Scheppele (n 51) 548.
[57] Ibid 547–8.

enforcement; constraint on the Court's decision-making and jurisdiction; and electoral-related issues.

Butt also discusses several cases of dismissal of judges who were involved in corruption cases, such as Arsyad Sanusi and Akil Mochtar.[58] Butt compared the decisions made under the first generation of judges led by Jimly Asshiddiqie to the second generation led by Mahfud MD, arguing for overall impression of a decline in quality of legal argument under Mahfud.[59] Further, the author also asserted that under Mahfud, the Court's decisions were more concerned with resolving immediate political issues and building popularity than with applying or creating legal principle.[60] The book also discusses the allegation that under Mahfud, 'the Court had held back its decision for political reasons, indicating that it had been influenced by political parties'.[61]

Another important study related to the politics of the Indonesian Constitutional Court was written by Stefanus Hendrianto. *Law and Politics of Constitutional Court* examines how judges play their politics. Hendrianto also classified Chief Justices from different generations in the Indonesian Constitutional Court as aggressive, bold and prudential-minimalist heroes.[62] This book describes leadership characteristics of the Chief Justice in the Constitutional Court and compares the previous and later-generation Chief Justices. The author argued that the first Chief Justice of the Indonesia Constitutional Court, Asshiddiqie, was an extraordinary heroic figure, while his successors were more ordinary.[63] Mahfud, as the second Chief Justice, was argued to have a bold and aggressive judicial leadership.[64]

Hendrianto's book is essential reading to understand the politics of judges in the Indonesia Constitutional Court. However, the book focuses on the leadership of the Chief Justices. It does not touch on the individual politics of each judge that coloured the deliberation in deciding cases. Regardless of the importance of leadership in Constitutional Court as an institution, every judge has their own judicial independence.

[58] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill Nijhoff, 2015) 46.
[59] Ibid 62.
[60] Ibid 64.
[61] Ibid 241.
[62] Stefanus Hendrianto, *Law and Politics of Constitutional Court* (Routledge, 2018) 4.
[63] Ibid 7.
[64] Ibid.

These two studies show the politics of the Indonesia Constitutional Court. I will, however, examine a more specific context of judges' politics in relation to the discourse between Islamic law and state law. There is an interesting legal framework to be understood in this context: the existence of legal pluralism in Indonesia. This means the state recognises Islamic law to be used in Indonesia. However, there are some conditions applied in this matter, such as Islamic law only governs civil (private) matters such as marriage; and Islamic law must comply with state law. In the case of contradiction between Islamic law and state law, state law will prevail.

The Islamist movement is aware of the condition of state law and would not opt for contesting it because it would cause them to be banned (eg, the Hizbu Tharir)[65] if they want to change state law into Islamic law. I found the Islamist movements use political tactics in this sense by promoting the interests and values of Islamic law in the making of state law. The Marriage Law is a clear example how Islamist movements have been influential, both in the making of the law in 1973–1974 and in judicial reviews of the law in the recent years. The finding of this chapter strengthens the argument of the whole thesis regarding sociopolitical pressure in the making of laws related to religious issues in Indonesia.

1.5.3 *Pancasila* and Religious Freedom

In the Indonesian context, constitutionalism is not only determined by the wording of the Constitution. The existence of the state ideology, *Pancasila*, plays an even more important role in guiding Indonesia constitutionalism. State ideology sets a parameter of religiosity in Indonesia in its first principle: 'The one and only God'. With such a statement of monotheism in the state ideology, a concern over religious freedom emerges. The idea of religious freedom under *Pancasila* has been studied by numerous scholars: among them, two prominent studies by Notonagoro and Yudi Latif. Notonagoro (d. 1981) was a professor of law and philosophy from Universitas Gadjah Mada. He is famously known in Indonesia as the most cited scholar in *Pancasila*.

Notonagoro's ideas about religious freedom and *Pancasila* are centred on four main arguments:

[65] The discussion of Hizbu Tahrir is covered in Chapter 4. In short, the international Islamic movement was banned in Indonesia after the government discovered the organisation's goal was to establish an Islamic state in Indonesia.

1. Since Presidential Decree 5 July 1959, the wording of the first principle of *Pancasila*, 'one and only God', was given additional substantial meaning, 'with the obligation to perform Islamic Law for Muslims'.[66]
2. The additional substantial meaning of the obligation to perform Islamic law for Muslims addressed by Presidential Decree 1959 is a sacred condition to be fulfilled to unite Indonesians because it was agreed upon by the founding fathers in 22 June 1945.[67]
3. There is no room for anti-divinity, anti-religion or compulsion in religion.[68]
4. The idea of anti-divinity can be tracked to the Western world and its scientific paradigm, which is not suitable to Indonesia.[69]

Addressing the first argument on Presidential Decree 1959, it is important to note that Notonagoro's idea was based on the mention of 'Jakarta Charter version 22 June inspires and thus is part of the Constitution' in the referred Presidential Decree. Jakarta Charter is the preamble of the Constitution made in 1945. As will be further explained in Section 3.1, this preamble of the Constitution was changed on 18 August 1945 erasing seven words, 'with the obligation to perform Islamic Law for Muslims'. Notonagoro argued that since the Presidential Decree 1959, these seven words was included back to the preamble of the Constitution.

However, it should be noted that the wording 'Jakarta Charter version 22 June inspires and thus is part of the Constitution' is not found in the main body text of the Presidential Decree 1959. It is stated in the preamble (consideration)[70] of the Decree. Therefore, the legally binding nature of the text is questionable because it gives an order to people; it oblige Muslims to perform Islamic law. Notonagoro stated that the Presidential Decree 1959 does not change the wording (legal norm) but adds substantial interpretation (meaning) to it: that Muslims have the obligation to perform Islamic law.[71] I dissent from this argument because an interpretation of a legal text should not create a new legal norm that did not exist in the body of the legal text. An interpretation should only explain, not add, a new norm. Moreover, the wording of the obligation to perform Islamic Law for Muslims was in the body text (version 22 June 1945)

[66] Notonagoro, *Pancasila Secara Ilmiah Populer* (Bina Aksara, 7th ed, 1987) 68.
[67] Ibid 72.
[68] Ibid 73.
[69] Ibid 74.
[70] In the Indonesian legal drafting, the consideration part (*poin menimbang*) is not a legal norm. See Undang-Undang No 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan [*Law No 12 2011 on Legal Drafting*] (Indonesia), 95.
[71] See Notonagoro, *Pancasila* (n 56) 70.

but was erased on 18 August 1945. Thus, it was designed to be a legal norm (not an interpretation) and the legal norm was erased. Therefore, the mention of *Jakarta Charter* version 22 June in the preamble of the Presidential Decree 1959 should not be read as a substantial interpretation to the legal text to obligate Muslims to perform Islamic law.

Second, Notonagoro's argument that the mention of 'obligation to perform Islamic law for Muslims' is a sacred condition that needs to be fulfilled to unite Indonesians because it was agreed upon by the founding fathers was a false claim on two premises: (1) to unite; and (2) agreed by founding fathers. First, the provision (the obligation to perform Islamic law) was rejected by representatives from the eastern part of Indonesia in August 1945, when they approached then-Vice-President Hatta to erase the words under threat that they would not join the newly established state.[72] Thus, it was not meant to be a condition to unite Indonesians. It was a condition to divide Indonesians. Second, it was agreed upon by the founding fathers to delete the words on 18 August 1945 because they preferred the unity of Indonesia over the mention of the controversial words that obliged Muslims to perform Islamic law.[73]

Third, Notonagoro's argument that *Pancasila* creates no space for anti-divinity, anti-religion or compulsion in religion is contradictory. Giving no room for anti-religion is a compulsion in religion because it forces people to have religion. This third point also relates to monotheism. The idea of monotheism in the first principle of *Pancasila* was taken from the Islamic value of *tawhid* (the one and only God).[74] This Islamic value was proposed by Islamist representatives during the drafting of the Constitution in 1945.[75] Islamist representatives debated with nationalist representatives whether to adopt this concept of monotheism alongside the controversial seven words, 'with the obligation to perform Islamic law for Muslims'.[76] The negotiation was only about the adoption of Islamic values. No values from other religions were

[72] Valina Singka Subekti, *Menyusun Konstitusi Transisi* (Rajawali, 2008) 122–3; Adnan Buyung Nasution *Aspirasi Pemerintahan Konstitutional di Indonesia,* (Grafiti, 1995) 62.
[73] Ibid.
[74] Tawhid is monotheism. It is an essential teaching in Islam stating that there is no God but Allah—Allah is the only God that people should worship. For more on tawhid, see Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Book, 2008) 4.
[75] Bahtiar Effendy, 'Islam and the State: The Transformation of Islamic Political Ideas and Practices in Indonesia' (PhD Thesis, Ohio State University, 1994) 92.
[76] For further elaboration on this, see Bahar, Saafroedin et al, *Risalah Sidang BPUPKI dan PPKI* (Sekretariat Negara Republik Indonesia, 4th ed, 1998), xxvii; Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila,* (Gramedia, 2011) 9; Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002—II: Sendi-Sendi/ Fundamen Negara*. (internal ed, Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi 2008); Nasution (n 72); Subekti (n 72); Denny Indrayana, Indonesian Constitution*al Reform 1999–2002: An Evaluation of Constitution-Making in* Transition (Kompas, 2008).

considered, although not all Indonesian were Muslims. There were various religions with different conceptions of deity adhered to by Indonesians. Therefore, it is discriminatory to state that the origin of *Pancasila* is Indonesia as a whole, while the debate in BPUPKI was only between the (interests) of Islamists and nationalists. Although the concern of nationalists in the debate was to eliminate any privilege for Islam, the end product (*Pancasila* and the 1945 Constitution) still contains some privilege for Islam—the adoption of monotheism (*tawhid*) under the wording 'belief in One and Only God'.

The wording 'one and only God' also might not be suitable to the absence of God in Buddhism[77] or atheism. These ideas about God, present in Indonesia, cannot easily fit Notonagoro's interpretations of 'one and only God' in *Pancasila*. I argue that *Pancasila* set a filter for religions other than Islam to exist in Indonesia—that those religions must fulfil the requirement of belief in one and only God. No matter what god these religions believe in, if they believe in a single god (one and only), they may exist in Indonesia. In contrast, if they believe in no gods, they may not be permitted to exist in Indonesia.

Interestingly, the wording of 'one and only God' was interpreted by Notonagoro not in a quantitative meaning (numeric), but in a qualitative sense. He explained that the principle of one and only God in *Pancasila* refers to God as *causa prima* in an objective realism.[78] It means that there might be different conceptions of God, but as long as the religions in discussion refer to the Almighty God, it will fit *Pancasila*. I suggest this is a way to accommodate major world religions adhered to by Indonesians, such as Hinduism, whose concepts of god do not fit with monotheism. In the Indonesian context, other religions and beliefs do not believe in God, such as the teachings of the traditional belief of animism that existed in Indonesia long before modern religion.[79]

Notonagaro's fourth argument—that anti-religion came from Western scientific tradition and is not suitable to Indonesians—is an Asian-value-driven answer to reject the globalised concept of human rights, including religious freedom, by arguing that Asia and Indonesia in this case, has its own distinct concept to address the issue. In 1951, as his university (Universitas Gadjah

[77] See Nyanaponika Thera, *Buddhism and the God-Idea* (BPD Online Edition 2008), in which he explained that from the discourse in *Pali Canon*, the idea of a personal deity, a creator God conceived to be eternal and omnipotent, is incompatible with the Buddha's teaching.
[78] Notonagoro, *Pancasila* (n 56) 81.
[79] See Ridwan Hasan, 'Kepercayaan Animisme dan Dinamisme dalam Masyarakat Islam Aceh' (2012) 36(2) *Jurnal Ilmu-Ilmu Keislaman* 285.

Mada) granted then-President Soekarno an honorary degree in law, Notonagoro made a famous speech. He concluded that *Pancasila* is not only a political conception, but also a worldview, a paradigm and a result of deeply meaningful contemplation from life experiences and knowledge.[80] He further explained that the origin (*causa materialis*) of the principles stated in *Pancasila* is Indonesian.[81] In other words, he claimed that the principles of *Pancasila* were already held by Indonesians. However, Notonagoro's claim that the idea behind *Pancasila* was already held by Indonesians is problematic because it generalises about all Indonesians, assuming they adopt one view, in particular, the idea of monotheism (first principle of *Pancasila*).

In a similar reading, the Indonesia Constitutional Court has also emphasised that religious freedom in Indonesia must be understood philosophically, privileging the principle of Indonesianness. What this means is uncertain and open to contest, but in doing so, the Court explicitly sought to distinguish Indonesia from overseas jurisdictions that are more liberal in their orientation. In its decision on the constitutionality of the Blasphemy Law, the Constitutional Court stated that this law should not be viewed solely from the judicial perspective, but also from a philosophical view that frames religious liberty in the perspective of Indonesianness, so that the practice of religious freedom in Indonesia should be distinguished from the practice of religious freedom in other countries. Further, the Constitutional Court stressed the important of the preventive aspect as a major consideration in a heterogeneous society in justifying the constitutionality of Blasphemy Law.[82] The preventive aspect of the Blasphemy Law is the protection it provides against a disturbance of public order or social harmony. The Court had no further explanation of what it meant by Indonesianness in its decision, but I suggest it is implicitly related to the idea of Asian values.

According to proponents of Asian values, Asian values are values that are intrinsic and specific to the whole of Asia.[83] However, the idea of Asian values as centred on cultural relativism rejects the idea of universality of human rights. The use of Asian values to justify certain government actions for example occurred in 1993, when the Vietnamese government campaigned to legitimise its human rights abuses by referring to 'Vietnamese values' and 'Buddhist values'. Another example was provided by the Indonesian government in the same

[80] See Notonagoro, Speech on Honoris Causa in Law promotion to President Soekarno by Universitas Gadjah Mada Senate in 1951 (Publication regarding *Pancasila* Number 1) 3.
[81] Notonagoro, *Pancasila* (n 56) 28.
[82] Constitutional Court of Indonesia, Court Decision Number 140/PUU-VII/2009, 274 [3.34.6].
[83] Michael D Barr, *Cultural Politics and Asian Values: The Tepid War* (Routledge, 2002) 4.

year, when it attempted to deflect accusations of human rights violations, arguing the need for others to understand the traditions and social values of developing nations, many of which were endowed with ancient and sophisticated cultures.[84] Such government tactics are designed to taint claimed hegemonic norms, such as the universal framework of human rights, with the allegation of cultural imperialism.[85]

The second prominent study about religious freedom and *Pancasila* is a book by Yudi Latif (b. 1964): *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila* (Plenary State: Historicity, Rationality and Actuality of *Pancasila*). In this book, Latif explained historical and theoretical-comparative perspectives on the idea of 'civilised divinity' (*ketuhanan yang berkebudayaan*). The term 'civilised divinity' was taken from Soekarno's speech during the drafting of the Constitution in 1945.

In his historical study, Latif explained how the idea of God and religions has long been a tradition in Indonesia.[86] Further, he argued that there has been a negotiation between secularisation and religiosity of the state since the colonial period.[87] In its historical development, periods of secularisation[88] and religiosity[89] of Indonesian politics led to the inclusion of theism during the drafting of the state ideology (*Pancasila*) and the Constitution.[90]

In his theoretical-comparative perspective, Latif explained the Indonesian model of the state-religion relationship. He reasoned that the compromise in the relationship between religion and state in Indonesia was achieved through a fierce confrontation of thoughts and hardly acceptable sacrifice.[91] Compared with Notonagoro's claim, Latif's explanation is more accurate because it explains the real political negotiations and struggles between Islamists and nationalists. The fierce confrontation was observed when Christian representatives from eastern parts of Indonesia threatened to withdraw their integration to the proposed state if the wording of Islamic law was incorporated in the Constitution; then, Islamists agreed to revoke the Islamic law provision from the Constitution.[92] Latif stated that frustration from the parties

[84] Ibid.
[85] Ibid
[86] Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila*, (Gramedia, 2011) 57.
[87] Ibid 59–60.
[88] Ibid 60.
[89] Ibid 62.
[90] Ibid 67.
[91] Ibid 95.
[92] Ibid 83.

at that time was a reflection of identity politics.[93] In regard to the Presidential Decree of 1959 that recalled the mention of *Jakarta Charter* version 22 June, Latif argued that it was Soekarno's attempt to compromise the interests of the Islamist representatives.[94] However, according to Latif, the mention of the *Jakarta Charter* version 22 June in the preamble of the Decree makes it unclear to confirm the (legal) status of the words; thus, it remains controversial.[95]

Latif's book also explains the relationship of religion and the state in Indonesia: that Indonesia does not separate itself from religion, but it also does not merge with religion.[96] In this regard, he criticised the idea of separation between state and religion, arguing that there is no strong empirical evidence of an inevitability of secularism in modern democratic states.[97] Latif also criticised the idea of secularisation as religious decline and secularisation as privatisation of religion, reasoning that the two related ideas are inconsistent and lack empirical evidence.[98]

Latif proposed a new model of the state and religion relationship. Instead of separating and privatising religion, he offered the idea of 'differentiation' in this relationship. It emphasises functional differentiation between religious institutions from other domains in modern society, particularly the state, economics and science.[99] He further argued that the politicisation of religion that led to the tendency of triumphalism and exclusion of others must be avoided for the sake of religion's public role.[100]

Latif's study is beneficial for understanding *Pancasila* and religious freedom in Indonesia. His analyses of political compromise during the making of *Pancasila* and Presidential Decree 1959 show the politics of religion-making in Indonesia, although he does not use the framework of religion-making to describe the phenomenon. Here lies the different focus of Latif's study from this thesis. Using the same object of study (*Pancasila* and the Constitution), this study will focus on the issue of religion-making in Indonesia.

[93] Ibid 85.
[94] Ibid 94.
[95] Ibid.
[96] Ibid 95.
[97] Ibid 97.
[98] Ibid 102.
[99] Ibid 105.
[100] Ibid 119.

1.6 Thesis Structure

This thesis comprises seven chapters, including the introduction (Chapter 1) and conclusion (Chapter 7). Chapter 2 covers theoretical ground to locate the issue within the current academic discussion of religious freedom. Chapter 3 explores the politics of law making in the drafting of the Indonesian Constitution. It explains why and how religious freedom is defined in the Indonesian Constitution and the issues that have arisen for the protection of religious freedom. Chapters 4, 5 and 6 elaborate upon how this problem of religious freedom is articulated within different examples: Blasphemy Law, Marriage Law and Civil Administrative Law.

Chapter 2 introduces key theoretical concepts used in this thesis. First, I will explain 'religion-making' in Section 2.1 of this chapter. This sociolegal approach is useful because it helps explain the lawmaking process regarding religious issues. In Section 2.2, I will elaborate upon theoretical understandings of religious freedom, which will then narrow to discussion of the limitation of religious freedom. This discussion is significant to ground the discussion in Chapter 6: that Indonesia has a distinct legal conception of religion and belief that creates room for discrimination and violations of religious freedom, particularly against minorities. I will briefly discuss minority rights (see Section 2.3.1) and freedom of speech (see Section 2.3.2) to better understand the legal position of Blasphemy Law. It is important to understand the practice of the Indonesian Constitutional Court in settling judicial review cases regarding constitutional rights. Understanding the concept of balancing rights will also be useful, particularly in reading the seemingly inconsistent decisions made by the Court in regard to the judicial review of Marriage Law, as I will further explain in Chapter 5.

Having understood the concept of religion-making and religious freedom in Chapter 2, Chapter 3 will discuss the practice of religion-making in the drafting and amendment of the Indonesian Constitution. Discussion on the drafting and amendment of the Constitution is important in this study to give contextual background for understanding the case study chapters. This is because the laws analysed in Chapters 4–6 were reviewed before the Constitutional Court in light of Constitutional articles on religious freedom. From the Constitutional Court decisions examined in those chapters, it can be observed that the Court affirmed the constitutionality of the laws in review, although the laws discriminate against religious minorities. This chapter will not only deliver the rationales behind the making of the articles to understand the textual meaning of the articles, but it will also examine the discourse surrounding the drafting and the amendment

of the articles to unveil the process of religion-making behind constitutional articles on religious freedom in Indonesia.

The focus of Chapter 3 is to identify the recurring unsettled debate between Islamists and nationalists during the drafting of three important constitutional documents in Indonesia: the making of the original 1945 Constitution; the work of parliamentary body *Konstituante* to draft a new constitution in 1955–1959; and the constitutional amendment of 1999–2002. Further, the findings of Chapter 3 are important in building the overall thesis, which argues to the existence of religious politics in the making of law in regard to the issue of religion in Indonesia. It creates a gap between the constitutional articles guaranteeing religious freedom and discriminatory derivative laws, such as Blasphemy Law, Marriage Law and Civil Administrative Law that interfere with religious freedom for minorities.[101] Such a legal gap explains why and how Indonesia fails to protect religious freedom for minorities, although it recognises and guarantees religious freedom under the Constitution.

Chapter 4 explains how the Indonesian Blasphemy Law and the Constitutional Court decisions regarding the law's failure to protect constitutional rights to religious freedom were influenced by pressure from Islamists. The explanation in this chapter is important to demonstrate the existence of political and social pressure on the Court, particularly regarding the Blasphemy Law. I will begin the discussion in Section 4.1 on the making of the Blasphemy Law in Indonesia and discuss how the regimes use this law. Section 4.2 will highlight three cases of Blasphemy Law judicial review before the Constitutional Court and followed by my commentaries on the decisions in Section 4.3, highlighting the judicial politics and pressure from Islamic movements.

Chapter 5 discusses the development of Indonesian Marriage Law (Section 5.1.) and the Constitutional Court decisions on the constitutionality of the law through several of its judicial review cases (Section 5.2.). I will argue that Islamic interests were involved in the making of the Marriage Law and the judicial decisions on its constitutionality. Thus, discussion in this chapter will be heavily reliant on sociopolitical discourse surrounding the Indonesian Marriage

[101] Different rationales on the *Marriage Law* reviews indicate a complex phenomenon beyond limiting religious freedom. Chapter 5 of this thesis explains how the prohibition of interfaith marriage under the *Marriage Law* shows how religious values of the majority (Islam) are used to limit civil rights to marry. This example indicates that discriminatory law regarding religious freedom not only violates religious freedom of minorities, but also arbitrarily uses majority religious values to limit other human rights.

Law, both in the lawmaking process and judicial review of the law before the Constitutional Court, in which Islamic movements played a significant political role in this regard.

Chapter 6 analyses the Constitutional Court decision and the Civil Administrative Law's stipulation on the religion column in the ID card to understand the state's framework of religious freedom from the administrative law perspective. I will begin the discussion by explaining Indonesia's Civil Administrative Law and the mention of religion in the ID card in Section 6.1. It will contain discussion of the institutional framework on religion and belief in Indonesia, including the establishment of the Ministry of Religion and BAKORPAKEM to control belief in Indonesia; the banning of Confucianism; parliamentary debate over the terms 'religion' and 'belief'; the history of the ID card, which highlights relevant political events; and the current Civil Administrative Law in regard to the religion column in the ID card. Section 6.2 will discuss the Constitutional Court's case law that will be followed by analysis of the unresolved issue of defining religion and belief in Indonesia, in which I argue that the Court and government failed to address these problems.

Chapter 7 will conclude the discussion by briefly answering the research question: that religion has been constructed and defined by dynamic political negotiations between Islamists and nationalists during constitutional debates, the legislative process and constitutional review. This chapter will briefly explain how religious politics influence Indonesian lawmakers. Recurring constitutional debates on the issue of religious freedom show the unsettled negotiations in 1945, 1959 and 2000. The premature end of the 1959 constitutional debate creates ambiguity around the status of the seven words. The 1965 Blasphemy Law mentions this in its general explanation, referring to the incorporation of the phrase 'with the obligation to perform Islamic law for Muslims' in the Constitution. However, an enforcement mechanism of this obligation under public law was never provided by the government. In the private law matter, particularly under the 1974 Marriage Law, the endorsement of Islamic law values was influential. This was also a result of the pressure of Islamic movements demonstrating outside the Parliament building. The more recent development of religious freedom examined in this thesis is the religion column in the ID card. Although the policy to mention religion in the ID card was introduced in 1978, it was not before 2016 that a judicial review case of the Civil Administrative Law was brought to the Constitutional Court, raising issues of discrimination to do with the recognition of religion and traditional belief. Although the Constitutional Court decision in the ID card case was a landmark decision in enhancing religious freedom of

minorities, this thesis found that the Court failed to address the problematic claim of the existence of official religions in Indonesia. Ultimately, this study contributes to the discourse of religious freedom and the study of constitutional law in Indonesia by bringing a new framework of analysis.

Chapter 2: Key Theoretical Concepts

This study examines Indonesia's legal concept of religious freedom and its limitation clause as interpreted by the Indonesia Constitutional Court through its decisions. The purpose of this study is to criticise this understanding of the concept, particularly in regard to degree of state neutrality and the politics of balancing interests and values in dealing with conflicting rights. By explaining the problems found in Indonesia's legal concept of religious freedom, it is hoped that Indonesia can better develop its protection and guarantee for religious freedom.

This thesis comprises five main chapters excluding the introduction and conclusion. This chapter (Chapter 2) covers theoretical ground to locate the issue within the current discourse of religious freedom. Chapter 3 of the thesis explains why and how the legal problems of religious freedom occur in the Indonesia Constitution. Chapters 4–6 elaborate upon how this problem of religious freedom is articulated within different case studies: The Blasphemy Law, Marriage Law and Civil Administrative Law.

The role of this chapter is to introduce the key theoretical concepts being used in this thesis. First, I will explain 'religion-making' in Section 2.1. I find it important to introduce this concept because religion-making is not a common approach in a legal study. However, this sociolegal approach is indeed embedded in every lawmaking process regarding religious issues. In Section 2.2, I will elaborate the theoretical understanding about religious freedom which will then narrow down to the discussion of the limitation of religious freedom. This part will provide an overview of the problem I found in Indonesia that will be further explained in Chapter 6 of this thesis: that Indonesia has a distinct legal conception of religion and belief that eventually cause discrimination and violations of religious freedom, particularly for minorities.

Section 2.3 will give an overview of the theoretical concepts of balance in dealing with conflicting rights. I will briefly discuss minority rights (see Section 2.3.1) and freedom of speech (see Section 2.3.2) in this part of the chapter to better understand the legal position of Blasphemy Law that I will further explain in Chapter 4 of this study. It is important to understand the practice of the Indonesia Constitutional Court in settling judicial review cases regarding constitutional rights. Understanding this concept of balance will also be useful, particularly in reading the seemingly inconsistent decisions made by the Court in regard to judicial review of Marriage Law, as I will further explain in Chapter 5.

2.1 Religion-Making

Religion-making in this study is not an act to establish religion. The term is mostly used in the field of religious studies and is broadly understood by Markus Dressler and Arvind-Pal S. Mandair among others as '[t]he ways in which religion(s) is conceptualised and institutionalized within the matrix of a globalized world religions discourse in which ideas, social formations, and social/ cultural practices are discursively reified as "religious" ones.'[102] They further explain that religion-making works, more or less explicitly, 'by means of normalizing and often functionalist discourse centred around certain taken-for-granted notions, such as the religion/secular binary, as well as binaries subordinated to it (such as sacred/profane, this worldly/otherworldly, etc)'.[103] What is important in this study is not how and whether religion is defined by the state, but rather on what is at stake in defining religion? What is the effect of such a definition?[104] According to Zainal Bagir, many studies show that religion-making has been present in Indonesia since the independence of the state in 1945.[105] However, most of this research was not in the field of legal studies.[106]

I would like to deliver this approach to legal study to unveil lawmaking process in relation to two important issues: (1) religion versus belief and (2) recognised religions. Religion-making elaborates sociopolitical construction beyond the legal text. It embraces discourses involving various political actors negotiating the idea of how religion and law should be constructed. Throughout this thesis, I will show how religion-making of these two issues in Indonesia has been problematic caused by political bargaining during lawmaking in the Parliament and Constitutional Court.

Dressler and Mandair explain that religion-making can be observed in three different scenarios: religion-making from above, religion-making from below, and religion-making from (a pretended) outside.[107] The first one reflects 'a strategy from a position of power, where religion becomes an instrument of governmentality, a means to legitimize certain politics and position

[102] Dressler and Mandair (n 38) 21.
[103] Ibid.
[104] Zainal Abidin Bagir, '"Kepercayaan" dan "Agama" dalam Negara Pasca-Reformasi' (2020) 39 *Prisma* 41, 43.
[105] Ibid 42.
[106] See eg, Michel Picard and Remy Madinier (eds), *The Politics of Religion in Indonesia* (Taylor & Francis, 2011); Michel Picard, 'Balinese Religion in Search of Recognition: From Agama Hindu Bali to Agama Hindu (1945–65)' (2011) 167(4) *Bijdragen tot de Taal-, Land- en Volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia* 482; M Nur Ichwan. 'Official Reform of Islam: State Islam and the Ministry of Religious Affairs in Contemporary Indonesia, 1966–2004' (PhD Thesis, Universiteit van Tilburg, 2006).
[107] Dressler and Mandair (n 38) 1.

of power';[108] the second one reflects 'a politics where particular social groups in a subordinate position draw on a religionist discourse to re-establish their identities as legitimate social formations distinguishable from other social formations through tropes of religious difference and/or claims for certain rights';[109] the third is, 'scholarly discourses on religion that provide legitimacy to the first two processes of religion-making by systematizing and thus normalizing the religious/ secular binary and its derivatives'.[110]

Religion-making from above is relevant to legal study as it can be used to explain the lawmaking process. As Dressler further explained, religion-making from above refers to 'authoritative discourses and practices that define and confine things (symbols, languages, practices) as "religious" and "secular" through the disciplining means of the modern state and its institutions (such as lawmaking, the judiciary, state bureaucracies, state media, and the public education system)'.[111] Using this concept, I would claim the phenomenon I identified in this study is religion-making conducted by the Indonesian political elites, involving Islamist interests during lawmaking process and judicial decisions, particularly on laws regarding religious freedom.

This phenomenon is problematic because when the political elites bargain to conceptualise religion within the legal system through laws and court decisions, particularly in regard to religious freedom, the result will most likely represent the interest of the majority. Regarding *the first issue of* religion versus belief, the core problem is the definition of religion. Indonesia has not had a definition of religion until today. Russel Sandberg, in 'Clarifying the Definition of Religion Under English Law: The Need for a Universal Definition', argued that legal definition delineates the granting of benefits and burdens of rights and duties.[112] This means the rights and duties of those being included in (classified as) the legal definition are recognised, while those excluded are 'denied legal recognition'.[113] Therefore, the broader the legal definition or classification of religion, the better it is to protect religious freedom because it (the legal norm) protects and provides legal certainty to those included in the definition.

[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid 21–2.
[112] Russel Sandberg, 'Clarifying the Definition of Religion Under English Law: The Need for a Universal Definition' (2018) 20 *Ecclesiastical Law Journal* 132, 133.
[113] Ibid.

Chapter 6 finds a problematic classification of religion and belief under Indonesian law which causes a serious violation of religious freedom, particularly to minorities. I argue that this is the result of religion-making which detrimentally affects minorities' interests. One example of it is the attempt to legally define religion in Indonesia started in 1952 by the Ministry of Religion with the aim of excluding traditional beliefs. One of the reasons for the proposal was the clash between traditional beliefs (*kepercayaan*) and modern religions.[114] The Ministry of Religion was not keen to give the same treatment to traditional beliefs as it gives to religions. The proposed definition requires religion to have prophet and written scripture as well as to be internationally recognised to be classified as a 'recognised' religion.[115] However, the definition was claimed by Niels Mulder, among others, to be too narrow because it excludes mysticism.[116] Most mystical and traditional beliefs in Indonesia do not satisfy the proposed definition of religion, either by having no prophet or no holy book. Niels Mulder argued this narrow definition of religion was the result of Islamist domination within the Ministry of Religion, despite the diverse religions in the country.[117] Eventually, the Ministry's proposed definition was broadly criticised, and the Ministry withdrew its proposal.[118]

The withdrawal was interesting because it was brought by the minority Hindu community.[119] As the biggest Muslim country in the world, Indonesia has a unique religious demographic composition.[120] Although the protest of the definition was proposed by the Hindus, it was more of the conflict between traditional beliefs and the 'recognised religions' (particularly Islam and Christianity) that intensified the discussion.[121] However, the solidarity of traditional beliefs and religious minorities successfully forced the Ministry to withdraw its proposal. Although the definition proposed by the Ministry of Religion was withdrawn, the government still perceived mysticism and traditional beliefs not as religion. Because traditional beliefs are not considered religions, the adherents continue to receive discriminatory treatment from the government such

[114] A year later, in 1953, the Ministry of Religious Affairs established BAKORPAKEM to supervise and prosecute traditional beliefs and religious sects accused of deviance.
[115] See Niels Mulder, *Mysticism in Java: Ideology in Indonesia* (Kanisius, 2005) 22.
[116] Ibid.
[117] Ibid.
[118] See Amos Sukamto, 'Ketegangan antar Kelompok Agama pada Masa Orde Lama sampai Awal Orde Baru: Dari Konflik Perumusan Ideologi Negara sampai Konflik Fisik' (2013) 1 (1) *Jurnal Teologi Indonesia* 25, 31.
[119] Ibid.
[120] For the percentage of religions in Indonesian demography back in the 1950s, see Gavin Jones, 'Religion and Education in Indonesia' (1976) 22 *Indonesia* 19, 33, in which he explained the development of six 'officially recognised' religions: Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. Although the percentages do not really change in the current development, Jones's study is more accurate to illustrate the context of the 1950s, when the discourse of defining religion first appear in Indonesia. Jones explained how Hindus were predominant only in Bali, but significant minorities were also found in East Java and Lombok.
[121] See Sukamto (n 118) 17.

as: no national identity card, no marriage registration and most importantly, no protection for their beliefs.

This differentiation of religion and belief reached into the 1970s, when the Indonesian Parliament created and later changed the Indonesian Outline of State Policy, known as *Garis-Garis Besar Haluan Negara* (GBHN), through Parliamentary Decree. GBHN is no longer applicable in today's Indonesian law.[122] However, during that era, GBHN was set to be umbrella law in directing the whole legal system under the Constitution. It is interesting to see how the members of Parliament changed their conceptions of religion and belief during the five years from 1973–1978. In 1973, the Parliament set religion and belief to be in equal position so that the government has the obligation to protect beliefs the same way as it protects religion.[123] This can be observed from the subtitle in page 438 of the Decree titled, '*Bidang Agama dan Kepercayaan terhadap Tuhan Yang Maha Esa, Sosial-Budaya'* (On the Issue of Religion and Belief to the One and Only God, Socio-Cultural). However, in 1978 the Parliament declared religion and belief to be two different things, where religion was managed under the Ministry of Religion, while belief was managed under the Ministry of Education and Culture.[124] It is explicitly stated on page 615 of the 1978 Decree that 'Belief (in One and Only God) is not religion.'[125]

The important articulation of this particular concept introduced in the 1970s Indonesia is that the government (Ministry of Home Affairs)[126] only acknowledged the 'official religions' that can be mentioned in the Indonesia ID card. This means, belief would not be allowed to be mentioned in the ID card. The mention of 'recognised religions' (without mentioning the name of the referred religions) appeared under Article 64 (5) of the 2013 Civil Administrative Law. Although the article revised the old policy of allowing only the recognised religions to be mentioned in the ID card, the article explicitly approves the claim of existing recognised religions in Indonesia, which does not include belief. This issue will be further explained in Chapter 6.

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[122] On the type of law (regulation) applicable in today's Indonesia, please refer to *Law No 12 2011 on Legal Drafting* [Undang-Undang No 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan] and its amendments.
[123] See Parliament Decree No IV/MPR/1973 on Outline of State Policy [TAP MPR No IV/MPR/1973 tentang Garis-Garis Besar Haluan Negara] (Indonesia) 438.
[124] Parliament Decree No IV/MPR/1978 on Outline of State Policy [TAP MPR No IV/MPR/1978 tentang Garis-Garis Besar Haluan Negara] (Indonesia).
[125] Ibid 615.
[126] Through Circular Letter of Ministry of Home Affairs No 477/74054, 18 November 1978.

The second issue of recognised religion complicates the problem. It is widely perceived that Indonesia created a legal norm which recognise six religions under the 1965 Blasphemy Law. First, we need to differentiate the term 'official' and 'recognised'. Legally speaking, the Indonesian Blasphemy Law does not explicitly define religion nor official religions in Indonesia. However, the elucidation or general explanation of the law mentions several religions in Indonesia, using the term 'adhered by most of Indonesians'. It later explains that the mention of several religions does not negate the existence of other belief including traditional belief.[127] The elucidation of the law read:

> The religions adhered to in Indonesia are Islam, Catholicism, Protestantism, Buddhism, Hinduism and Confucianism, but that this does not mean that other religions, such as Judaism, Zoroastrianism, Shintoism, Thaoism are prohibited in Indonesia. Adherents of other religions are entitled to the guarantee set out in Article 29 (2) of the 1945 Constitution, namely, freedom to adhere to their own religion and to worship according to that religion and belief, provided they do not violate the provisions of Law No. 1/PNPS/1965 or other regulations.[128]

Because of this, many believe that the Blasphemy Law has set a legal basis for official religions in Indonesia[129] and thus creates a barrier for religious minorities whose religions or beliefs are not among those recognised under the law. The blasphemy law suppresses the religiosity of the minorities in Indonesia who share different thoughts compared with the majority as it prohibits different interpretation of religions, which considered deviant.[130] It can be seen from the elucidation of the law that it creates a hierarchy of religions in Indonesia. The first rank of religions consists of the six religions mentioned as 'religions adhered to by majority of Indonesian.' The second rank of religions consists of 'other religions such as Judaism, Zoroastrian, Shinto, and Taosim'. Although the second rank of religions are free to exist, they need to fulfil a certain condition: only when these religions satisfy the requirement of not violating the Blasphemy Law and other respective laws. This statement is discriminatory in nature because major religions obtain privilege over minority ones.

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[127] See *Law No 1/PNPS/1965 Blasphemy Law* [Undang-Undang No 1/PNPS/1965 tentang Penodaan Agama] (Indonesia).
[128] I use the translation of Nicola Colbran. See Nicola Colbran, 'Realities and Challenges in Realising Freedom of Religion or Belief in Indonesia' (2010) 14 (5) *International Journal of Human Rights* 678, 697.
[129] See Melissa Crouch 'Constitutionalism, Islam, and the Practice of Religious Deference: The Case of The Indonesia Constitutional Court' (2016) 16(2) *Australian Journal of Asian Law* 3.
[130] Art 1 of *Indonesian Blasphemy Law* (Law No 1 PNPS 1965).

Interestingly in 1967, the then-President Soeharto established Presidential Instruction to ban Confucianism, thus Confucianism was removed from the group of recognised religions. In 2000, the Presidential Instruction on Banning Confucianism was removed. Thus, since then, Confucianism was re-acknowledged as one of the six recognised religions.[131] This change shows a dynamic in religion-making which disregards the legal certainty of law. If we presume existing recognised religions based on the mention of these religions under the elucidation of the 1965 Blasphemy Law, any change to the law should be made in a formal revision of the law. However, the president chose to not revise the law to exclude Confucianism from the list of recognised religion, because the Blasphemy Law never explicitly validated Confucianism nor other five religions as the official ones. However, under the Soeharto regime after the Presidential Instruction 1967, Confucianism was practically banned before the Presidential Instruction was removed in 2000.[132] This shows how religion-making is conducted beyond the formal legal framework.

Under the Indonesia Constitution, provision on religion and belief can be found in the chapter on 'Human Rights' and the chapter on 'Religion'. The chapter on human rights was added to the Indonesian Constitution during the amendment of 2000. The incorporation of human rights articles in the amendment was one of the major constitutional developments in Indonesia after the reform in late 1990s. Under the human rights chapter of the Constitution, religion and belief are dealt with under two different articles. While religion falls under Article 28 E(1), belief is protected under Article 28 E(2).

There is no clear explanation as to why the Parliament put religion and belief in two different articles in the human rights chapter of the Constitution.[133] However, it indicates that the two terms are still constructed differently under Indonesian human rights law. According to Zainal Bagir, the different articles were meant to affirm that belief is not a religion, and moreover, belief is just an integral part of a religion.[134] This means, belief which has no root in certain religion is not protected under the Constitution. This is where the Indonesian concept of belief

[131] Please refer to Chapter 6 of this thesis for a deeper discussion on Confucianism.
[132] See Evi Sutrisno, 'Negotiating the Confucian Religion in Indonesia: Invention, Resilience and Revival (1900–2010)' (PhD Thesis, University of Washington, 2018) 80.
[133] The Chapter on Human Rights under the Indonesian Constitution was the result of the second amendment in 2000. The Comprehensive Script and Minutes of Meeting of the amendment in 2000 do not show the reasoning behind the grouping of rights under the chapter. See Mahkamah Konstitusi (2008) *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002—VIII: Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama*. Internal Edition. Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi).
[134] Bagir (n 104) 45.

differs from the broadly recognised international human rights conception of belief under the International Covenant on Civil and Political Rights (ICCPR). The later part of this chapter will elaborate this differentiation.

Aside from the Human Rights Chapter, still under the Indonesian Constitution, religion and belief are also constructed in the chapter on religion. It should be noted that Articles 29 (1) and (2) in the chapter on religion were not changed during the amendment. The wording of the articles remains the same since its original prescription in 1945. Here, the words religion and belief are mentioned together in the same article (in a single sentence) using the conjunction 'and'. It can be found in Article 29(2) of the Indonesian Constitution.

'The State guarantees freedom of every inhabitant to embrace his/her respective religion and to worship according to his/her religion and belief as such'.[135]

The conjunction 'and' in this article indicates that Indonesian law regards religion and belief to be in the equal position. It was not a smooth agreement. Zainal Bagir analysing the discourse surround the making of Article 29 of the Indonesia Constitution shows how the parties negotiated the terms.[136] An old documentary from 1977 shows how the heated debate of the term religion and belief reoccurred in the parliamentary debate during the making of GBHN.[137] The full elaboration of this discussion can be found in Chapter 6 of this thesis because it relates to the discussion on the mentioning of religion in the ID card. Recalling Articles 28 E(1) and (2) in the human rights chapter of the Constitution, the terms 'religion' and 'belief' are also perceived to be given different legal positions. While the Human Rights Chapter was made during the constitutional amendment in 2000, the chapter on 'Religion' in the Constitution was originally made in 1945 and has not been amended since. This means, the Indonesian Constitution has set the terms 'religion' and 'belief' as equal since the very beginning of the establishment of the Constitution. Since 2000, the two terms are regarded differently under the Indonesia Constitution.

The Indonesian Constitutional Court, in decision on Case No 97/PUU-XIV/2016 on Civil Administrative Law, made an interpretation to the Indonesian Constitution's concept of the term 'religion' and 'belief'. According to the Court, the wording of the two terms needs to be

[135] *Constitution of the Republic of Indonesia* (n 8).
[136] Bagir (n 104) 46–7.
[137] Administrator, 'Dan "Kepercayaan" itu Ramai Dibahas' *Tempo* (webpage, 22 October 1977) <https://majalah.tempo.co/read/nasional/75749/dan-kepercayaan-itu-ramai-dibahas>.

examined beyond the textual reading. After examining the context of the wording and its historical background, the Court stated that religion and belief should be seen as two equal different things.[138] This has two legal consequences: (1) that belief may exist without having its root in a certain religion; and (2) that the Constitution protects belief in the same way as it protects religion.

The Court uses this reasoning to allow the mention of belief in the ID card. However, the Court also refers to the mention of official religions in its decision.[139] Thus it approves the existence of official religions in Indonesia which discriminates against the other religions and beliefs which are not being recognised as 'official religions'. I will further explain this in Chapter 6 of this study. For now, I want to highlight that the Constitutional Court, in interpreting Indonesia's Constitutional articles on religious freedom, has approved Indonesia's concept of religion and belief which is different from the international human rights norms. The different conceptions can be observed in Table 2.1.

Table 2.1: Conceptions of religion and belief

Term	ICCPR[140]	Indonesia's Law
Belief	Protects theistic, non-theistic and atheistic belief, as well as the right not to profess any religion or belief. (General Comment 22, point 2)	Limited to belief in One and Only God as stated in the State's ideology *Pancasila* and Article 29(1) of the *Indonesia Constitution* proclaiming the

[138] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] (Indonesia) 140.
[139] Ibid 151.
[140] Indonesia ratified the ICCPR in 2005. The Covenant is incorporated in Indonesia's domestic legal system through Undang-Undang Nomor 5 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-Hak Sipil Politik) [Law No 12 Year 2005 on Ratification of International Covenant on Civil and Political Rights] (Indonesia).

		state to be based on One and Only God. (Theistic State)
Religion	Is not limited in its application to traditional religions, or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. Newly established religions or beliefs or religions and beliefs that represent religious minorities are also covered.	The elucidation of Indonesia's Blasphemy Law has been interpreted to mean that there are six official religions in Indonesia (Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism). There are also six official religious institutions, one for each of the six religions.

2.2 Religious Freedom and Its Limitation

As Rex Ahdar and Ian Leigh explain that liberalism is the principal philosophical foundation for law in modern liberal democracy[141], we should not and cannot ignore the liberal contribution in today's study of human right law, including religious freedom.

The very core idea of liberalism is liberty. Because liberty is the essence of liberalism, the burden of proof for intervening in another's conduct, as John Stuart Mill stated is, 'supposed to lie with the affirmative'.[142] This means, if someone would restrict another's liberty, he needs to justify such act of intervention. Mill continued, stating:

> the a priori presumption is in favour of freedom and impartiality. It is held that there should be no restraint nor required by the general good, and that the law should be no respecter of persons, but should treat all alike, save where dissimilarity of treatment is required by positive reasons, either of justice or of policy.[143]

The above explanation of liberty is important to place the idea of religious freedom in human rights discourse. In this regard, the main concern is protecting liberty, not religion. What is being protected is the autonomy of an individual to deal with religion, and not to protect religion itself.[144] Further, for liberals, religion belongs to the private domain alongside other subjective, speculative preferences and not in rational, public life.[145] There lies interesting construction of religious freedom from the liberal perspective: that religious freedom is, to cite

[141] Ahdar and Leigh (n 41) 51.
[142] John Stuart Mill, *The Subjection of Women* (Longmans, Green, Reader, and Dyer, 2nd ed, 1869) 3.
[143] Ibid 3–4.
[144] Compare it with the conception of *Blasphemy Law*, which protects religion instead of individuals (humans). Please refer to discussion in Chapter 4 of this thesis.
[145] Ibid.

Douglas Laycock, 'first and foremost a guarantee of liberty. It is liberty with respect to religious choices and commitment. However, religion is not guaranteed, and neither is secularism—only liberty is guaranteed.'[146] This is an important notion that happened to be forgotten by Indonesia after ratifying various international human rights norms on religious freedom as well as incorporating them in its domestic legal system such as the constitutional articles and human rights law.[147] By accepting legal norms on religious freedom, Indonesia should emphasise its protection of (human) rights, instead of religion.

Douglas Laycock further explained that religious freedom does not presuppose religion as a good thing, or bad thing, or as subordinate to reason[148]. Religion falls under what Rawls called 'comprehensive doctrines' [149] and it contains a conception of the good life. Hence, liberals believe that religion should remain in the private sphere, because people will have different ideas of what a good life consists in, and it will be a threat to equality if government takes sides with religion in the public sphere. Ronald Dworkin stated:

> Political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.[150]

Thus, in relation to state affairs, it is then claimed further by liberals that there is a need for governmental duty of neutrality. Laycock argued: '[t]he core point of religious freedom is that the government does not take positions on religious questions—not in its daily administration, not in its laws, and not in its Constitution either.'[151] Such neutrality of government, according to Laycock is important to minimize religious conflict. His explanation continued:

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[146] Douglas Laycock, 'Religious Freedom as Liberty' (1996) 7 (2) *Journal of Contemporary Legal Issues* 313, 313.
[147] Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia [Law No 39 Year 1999 on Human Rights] (Indonesia).
[148] Ibid.
[149] According to Rawls, reasonable comprehensive doctrine is 'An exercise of theoretical reason: it covers the major religious, philosophical, and moral aspect of human life in a more or less consistent and coherent manner. It organizes and characterized recognized values so that they are compatible with one another and express an intelligible view of the world. Each doctrine will do this in ways that distinguish it from other doctrines'. See John Rawls, *Political Liberalism* (Columbia University Press, expanded ed, 2005) 59, 61.
[150] Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1986) 191.
[151] Laycock (n 146) 313.

> If we interpret the Religion Clauses to mean that government may promote the religious views of the dominant religious faction so long as it refrains from coercion, we ensure perpetual battles for dominance, perpetual battles to control or influence the government's religious message. That interpretation abandons in principle the goal of eliminating conflict over the government's role in religion.[152]

My finding in the following chapters explains how the Indonesian political elites, particularly the members of Parliament and constitutional judges, promote the religious views of the dominant religious factions (Islam) in the making of the Constitution, Blasphemy Law, Marriage Law and Civil Administrative Law, and during the judicial reviews of the laws. Although these elites may justify their preference to Islam with their affiliation to Islamic political parties—which allows them to become members of Parliament and constitutional judges—the preference for Islam has led to marginalisation or absence of the rights and interests of minorities.

For example, the Blasphemy Law prescribes that a deviant sect may not be allowed to manifest their belief in public.[153] Under this law, the Ahmadiyya community is denied their right to manifest religion because the state perceived Ahmadiyya as a deviant sect to Islam.[154] Interestingly, if we analyse this case further, the state's claim (including the Constitutional Court) regarding Ahmadiyya as a deviant sect is heavily influenced by the majority Muslims' perception on Ahmadiyya without weighing the interest or perception of the Ahmadis.[155] I argue that the absence of state neutrality in this case resulted in discrimination and neglect of the minority's rights, including religious freedom. Although the elected government came from Islamic political parties, as government to everyone within its jurisdiction, the state should not be neglecting the rights of minorities. The state needs to remain neutral regarding conflicting conceptions of the good life within the society.

Ahdar and Leigh further explained:

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[152] Ibid 322.

[153] Undang-Undang No 1/PNPS/1965 tentang Pencegahan nyalahgunaan dan/ atau Penodaan Agama [*Law No 1/PNPS/1965 on Blasphemy*] (Indonesia) art.1.

[154] Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republic Indonesia Nomor 3 Tahun 2008; Nomor KEP-033/JA/6/2008; Nomor 199 Tahun 2008 tentang Peringatan dan Perintah kepada Penganut, Anggota, dan/ atau anggota pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat [Joint Decree by Minister of Religious Affairs, Attorney General, and Minister of Home Affairs of the Republic of Indonesia on the matter of Warning and Order to the Followers, Members, and/or Leaders of the Indonesia Ahmadiyya Jama'at (JAI) and to the General Public] (Indonesia).

[155] For further elaboration on this claim, see Chapter 4 of this thesis.

> The claim of (state) neutrality rests on a vision of liberalism as a procedural theory, a mechanism or process for doing justice among individuals with differing conceptions of the good, rather than as a substantive conception of the good in its own right.[156]

Although liberals claim that religion belongs to the private domain alongside other subjective, speculative preferences and not in rational, public life,[157] religious freedom is important for them. There are reasons to justify religious freedom from a liberal perspective, ranging from macro justification such as the idea of civil peace to obtain desirable social ends to micro justification theories that focus on personal autonomy.[158]

First, religious freedom is important to facilitate civil peace. Ahdar and Leigh cite Locke's *Letter Concerning Toleration* where Locke says that toleration ensures 'all things will immediately become safe and peaceable.'[159] The absence of religious freedom, such as in the case of suppression of religious minorities, will lead to social disunity, turmoil, and even war.[160] Second, according to Ahdar and Leigh, religion can be used as an intermediate or mediating institution.[161] Although religious freedom is an individual right, the sense of grouping with those sharing same religion is inevitable. Religious community affords its members the opportunity to interact, to find a certain sense of identity and meaning.[162] For members of a minority, grouping with people sharing the same identity will enhance their bargaining position as their group acquires more power to check the state.[163]

Last, religious freedom is important for reasons of personal autonomy. There are three points to be highlighted from personal autonomy perspective in regard to the importance of religious freedom: individual choice and self-determination; equal treatment; and protecting conscience. For liberalism, the individual human being is the central focus, the basic unit of society.[164] As religion is undoubtedly a matter of one's self identity and wellbeing, liberals respect people's choices in religious matters alongside other means to pursue the good life[165]. Further, liberals respect the equality of every member in the political community and religious people are not

[156] Ibid.
[157] Ahdar and Leigh (n 41) 51.
[158] Ibid 70.
[159] Ibid.
[160] Ibid.
[161] Ibid 72.
[162] Ibid.
[163] Ibid 73.
[164] Ibid 58, 54.
[165] Ibid 76.

excepted. Lastly, protecting religious freedom is protecting individual's conscience, thus liberals insist on respecting it.

The following chapters of this thesis will criticise how the Indonesian government develops its law on religious freedom in light of this broadly accepted approach to religious freedom. However, it should also be noted that religious freedom includes two different aspects: the *forum internum* that is absolute and may not be limited, and *forum externum* that may be limited. *Forum externum* is the manifestation of religious freedom. It is not an absolute right because it may conflict with other rights involved.

On the theoretical reasoning on limiting the external dimension of religious freedom, we can refer to John Stuart Mill's book, 'On Liberty'. Mill stated, 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[166] It follows that for Mill, the freedom to manifest religion cannot be limited unless it causes harm. For example, the state may forbid someone from practising his religious obligation to pray in the middle of a road, for the reason that his religious activity may cause harm to other people who will use the road as a public utility.

However, it is not always clear what counts as 'harm'. For example, suppose that religion A has a contradictory belief to religion B. While religion A perceives X as a holy book, religion B perceives X as a fiction bedtime storybook. One day, a preacher from religion B delivers a public speech mocking X. The speech was heard by adherents of religion A and they felt offended by the speech claiming it to be blasphemous to their religion. The preacher says the speech was an act of his freedom to manifest religion as well as his freedom of speech. The adherents of religion A say his freedom can be limited because they were harmed.[167] The question is whether offence can count as harm. I will delve deeper into this issue later in this Section.

Another liberal account of the circumstances in which the freedom to manifest religion can justifiably be limited can be found in the work of John Rawls. In his book, *Political Liberalism*, Rawls did not defend liberal political arrangements by appealing to liberalism as a 'comprehensive' doctrine—one that rests on distinctive liberal values such as autonomy and individuality—since Rawls believes that reasonable people disagree about the truth of such

[166] John Stuart Mill, *On Liberty* (Batoche Books, Kitchener 2001) 13.
[167] Piers Norris Turner, '"Harm" and Mill's Harm Principle' (2014) 124(2) *Ethics* 299, 300.

comprehensive doctrines. Instead, liberalism for Rawls should provide a neutral political framework for exercising power in a way which manages such reasonable pluralism. Rawls begins his discussion of political liberalism by identifying the existing diversity of comprehensive doctrines within democratic society. He stated, 'The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines.'[168] These various comprehensive doctrines naturally share different conceptions of the good and as a consequence, according to Rawls, 'there are many conflicting reasonable comprehensive doctrines with their conceptions of the good, each compatible with the full rationality of human persons, so far as that can be ascertained with the resources of a political conception of justice'.[169]

The conflicting comprehensive doctrines gives challenge to find a principle of justice that accommodates free and equal citizens despite their different conceptions of the good. In this regard, Rawls prioritises right over the good,[170] as he sets criterion of reciprocity where 'only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.'[171] In this regard, the exercise of political power 'is fully proper only when it is exercised in accordance with a constitution the essential of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.'[172] This implies that the freedom to manifest religion may be limited only when there is a justification for the limitation in terms of public reasons which all citizens can reasonably be expected to endorse despite their religious differences.

Rawls further asked, 'How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?'[173] To answer this concern for stability, Rawls used the idea of an overlapping consensus.[174] It serves as the basis of public reason where citizens share equal status of citizenship.[175] He further explained, 'Thus, to see how a well-ordered society can be

[168] Rawls (n 149) 4.
[169] Ibid 135.
[170] Ibid 173.
[171] Ibid 137.
[172] Ibid 137.
[173] Ibid 135.
[174] Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Differences* (Cambridge University Press, 2007) 42.
[175] Rawls (n 149) 212.

unified and stable, we introduce another basic idea of political liberalism to the idea of a political conception of justice, namely the idea of overlapping consensus of reasonable comprehensive doctrine'.[176] The overlapping consensus grounds social unity on a consensus on a political conception of justice—a commitment to certain basic goods, for example, or the neutrality of the state.[177] For this overlapping consensus to work, Rawls requires citizens to be reasonable[178], which means that they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. The reasonable is an element of the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity.[179]

Here, we can say that the key for citizens to be reasonable is when they are willing to fairly cooperate with each other. Rawls sought reciprocity to build an overlapping consensus, which need not to be comprehensive.[180] The cooperation is only important so that it gives benefit to each other. Reasonable persons claimed Rawls was:

> not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others.[181]

In contrast, unreasonable persons may plan to engage in cooperative schemes but are 'unwilling to honour, or even to propose, except as a necessary public pretence, any general principles or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow'[182]

By referring to this conception of religious freedom from a liberal perspective, I argue that this concept, particularly its emphasis on state neutrality and reasonable persons, is important to be used in Indonesia. However, the use of liberal 'flag' may be subject to another controversy. As

[176] Ibid 134.
[177] Ibid.
[178] Rawls differentiated reasonable from rational: 'For the purpose of a political conception of justice, I give the reasonable a more restricted sense and associate it, first, with the willingness to propose and honor fair terms of cooperation, and second, with the willingness to recognize the burdens of judgment and to accept their consequences'; Rawls (n 149) 49.
[179] Ibid.
[180] Ibid 154.
[181] Ibid 50.
[182] Ibid.

I will show in the following chapters of this thesis, the dynamic contest between illiberal and liberal understandings of the religion-state relationship in Indonesia is a fact. Discussing the Indonesian historical context, Farabi Fakih stated, 'Imbued by Marxist and socialist ideas, the new Indonesian political elites were wary of liberalism and capitalism, seeing a strong overlap with imperialism and colonialism.'[183] He further explained, 'Nationalist and traditionalist ideas of the 1930s and 1940s drew leftist leaders like Soekarno.'[184]

However, in a more modern Indonesia, particularly after the constitutional amendment in 2000, a more liberal framework was embraced by the government. Denny Indrayana argued the incorporation of human rights articles in the Constitution during the amendment embraced a liberal-democracy model.[185] The latest report from the Center for Religious and Cross-Cultural Studies (CRCS) at the Universitas Gadjah Mada noted how both liberal and Islamist parties in Indonesia debate the interpretation of *Pancasila* in justifying their claims of how state and religion relationship should be.[186] Therefore, I argue that the use of certain liberal perspectives on religious freedom, particularly state neutrality and the idea of reasonable citizens should be adopted by Indonesia in developing its religious freedom framework in order to provide better protection for minorities.

Aside from this theoretical framework, there is also an explicit legal instrument regulating limitation of religious freedom. This is important, as it emphasises that limitations of religious freedom need to satisfy strict conditions. The following will explain such limitation clause under Indonesian and international law.

Under the *Indonesia Constitution*, there are four articles protecting religious freedom: Articles 28 E(1), 28 E(2), 28 I(1) and 29(2). The Constitutional articles on religious freedom also has its derivative laws further regulating religious freedom such Article 22 of the Indonesian Human Rights Law:

1. Everyone has the right to freedom to choose his religion and to worship according to the teachings of his religion or beliefs.[187]

[183] Farabi Fakih, 'Reading Ideology in Indonesia Today' (2015) 171 *Bijdragen Tot De Taal-, Land- En Volkenkunde* 347, 349.
[184] Ibid.
[185] Indrayana (n 76) 287.
[186] Azis Anwar Fachrudin, *Polemik Tafsir Pancasila*, (Center for Religious and Cross-cultural Studies, 2018) 16.
[187] International Labor Organization (United Nations), *trans, Law No 39 1999—Concerning Human Rights Republic of Indonesia* (2015).

2. The state guarantees everyone the freedom to choose and practice his religion and to worship according to his religion and beliefs.

In addition, Indonesia has ratified the ICCPR with its Law Number 12 Year 2005. By ratifying the ICCPR, Indonesia set its commitment to human rights, including religious freedom as it makes no reservation to the ICCPR. Moreover, the ratification of ICCPR means that Indonesia incorporates this international standard on human rights, including religious freedom, into Indonesia's domestic (national) legal system. This means, an Indonesian citizen may claim the right protected under the ratified ICCPR in a domestic court.

Within the ICCPR, religious freedom is protected under Article 18, particularly 18.1-3:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[188]
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.[189]
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.[190]

Article 18 regulates religious freedom or freedom to religion in its language, and freedom to manifest religion. However, the freedom to manifest religion as set out under Article 18(3) is subject to limitation as explained by General Comment 22 of the ICCPR.[191]

The General Comment gives several important guidelines for implementing Article 18 of the ICCPR. In this regard, I choose eight points relevant to the Indonesian context. First, that the rights stated under Article 18(1)—freedom of thought, conscience and religion— is far-reaching and profound. It encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community

[188] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*International Covenant on Civil and Political Rights*').
[189] Ibid.
[190] Ibid.
[191] Human Right Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

with others.[192] Second, Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.[193] By ratifying the ICCPR, Indonesia should have been following this official interpretation of Article 18 of the ICCPR made by the Human Rights Committee. However, it is still unclear under Indonesian law whether non-theistic and atheistic belief are allowed. Notonagoro claims that *Pancasila*, specifically under the first sila 'The One and Only God', sets the theistic frame for Indonesia thus there should be no room for atheism.[194]

Third, the General Comment differentiates freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief.[195] It is stated that the Covenant,

> does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with article 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.[196]

Fourth, the General Comment also emphasises that 'the freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private'.[197] This freedom also includes broad range of acts as 'the concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest'.[198] The General Comment further explain that 'observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of particular language customarily spoken by a group'.[199] It also sets a description for practice and teaching religion or belief by including 'acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders,

[192] Ibid point 1.
[193] Ibid point 2.
[194] Notonagoro, *Pancasila* (n 56) 72.
[195] Human Right Committee (n 191) point 3.
[196] Ibid.
[197] Ibid point 4.
[198] Ibid.
[199] Ibid.

priest and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications'.[200]

Fifth, the General Comment lays down a very important point that 'no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[201] Sixth, the General Comment approves that Article 18.3 'permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted'.[202] However, in interpreting the scope of permissible limitation clauses, 'States parties should proceed from the need to protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26'.[203]

Still within the sixth important guideline, the General Comment also states that 'limitation imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18'. [204] For this matter, The Committee observes that 'paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security'.[205] It is further explained that limitations may only be applied 'for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner'.[206]

The Committee further observes that the concept of morals derives from many social, philosophical and religious traditions. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraints. States parties' reports should

[200] Ibid.
[201] Ibid point 7.
[202] Ibid point 8.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.

provide information on the fullest scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.[207]

Seventh, on the condition that 'religion recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of population', it should not result in 'any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers'.[208]

Eight, The General Comment also stresses that,

> if a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[209]

The highlight both from the Constitutional articles and the ICCPR articles on religious freedom is that one aspect of religious freedom in Indonesia, the *forum internum*, is absolute. The claim that this aspect of religious freedom is absolute follows from Article 28 I(1) of the Indonesian Constitution: 'The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to hold religion[210], the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever.'[211] The clause 'cannot be reduced under any circumstances whatsoever' indicates the characteristic of an absolute right. However, the Constitutional Court considers Article 28 I(1) to be limited by Article 28 J(2):[212]

> In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and to comply with just demands in

[207] Ibid.
[208] Ibid point 9.
[209] Ibid point 10.
[210] As explained above, the translated term 'the right to religion' is taken from the Constitutional Court translation of the Indonesian Constitution. I use this translation because it is the most authoritative translation of the Indonesian Constitution since no other state institutions provide a translation. However, there is no official translation of the Indonesian Constitution. I would use the term 'the right to hold religion' to better translate the language in the Indonesian version of the Constitution.
[211] *Constitution of the Republic of Indonesia* (n 8).
[212] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 277 [3.34.15].

> accordance with considerations for morality, religious values, security, and public order in a democratic society.[213]

I disagree with the Court's view for the reason that Article 28 J(2) only limits the manifestation of the right to religious freedom and not the right to hold religion which is protected by Article 28 I(1). Article 28 J(2) is similar to the ICCPR's limitation clause on the right to manifest religion under Article 18(3), in which the manifestation of religion may be limited under the law.[214] Thus, Article 28 J(2) may not be used to limit the right to have a religion under Article 28 I(1), which is set to be absolute.

Further, General Comment 22 also explains in its third point that it does not permit any limitations whatsoever on the freedom of thought and conscience or of the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally.[215] With the ratification of the ICCPR, Indonesia has put the ICCPR within its domestic legal framework. Thus, it is bound by the Covenant in the same way as it is bound by its law *(undang-undang).*[216]

However, one other aspect of religious freedom, that is, the freedom to manifest religion (*forum externum*), is not absolute. For this, there is a need to identify the two aspects intertwined in religious freedom: belief and its manifestation. Belief is located in the *forum internum* or inner realm. Thus, it cannot be seen or verified by others, while the manifestation of belief is located in the *forum externum* or realm of external behaviour and can therefore be seen by others. Because belief cannot be seen by others, naturally it is an absolute right. However, when it comes to the manifestation of belief, the conduct may cause harm to others and for this reason, it may be limited. However, although the ate may limit the manifestation of religious freedom in certain circumstances, it should not do so arbitrarily.

Constitution of the Republic of Indonesia (n 8).

[214] *International Covenant on Civil and Political Rights* (n 188). See also Human Right Committee (n 191).

[215] Human Right Committee (n 191) point 3.

[216] The Indonesian Legal Drafting Law stated that the contain of a law (statute) are derivative regulation of constitutional article, derivative regulation of law (statute), ratification of international treaty, follow up of Constitutional Court decision, and fulfilment of legal needs. See Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan. [*Law No 12 Year 2011 on Legal Drafting*] (Indonesia) art 10(1)C. consequently, there are six type of law/statute (undang-undang) in Indonesia based on its substance: delegating authority, investigation, revocation of old law, amendment of old law, affirmation of Government Regulation in Lieu of Law (Perppu) to be Law, and ratification of International treaty. See Lampiran II Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan. [2nd Appendix of *Law No 12 Year 2011 on Legal Drafting*] (Indonesia).

As stated in this chapter, although the internal dimension of religious freedom (the right to hold particular religious beliefs) is an absolute right, the external aspect of it—the right to manifest religion—is limitable. This means the state may limit the right to manifest religion. However, as Articles 18(3) and 28 J(2) of the Indonesian Constitution and the General Comment No 22 of the ICCPR provide, limitations on the right to manifest religion may only be justified if they meet very strict conditions. The ICCPR stated that the limitation must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others.[217] Meanwhile the most important difference is that Article 28 J(2) of the Indonesian Constitution mentions religious values as one of the permissible reason to limit rights.

The easiest condition to be fulfilled by the state in this matter is 'prescribed by law' because the law is made by the state. However, point 8 of the General Comment 22 of the ICCPR provides:

> the limitation may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in discriminatory manner.[218]

This means that to have the limitation enacted under domestic law is not enough. The state must be able to prove: (1) the legitimate purposes for which the limitation was prescribed, and it must be (2) directly related to and (3) proportionate to the specific need on which it is predicated. Restrictions may not be imposed for (4) discriminatory purposes or applied in a discriminatory manner.

The United Nation Human Rights Committee has received cases regarding this limitation. One of the cases that has become jurisprudence[219] is *Viktor Leven v Kazakhstan*.[220] In this case, the Committee noted that Article 18.1 of the Covenant protects the right of all members of a religious congregation, not only missionaries, and not only citizens, to manifest their religion in community with others, in worship, observance, practice and teaching.

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[217] Art 18(3) of the ICCPR.
[218] Human Rights Committee (n 191) point 8.
[219] https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx
[220] Human Rights Committee, *Decision: Communication No 2131/2012*, 112th sess, UN Doc CCPR/C/112/D/2131/2012 (5 January 2015) (*VL v Kazakhstan*).

In this case, the Committee concluded that:

> the punishment imposed on the author, and in particular its harsh consequences for the author, who is facing deportation, amount to a limitation of the author's right to manifest his religion under article 18.3; that the limitation has not been shown to serve any legitimate purpose identified in article 18, 3; and neither has the State party shown that this sweeping limitation of the right to manifest religion is proportionate to any legitimate purpose that it might serve.[221]

From the above case, it is important to note that the limitation imposed by the state needs to be proportionate to the legitimate purpose that it was designed for.

Further, the General Comment No 22 also provided:

> the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.[222]

Reflecting on the discussion in the previous part of this chapter on religion-making in Indonesia, where the Muslim majority dominates the making of laws regarding religion, it is obvious that the Indonesian government does not satisfy the above General Comment—that the concept of morals should not be exclusively derived from a single tradition.

Under the Indonesian Constitution, the limitation clause for human rights is prescribed under Article 28 J(2). Although the Constitution does not exclusively mention the freedom to manifest religion as a right that may be limited under Article 28 J(2), all of the rights excluding those mentioned under Article 28 I(1) are subject to the general limitation clause set under Article 28 J(2). Again, even though religious freedom is mentioned under Article 28 I(1), the freedom to manifest religion is not. Therefore, freedom to manifest religion is subject to the limitation clause under Article 28 J(2). Interestingly, Article 28 J(2) includes the term 'security' (*keamanan*) as a justifiable limitation, instead of safety (*keselamatan*). This is a different concept compared with the ICCPR.

[221] Ibid [9.4].
[222] Ibid.

General Comment No 22 of the ICCPR provides, 'restrictions are not allowed on grounds not specified there, even if they would be allowed as restriction to other rights protected in the Covenant, such as national security'.[223] This means, the state should not justify the use of national security to limit freedom to manifest religion. What is allowed to justify the limitation to freedom to manifest religion is public safety. Interestingly, Indonesia uses security approach instead of public safety in justifying limitations on the freedom to manifest religion without making any reservation to the ICCPR in this regard. The Indonesian official translation of ICCPR written under Law No 12 Year 2005 has wrongly translated the term 'safety' to '*keamanan*' (security).[224]

Zainal Bagir et al., in their book, '*Membatasi Tanpa Melanggar'* (Limiting without Violating), argue that the mistranslation indicates that the concept of human rights has been misunderstood by the Indonesian government.[225] Further, they argue, the implication of this can be seen in the way the state handles cases in this regard.[226] State would use national security to justify the limitation to freedom to manifest religion, which is explicitly prohibited by the General Comment No 22 of the ICCPR.

2.3 Proportionality Test and Balancing Other Rights Involved

As explained in the previous sub chapter (2.2), religious freedom has two dimensions: *internum* and *externum*. The *internum* dimension is an absolute right that cannot and may not be limited. however, the *externum* dimension or the manifestation of religious freedom can be limited. The proportionality test requires laws that seek to limit people's freedom to manifest religion and/or freedom of speech to be proportionate. In this sense, the government must balance the interests of all related parties, especially in relation to human dignity, equality and freedom.[227] Returning to the example of the preacher which I gave earlier in this chapter (see Chapter 2.2), the law that seeks to limit his freedom of speech as well as his freedom to manifest religion must be balanced against other people's rights. There is therefore a need to determine whether the offence claimed by adherents of religion A is enough to justify limiting preacher B's freedom

[223] Human Rights Committee (n 191) point 8.
[224] See Undang-Undang Nomor 5 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-Hak Sipil Politik), pasal 18 (3) [*Law No 12 2005 on Ratification of International Covenant on Civil and Political Rights*] art 18(3) (Indonesia).
[225] Zainal Bagir et al, *Membatasi Tanpa Melanggar*. *Hak Kebebasan Beragama atau Berkeyakinan* (Center for Religious & Cross-Cultural Studies, 2019) 35.
[226] Ibid.
[227] https://www.alrc.gov.au/sites/default/files/pdfs/publications/ir_127ch_4._freedom_of_religion_.pdf, 23.

to manifest his religion and his right to freedom of speech. In this regard, we need to clearly define whether offence should be classified as harm.

To offend someone is to 'irritate in mind or feelings' or to 'cause resentful displeasure'. Mill explains this by illustrating the same speech given in different contexts: one to be circulated through the press and one to be delivered in front of an excited mob.[228] The speech circulated through the press may create offence as it irritates in mind or feeling, but it is not directly causing harm. The same speech given to an excited mob may provoke them to do real action that will imminently lead to tangible harm beyond the mind or feeling, such as physical harm. Therefore, solely causing offence is not a good reason to limit the right to manifest religion and the freedom of speech.

As explained above, an offence without tangible harm is not justified to limit religious freedom and freedom of speech. It must cause tangible harm, such as harming national security, or public safety, order, health, morals or the fundamental rights and freedoms of others. Further, as in the above example of speech by preacher from religion B whose speech causes offence for people from religion A, people from religion A claim that the speech blasphemes their religion. However, the speech does not violate their (human) fundamental rights and freedoms as it addresses the holy book (or religion) and not the individual.

Balancing other rights involved is important when there are two or more conflicting rights. to give other example, in the case of polygamy, one may argue that doing a polygamy is part of his religious freedom because his religion perceives polygamy as a practice of religious teaching. He would argue that the right to manifest religion protects his choice of doing polygamy. However, the rights of women and children are intertwined in this case because they are also the parties inside the polygamous marriage. In this regard, the rights of women and children, such as the right to get basic necessities (food, clothing, shelter) and freedom from domestic violence may be interfered by polygamous marriage. Therefore, the right to manifest religion in the case of polygamy should be limited by taking consideration of women and children's rights.

From a theoretical perspective, the use of proportionality test to evaluate limitations on rights is closely related to the idea of balancing rights.[229] According to Malcolm Thorburn, the

[228] Mill (n 167) 52.
[229] For further discussion on balancing rights as one of the central features of postwar Western legal theory, see Jacco Bomhoff, *Balancing Constitutional Rights* (Cambridge University Press, 2013).

proportionality justification is the defining feature of the post-war paradigm. The idea of proportionality justification was first developed in German constitutional law and then spread all over the world with the emergence of the idea of constitutional review in the Constitutional Court.[230]

Robert Alexy, a prominent German scholar explains the idea of proportionality test by elaborating three sub-principles in the principle of proportionality: suitability, necessity, and proportionality in a narrow sense.[231] Suitability signifies that any means taken to realise an aim or principle should not obstruct any (other) aim or principle for which it has been adopted.[232] For example Blasphemy law limits freedom of speech to protect religion in the sense that speech that blaspheme religion is not allowed. There might be a situation that a minority's preaching would be perceived to be blasphemous to majority because of its deviant point of view. If such minority's preaching is not allowed (limited) by blasphemy law, it is not only the freedom of speech (of the minority) that being obstructed, but also the right to manifest religion of the minority being obstructed as well. So, if the blasphemy law in this case cease to exist, two rights will not be obstructed (freedom of speech and freedom to manifest religion), but if the blasphemy law continue to exist, it will obstruct the two rights mentioned above.

The second sub-principle is necessity. Under this sub-principle, if there are alternate options of means that equally suitable, we should choose for the one with less intervention to other principle.[233] Alexy gives an example of how this sub-principle of necessity taken by the German Federal Constitutional Court in the case of puffed rice sweets that being banned to protect consumer for mistakenly choosing it as chocolate product.[234] The court argues that another mean can be taken as a substitute to banning the product, that is by labelling the product to give notice to the consumer.[235] Therefore, it is not necessary to ban the product because by banning the product as a whole, it will cost more than adding a label.

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[230] See Malcolm Thorburn, 'Proportionality' (2016) in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundation of Constitutional Law* (Oxford University Press, 2016) 305, 307; for comparison, see eg, Bomhoff (n 227) 3; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 1.
[231] Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 Revus – *Journal for Constitutional Theory and Philosophy of Law* 51, 52.
[232] Ibid.
[233] Ibid., 53.
[234] Ibid., 54.
[235] Ibid.

The third sub-principle is proportionality in a narrow sense. Alexy calls it further as the law of balancing which states, 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[236] The balancing is important when conflicting rights resulting in unavoidable cost.[237] Here, a cost and benefit analysis is taken to conclude the best option with the more benefit. Alexy uses a 'Weight Formula' to count the colliding principles/ rights.[238] However, (qualitative) argument must be made to explain the 'Weight Formula' to avoid simplification of numbering (quantitative calculation). To have a more qualitative sense, he uses the triadic scale that give attribute to values to be light (l), moderate (m), and serious (s). [239] Further, an argument must be made when we give attribute to a value.[240]

For example, in the case of polygamy with two conflicting rights of freedom to manifest religion of a Muslim man in one hand and women's rights in the other hand, the violation of women's rights will be light if polygamy is totally banned. However, doing so will seriously violate freedom to manifest religion of a Muslim man. To give a light obstruction to one right and a serious obstruction to the other right is not balance so totally banning polygamy is not a good choice.

The law of balance in this case can be done by permitting polygamy under strict limitation clause, that is: provided that women's (and children's) rights must be satisfied by the husband in polygamous marriage. With such arrangement, the man's freedom to manifest religion is lightly violated because the man needs to fulfil the requirement before he can do polygamy, and if he could not fulfil the requirement, he cannot do polygamy and his freedom to manifest religion may be violated. In the other hand, strictly limiting polygamy means that the law permits it. In this regard, the right of the women may also be lightly violated because the total amount of rights that she has will be reduced in polygamous marriage, simply because she has to share it with the other wife. In conclusion, having both rights lightly obstructed or violated, is more balance, compare to having one right seriously violated and one other right lightly violated.

[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.

I observe in this study that there are two rights commonly found in discussing religious freedom: minority rights and freedom of speech. The following part of the chapter will explain the two competing rights to comprehend the complexity of religious freedom.

2.3.1 Minority Rights

According to Francesco Capotorti:

> a minority is a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[241]

Therefore, a numerically inferior group of individuals sharing the same religion can be classified as a minority, i.e., a religious minority. In practice, violations of religious freedom in Indonesia often target religious minorities.[242] In this regard, it is also important to notice the legal framework for protecting minorities, and in particular religious minorities.

The ICCPR has set a specific provision for minorities under Article 27,

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[243]

This article specifically refers to the condition of being a member of a religious minority, as the state party should not only recognise their rights, but also should not deny their right, including practising their own religion.

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[241] Francesco Capotorti, '*The International Protection of Persons Belonging to Ethnic, Religious and Linguistic Minorities Since 1919*' (United Nations Economic and Social Council, 1977) 96.

[242] See eg, https://www.hrw.org/news/2018/08/31/chance-urge-religious-freedom-indonesia; https://www.voanews.com/a/indonesian-groups-call-for-minority-religious-protections/4571828.html; https://www.state.gov/documents/organization/281068.pdf

[243] *International Covenant on Civil and Political Rights* (n 188).

The Human Rights Committee also set an official interpretation of this article under General Comment 23.[244] There are several important notes in this General Comment in relation to the Indonesian context. First, Article 27 'establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant'.[245]

Second, the terms used in Article 27 indicate that 'the persons designed to be protected are those who belong to a group and who share a culture, a religion, a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party'.[246]

Therefore, the state should enlarge its protection to non-citizens if they belong to a minority group living under its jurisdiction. However, certain rights may be withheld from non-citizens, as further explained in the General Comment,

'A State party is required under the article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone'.[247]

These non-citizens also include migrant workers and visitors, as explained further in the General Comment:

> migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.[248]

A State party is also required to take positive measures of protection 'through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party'.[249] The positive measures should also be taken to protect the identity of a minority and

[244] Human Right Committee, General Comment No 23: *The Right of Minorities*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).
[245] Ibid point 1.
[246] Ibid point 5(1).
[247] Ibid.
[248] Ibid point 5(2).
[249] Ibid point 6(1).

the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.[250] Here lies the important relation between individual rights and group rights. The General Comment continues, 'In this connection, it has to be observed that such positive measures must respect the provisions of article 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population'.[251]

In the Indonesian context, religious identity in democracy has become a real problem. As I will explain further in the next chapter, religion-making where political elites promote their Islamic interest leads to laws that discriminate against religious minorities. Even after the reform in 1998 and the constitutional amendment 1999–2002, euphoria of freedom explodes,[252] contrasting to the situation under Soeharto's regime when people chose to remain silent in avoiding malicious action by his regime.[253] Conflict between majority-minority started to emerge as a result of this euphoria. More cases involving majority-minority conflict have been lodged before the court, particularly regarding religious blasphemy.[254]

2.3.2 Freedom of Speech

Another right often involved in the case of religious freedom is freedom of speech. Freedom of speech and religious freedom mostly intersect when we discuss Blasphemy Law. As I will explain further in Chapter 4 of this thesis, Blasphemy Law is designed to protect religion by limiting freedom of speech whenever the speech is considered blasphemous to religion. However, before we examine the case of Blasphemy Law, I would like to explain the importance of freedom of speech and when it may be limited.

[250] Ibid point 6(2).
[251] Ibid.
[252] See eg, Vedi R Hadiz and Richard Robinson, 'The Political Economy of Oligarchy and The Reorganization of Power in Indonesia' (2013) (96) *Indonesia* 35, 36. In their study, Hadiz and Robinson showed how the reform opened what they call 'the door for political chaos or money politics and for the entry of extremist, resentful, and violent political interests that appeal to the basest of xenophobic sentiments'.
[253] Olle Törnquist, Stanley Adi Prasetyo and Teresea Birks, *Aceh: The Role of Democracy for Peace and Reconciliation* (PCD Press Indonesia and ISAI, 2009) 13.
[254] See eg, Zainal Abidin Bagir, *Laporan Tahunan Kehidupan Beragama di Indonesia 2012* (Center for Religious and Cross-Cultural Studies, 2013); Universitas Gadjah Mada and Melissa Crouch, *Indonesia, Militant Islam and Ahmadiyah* (Centre for Islamic Law and Society University of Melbourne, 2009).

According to Eric Barendt, there are four arguments to justify freedom of speech: discovering truth; speech as an aspect of self-fulfilment; citizen participation in democracy; and suspicion of government.

First, *freedom of speech is important as it opens up discussion that lead to discovering the truth*.[255] This idea is particularly based on Mill's position that truth is a coherent concept and that particular truths can be discovered and justified.[256] Against people arguing that speech may be supressed when it is objectively false, Mill replies that it is still wrong, for people holding true beliefs will no longer be challenged and forced to defend their views.[257] In this sense, their truth will be held as a dead dogma and not a living truth.[258] The assurance of freedom of speech does not mean that it is absolute. There is a need to balance at any rate, the risk of immediate damage which may occur from the acceptance of falsehood and the long-term benefits of constant, uninhibited debate.[259]

Second, *freedom of speech as an aspect of self-fulfilment.* This approach argues that restrictions on what we are allowed to say and write or hear inhibit our personality and its growth,[260] as they prevent free people from enjoying access to ideas and information which they need to make up their own minds.[261] It further reasons that the reflective mind, consciousness of options and the possibilities for growth distinguish human beings from animals.[262] However, as the exercise of freedom of speech may cause harm for other, there is a need to set a fine line on balancing the rights.

Third, *freedom of speech is a form of citizen participation in democracy*. This argument to justify freedom of speech addresses political expression towards the state in public sphere. Freedom of speech will expose citizens to a wide variety of views and provide them with enough information to hold government to account.[263] The purpose of speech here is to serve democracy. However, in a majoritarian conception of democracy, it is important to assure the

[255] Eric Barendt, *Freedom of Speech* (Oxford University Press, 2007), 7.
[256] Ibid.
[257] Ibid.
[258] Ibid.
[259] Ibid 9.
[260] Ibid 13.
[261] Ibid 18.
[262] Ibid 13.
[263] Ibid 18.

right of minority to also contribute to political debate considering equal respect and concern, which underlines their right to engage in public discourse.[264]

Fourth, *freedom of speech as based on suspicion of government*. This argument based on the perception that we need protection against the abuse of power Freedom of speech is important as a checking mechanism to hold the government accountable. Further, constitutionalism in its intellectual and political origins has been concerned to limit government.[265]

Freedom of speech is not an absolute right. This is because freedom of speech is a kind of communication done in public which invites other people to notice it. Like freedom to manifest religion, freedom of speech may cause harm to others, especially when it comes to hate speech and insult. Similar to the limitation set for the freedom to manifest religion, General Comment 34 of the ICCPR also provides for permissible limitations on freedom of speech: either to respect the rights or reputations of others or to protect national security or public order, orpublic health or morals.[266] Such limitations should also conform to the strict tests of necessity and proportionality in terms of the ICCPR.[267]

This chapter is designed to give a brief introduction to theoretical concepts that will be used in the following chapters. Therefore, it does not mean to give a deep critical conversation about the concepts. By introducing these theoretical concepts in the forefront of this study, I am laying the foundation for the discussion of cases in the following chapters following the track of studying religious freedom in Indonesia, particularly regarding religion-making.

[264] Ibid 20.
[265] Ibid 22.
[266] Human Right Committee, *General Comment No 34: Article 19: Freedom of Opinion and Expression*, 102nd sess, UN Doc CCPR/GC/34/ (12 September 2011), 5.
[267] Ibid 6.

Chapter 3: Drafting and Amending the Indonesian Constitution: The Debate over Religion

Having explored the concept of religion-making and religious freedom in Chapter 2, this chapter will analyse the practice of religion-making in the drafting and amendment of the Indonesian Constitution. Discussion on the drafting and amendment of the Constitution is important in this study to give the contextual background for understanding the following chapters on case studies. This is because the laws analysed in Chapters 4–6 were reviewed before the Constitutional Court in light of the constitutional articles on religious freedom. From the Constitutional Court decisions examined in those chapters, it can be observed that most of the cases show how the Court affirms the constitutionality of the laws in review, despite the fact that the laws discriminate against religious minorities.

Interestingly, the wording of the articles on religious freedom under the Indonesian Constitution explicitly protects religious freedom for all, including minorities. See for example Article 29(2) of The Indonesian Constitution saying, 'The State guarantees freedom of every inhabitant to embrace his/her respective religion and to worship according to his/her religion and faith as such';[268] Article 28 E(1) states, 'Every Person shall be free to embrace a religion and to worship according to their religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place to reside in the territory of the state and to leave it, as well as be entitled to return'.[269] Article 28 E(2) provides, 'Every person shall be entitled to freedom to be convinced of a belief, to express thought and attitude in accordance with their conscience'.[270]

Constitutional Articles need to be interpreted because, as the state's highest law, the wording of the Constitution is designed to be abstract and general.[271] In this regard, the Constitutional Court has the authority to interpret the constitutional articles through its judicial review mechanism. The Court endorses certain methods of interpreting the Constitution including the textual meaning or original intent of the creator of the constitutional articles.[272] That is why

[268] *Constitution of the Republic of Indonesia* (n 8).
[269] Ibid.
[270] Ibid.
[271] See Jimly Asshiddiqie and M Ali Safa'at, *Teori Hans Kelsen tentang Hukum* (Konstitusi Press, 2012) 126.
[272] Simon Butt, *Constitutional Court and Democracy in Indonesia* (Brill Nijhoff, 2015) 237.

discussion on the drafting and amendment of constitutional articles regarding religious freedom is important in this study.

This chapter will identify the rationale behind the making of the articles to understand the textual meaning of the articles, but it will also examine the discourse surrounding the drafting and the amendment of the articles to reveal the process of religion-making behind constitutional articles on religious freedom in Indonesia. The focus of this chapter is to prove recurring unsettled negotiation between the Islamists and the nationalists during the drafting of three important constitutional documents in Indonesia: the making of the original 1945 Constitution; the work of parliamentary body *Konstituante* to draft a new constitution in 1955–1959; and the constitutional amendment 1999–2002.

Further, the finding of this chapter is important in building the overall thesis, which argues that there is a legal gap regarding the protection of religious freedom in Indonesia. The gap is between the constitutional articles guaranteeing religious freedom and laws that potentially interfere with religious freedom for minorities, such as Blasphemy Law, Marriage Law and Civil Administrative Law. Such a legal gap explains why and how Indonesia fails to protect religious freedom for minorities although it recognises and guarantees religious freedom under the Constitution.

The Constitutional Court's interpretation of the constitutional articles on religious freedom contributes to the problem because it affirms the constitutionality of the discriminatory laws. This chapter revisits the discourse surrounding the drafting and the amendment of the Constitution because the Constitutional Court refers to the original intent of the Constitution. Analysing the Constitutional Court's decisions, this thesis argues that the legal gap happens because discourse over religious freedom is never settled during constitutional debates. It leads to multi-interpretative constitutional articles on religious freedom, such as the seemingly contradictory Article 28 I(1) on absolute rights[273] and Article 28 J(2) on the limitation of rights.[274] The multi-interpretative constitutional articles give no solid basis for protecting

[273] The full wording of the article read: 'The rights to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever'. See *Constitution of the Republic of Indonesia* (n 8).
[274] The full wording of the article read: 'In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security and public order in a democratic society'. See *Constitution of the Republic of Indonesia* (n 8).

religious freedom, especially for minorities.[275] This can be observed when the Constitutional Court tests the constitutionality of controversial laws such as Blasphemy Law, Marriage Law and Civil Administrative Law, which will be discussed in the later chapters of this thesis.

These laws are among the most repeatedly tested before the Constitutional Court in relation to religious issues. As the authoritative body to interpret the Constitution as well as testing the constitutionality of laws in light of the Constitution,[276] the opinions and decisions of the Constitutional Court are crucial in shaping the legal framework of religious freedom in Indonesia. However, most of the decisions regarding religious freedom before the Constitutional Court emphasise sociopolitical interests, especially from Islamist groups. Considering the interest of related parties during trial is important to achieve justice and fair trial. However, in an extreme level, sociopolitical pressure can be a threat to judicial independence. This can be seen, for example in the case of Basuki Tjahaja Purnama when he was convicted for violating Blasphemy Law in 2017. During the trial in Jakarta's North District Court, Islamist groups marched and shouted outside the court building, demanding the judges find the defendant guilty of blaspheming Islam. [277]

The role of this chapter is first and foremost to explore the fragile political consensus behind the making of the state ideology, *Pancasila* and the constitutions (the original 1945 Constitution, the debate in *Konstituante*, and the constitutional amendment 1999–2002); this will help to understand the context and the way Islamist parties play a role in shaping the legal framework of religious freedom in Indonesia. This chapter is important to set the position of the agents in the discourse. Without understanding the historical development of the legal framework for religious freedom in Indonesia involving the recurrent debate between the Islamists and the nationalists, we will not be able to comprehend the problem of religious freedom in Indonesia.

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[275] *Constitution of the Republic of Indonesia* (n 8).

[276] See *Constitution of the Republic of Indonesia* (n 8) article 24 C(1): 'The Constitutional Court has the authority to adjudicate at the first and final instance, the judgement of which is final, to review laws against the Constitution, to judge on authority dispute of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of a political party, and to judge on dispute regarding the result of a general election'.

[277] Various media reported on the sociopolitical pressure during the trial, as can be observed in: https://theconversation.com/jakarta-governor-election-results-in-a-victory-for-prejudice-over-pluralism-76388; https://www.thejakartapost.com/news/2016/12/13/protesters-call-for-arrest-as-ahok-arrives-at-court.html; https://www.bbc.com/news/world-asia-38902960 ; https://www.theguardian.com/world/2017/may/09/jakarta-governor-ahok-found-guilty-of-blasphemy-jailed-for-two-years. The defendant was found guilty of blaspheming Islam, despite the edited video used as evidence in the case.

This chapter comprises four parts. Chapter 3.1 introduces the hierarchy of law in Indonesia, while Chapter 3.2 discusses the 1945 constitutional debate on *Pancasila* as the state ideology and the highest source of law in Indonesia. Chapter 3.3 examines the constitutional debate after 1945 (1955–1959 and 1999–2002) and Chapter 3.4 explores the Indonesia Constitutional Court as a newly installed state institution after the constitutional amendment gave it the task of interpreting the Constitution.

In the discussion of *Pancasila* (see Chapter 3.2), I will explain its position in the Indonesian legal system, and its first principle, 'The One and Only God'. It will also explain why *Pancasila* matters in Indonesia and why it will always be an ultimate reference in Indonesia constitutional law. Chapter 3.3 will focus on the important debates between the Islamists and the nationalists in the making of Jakarta Charter and the controversial seven words which reoccur in three important constitutional works: the drafting of the original 1945 Constitution; the work of *Konstituante*; and the constitutional amendment 1999–2002. Chapter 3.3 is particularly important to understand the making of constitutional articles on religious freedom.

I will conclude the chapter by arguing that constitutional debates between the Islamists and the nationalists regarding religious freedom were never settled. In 1945, the debate was postponed, giving priority to establish the state as it was promised by the president that the debate will be continued in the later constitutional work. In 1959, the four years debate forced to deadlock resulted in the reinstalment of the 1945 Constitution with an ambiguous phrase of 'Jakarta Charter version 22 June 1945 inspired and part of the Constitution'. During the constitutional amendment 1999–2002, there were two separate discussions: on human rights (chapter XA of the Constitution) and on religion (chapter XI of the Constitution). The chapter on religion remained untouched while the Parliament introduced the new dedicated chapter on human rights. There are two seemingly contradictory articles regarding (1) the right to hold religion as an absolute right and (2) limitation of rights. In this regard, I disagree with the Constitutional Court decision saying that the Constitutional article on limitation of rights (Article 28 J(2)) prevails over the Constitutional article on absolute rights (Article 28 I(1)).

3.1 Hierarchy of Legislation in Indonesia—A Brief Introduction

Before discussing the making and the content of *Pancasila*, the Constitution, and the laws, it is important to understand the hierarchy of legislation in Indonesia because in my case studies in later chapters I will consider both legislation and regulations concerning religion. To

understand the hierarchy of these laws, I will here explain the official sources of law. I will give a brief section to explain this, especially in regard to the position of *Pancasila* as the guiding ideology of the state and the fact that all laws and regulations should be in conformity with and uphold the key principles of *Pancasila*. Legally speaking, the position of *Pancasila* as the guiding ideology of law in Indonesia is written under Article 2 of Law Number 12 Year 2011 on Legal Drafting. The full wording of the article reads as follows in Indonesian: '*Pancasila merupakan sumber segala sumber hukum negara*.' (literal translation: *Pancasila* is the source of all sources of the state's law).[278] The Legal Drafting Law further states that the use of *Pancasila* as the guiding ideology of law in Indonesia is in accordance with the preamble of the Constitution.[279] As the guiding ideology of law in Indonesia, Pancasila is being used as the state fundamental norm according to the Indonesia's legal drafting principle.[280]

In this regard, Indonesia adopts *Stufenbaulehre*, which was originally conceptualised by Adolf Julius Merkl and then used by Hans Kelsen and Hans Nawiansky.[281] Jimly Asshiddiqie, a prominent Indonesian constitutional lawyer and the first Chief Justice of the Constitutional Court identifies that the *Pancasila* is regarded as *grundnorm* in Kelsen's theory or *Staatsfundamentalnorm* in Nawiansky's term.[282] According to Asshiddiqie, every state must have fundamental or philosophical values inherent in their nation.[283] In the Indonesian case, these values are found in *Pancasila*.[284] Asshiddiqie's statement is referring to the well-known legal scholar Hamid Attamimi who was the teacher to both Asshiddiqie and Farida Indarti in Universitas Indonesia who adhered to Kelsen's idea of law.[285] Building on Attamimi's concept

[278] See Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan [*Law No 12 2011 on Legal Drafting*] (Indonesia) art 2.
[279] Ibid explanation of art 2.
[280] Maria Farida Indarti, *Ilmu Perundang-Undangan* (Kanisius, 2007, Vol 1) 254.
[281] Both Kelsen and Nawiansky are philosophers in legal positivism. Their teaching of legal certainty and written law is inherently used in the Indonesian legal system because of the Dutch colonisation. In the Dutch colonisation era, Indonesia was introduced to the European Civil Continental legal system and as the state proclaimed its independence in 1945, the European Civil Continental legal system continued to be used prominently in constitutional law and criminal law. For more on *stufenbautheori*e, see Hans Kelsen, *General Theory of Law and State* (trans Anders Wedberg, Russel & Russel, 1961); Hans Kelsen, *Pure Theory of Law—Revised and Enlarged* (trans from the 2nd German ed by Max Knight, University of California Press, 1967). Jimly Asshiddiqie brings their idea of written law and positivism in Indonesia, particularly in positioning *Pancasila* as the state fundamental norm in his book, *Teori Hans Kelsen tentang Hukum* (Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006) especially in Chapter IV, 169.
[282] See Asshiddiqie (n 281) 241.
[283] Ibid.
[284] Ibid.
[285]Attamimi's most prominent work was his doctoral thesis in Universitas Indonesia: 'Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I–Pelita IV' (Universitas, 1990).

of the hierarchy of law, Asshiddiqie claims there is a hierarchy in the Indonesian legal drafting regime as follows:

1. *Staatsfundamentalnorm*—State's fundamental norm (*Pancasila*—Preamble of the Constitution)
2. *Staatsgrundgesetz*—State's ground/basic law (Articles of the Constitution, MPR[286] Decree, and Constitutional Convention)
3. *Formelle Gesetze*—Formal law (Law/ Legislation—created by DPR/Parliament and the President)
4. *Verordnungen, Autonome Satzung*—Executive order (Hierarchical from Presidential Decree to Governor Decree and later to Mayor Decree).[287]

Asshiddiqie's book was written in 2006, and since then, the Indonesian Law on Legal Drafting was changed in 2011. The changing of the law adjusted the hierarchy. Although the idea of *Pancasila* as the *Staatsfundamentalnorm* and the Constitution as *Staatsgrundgesetz* are still used, the classification of the law in *Formell gesetz,* and *Verordnungen Autonome Satzung* changed:

1. The Constitution—UUD 1945
2. MPR Decree—TAP MPR[288]

[286] MPR is a joint session between Parliament (DPR) and Senate (DPD). While the members of Parliament (DPR) are affiliated with political parties, Senate members represent provinces in Indonesia. MPR was the highest state institution before the amendment of the Constitution 1999–2002. It had the responsibility to appoint and mandate presidents and vice-presidents and distribute its power to lower state institutions. After the amendment of the Constitution, the term 'highest state institution' is no longer applicable as Indonesia moved into adopting pure presidential, separation of power and checks and balances instead of distribution of power from MPR. See eg, art 1(2) of the amended Constitution: 'Sovereignty shall be vested in the hands of the people and be executed according to the Constitution'. This compares with art 1(2) before the amendment: 'Sovereignty shall be vested in the hands of the people and be executed by MPR'. Butt and Lindsey argued the amendment this article was part of MPR's wider disempowerment that was a key theme of the post-Soeharto amendment. See Butt and Lindsey (n 5) 12.

[287] Asshiddiqie, *Teori Hans Kelsen* (n 281) 171.

[288] Following the constitutional amendment 1999–2002, MPR no longer has the authority to create Decree (*Ketetapan*) as stated here. However, several previous MPR decrees established before the amendment of the Constitution are still applicable. Therefore, its original position in the hierarchy before the amendment was reinstated. See Explanation of art 7(1) b of *Law No 12 2011 on Legal Drafting*: 'MPR Decrees in this regard are limited to MPR Decrees referred to by Article 2 and Article 4 MPR Decree No 1/ MPR/ 2003 on Legal Review of TAP MPRS dan TAP MPR 1960–2002, dated 7 August 2003'.

3. Law/ Legislation—*Undang-Undang* (created by DPR and President)[289] and Emergency Law—Perppu[290]
4. Government Regulation – Peraturan Pemerintah (Executive Order created by President as derivative regulation from Legislation)
5. Presidential Regulation
6. Provincial Regulation (Created by Provincial-level Parliament and Governor)
7. City/ Municipality Regulation (Created by City/Municipality-level Parliament and the Mayor).[291]

The Legal Drafting Law recognises other laws as long as the laws are created by an authoritative body and in accordance with higher laws.[292] The consequence of hierarchy of law is that the lower law may not contradict the higher law (*lex superior derogat legi inferior*).[293] The hierarchy mentioned under Article 7 of the Legal Drafting Law does not mention *Pancasila* because formally it is included in the Constitution. Thus, it lies on the highest hierarchy of law in Indonesia. Substantially, the Legal Drafting Law regards *Pancasila* as the ultimate source of law. Both arguments (formal and substantial) still place *Pancasila* in the ultimate position within the Indonesian legal system. Consequently, all the laws in Indonesia must be in accordance with and may not contradict *Pancasila*.

This logic of hierarchy is influential for Indonesia's constitutional judges, including Jimly Asshiddiqie (2003–2008) and Maria Farida (2008–2018) in deciding judicial review cases. Therefore, understanding the hierarchy will make it easier to understand the following chapters of this thesis (see Chapters 4–6) on the discussion of the judicial review cases because the three case studies each concern legislation and the question of whether the law is constitutional.

[289] To some extent, this may involve Senate (DPD) when the law is related to local autonomy. See Constitutional Court Decision No 79/PUU-XII/ 2014. In its decision, the Court enlarged the authority of Senate (DPD) to actively become involved in the making of legislation/law with the Parliament (DPR) and president, as long as the proposed law relates to local autonomy, natural resources and DPD.
[290] *Emergency Law* or Peraturan Pemerintah Pengganti Undang-Undang (Perppu) is enacted solely by the president in an emergency situation. *Emergency Law* has to be delivered to the Parliament in the nearest agenda between the Parliament and the president. When Parliament disapproves the applicability of the emergency law, the law will no longer be in effect. If the Parliament approves the law, it will become (regular) law. See arts 1(4) and 52 of *Law No 12 2011 on Legal Drafting*.
[291] See arts 7(1) and (2) of the *Law No 12 2011 on Legal Drafting*.
[292] Art 8 of *Law No 12 2011 on Legal Drafting*.
[293] See explanation of art 7(2) of *Law No 12 2011 on Legal Drafting*.

3.2 Pancasila and the Seven Words

In this section of the chapter, I return to the original debates over the origins and the meaning of the *Pancasila*. I do this to unveil the religion-making process in the debate as well as to show that *Pancasila* was a product of unsettled political negotiation between the Nationalists and the Islamists resulting in an 'open interpretation' ideology (known as '*ideologi terbuka'* in Indonesian).[294] The danger of such open interpretation is that the interpretation of *Pancasila* can be driven by the regime or popular opinion that resulted in a narrowing down of the meaning of *Pancasila* over time in a way that has infringed on the rights of minorities.

Before discussing the content of the principles, I would like to draw attention to the drafting of *Pancasila*. I argue the making of *Pancasila* was problematic, mainly because of the political rivalry between the Nationalists and the Islamists to uphold their proposal on whether to adopt Islamic law.

The rivalry between nationalist and Islamist parties in Indonesia can be traced to the 1900s, when civil movements for independence started to rise to fight against the Dutch colonial government. *Budi Oetomo,* regarded as the first Indonesian organisation established in 1908, and *Partai Nasional Indonesia,* established in 1927, were among nationalist movements. Meanwhile, Sarekat Dagang Islam, which later changed into *Sarekat Islam*, was the first Islamist movement created in 1905, followed by *Masyumi* and other Islamist parties seeking to establish Islamic law in their image of Indonesia as an independent state.[295]

In the 1930s, Natsir, representing the Islamists and Soekarno, who represented the nationalists, argued about how their idea of Indonesia as an independent state will embrace Islam. While Soekarno promoted secularism, as he believed religious issues should be classified as private matters, Natsir, in opposition, argued that Islam should be recognised in the public sphere and

[294] Further discussion of *Pancasila* as an 'open ideology' can be observed in, for eg, Sudharomono, '*Pancasila* sebagai Ideologi Terbuka' (1995) *Jurnal Filsafat* 1, 1; Philip Eldridge, 'Human Rights and Democracy in Indonesia and Malaysia: Emerging Contexts and Discourse' (1996) 18(3) *Contemporary Southeast Asia* 298, 309–310.

[295] See Saifuddin Anshari, 'the Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia' (PhD Thesis, McGill University) 5. For more on Islamist activists' role during the revolution, see Lukman Hakiem, *Jejak Perjuangan Para Tokoh Muslim Mengawal NKRI* (Pustaka Al-Kautsar, 2018). For other writings to help understand the role of Islamic movements during the Indonesian revolution, see MC Ricklef, *Islamisation and Its Opponents in Java* (NUS Press, 2012); Anthony Reid, *To Nation by Revolution: Indonesia in the 20th Century* (NUS Press, 2011); Robert Hefner, *Civil Islam: Muslims and Democratization in Indonesia* (Princeton University Press, 2002).

statehood as it set the relation between humans. Hence, his idea of an independent state in Indonesia was a state in which Islamic law regulated the life of the nation.[296]

The debate between Islamists and nationalists went to a further level in 1940s when the Japanese empire took over the Indonesian territory under its colonisation.[297] However, this colonisation lasted for only a short period of three years. Knowing they would lose in World War II, Japan promised the independence of Indonesia in September 1944.[298] For the transition, the Japanese government created a team (*Dokuritsu Junbii Chosakai*/ BPUPKI) to prepare for Indonesian independence on 1 March 1945. Included in the team of 69 representatives from different social classes and status,[299] were the Indonesian movement figures such as Soekaro and Hatta,[300] who later became the first president and vice-president of Indonesia. They worked together in BPUPKI alongside other founding fathers to prepare a draft for the Constitution and other technicalities for the new state. The team then agreed to develop a state's fundamental norm, later named '*Pancasila*'. Despite the fact of having multicultural society, the appointed team, BPUPKI,[301] which created *Pancasila* was dominated by the Nationalists and the Islamists who had been debating on the aspiration to use Islamic law in their idea of Indonesia as an independent state.

The most important issue to be discussed by the team was to design the state ideology as the foundation of the newborn Indonesia. For this, both the nationalist and the Islamist side delivered their own conception for the ideology that they wanted to propose for Indonesia. The Islamist representatives in BPUPKI were led by Ki Bagoes Hadikoesoemo, Abdul Kahar Muzakkir, Abikusno Tjokrosujoso and A Wahid Hasjim, who argued for an Islamic state in Indonesia,[302] as they believed that religion and state should not be separated.[303] On

[296] See Subekti (n 72) 112–113.
[297] For more on this, see Harry J Benda, 'Indonesian Islam Under the Japanese Occupation, 1942–1945' (1955) 28(4) *Pacific Affairs* (1955) 350–62; MC Ricklefs, *Islamisation and Its Opponenets* (n 295).
[298] Nasution (n 72) 10; Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila* (Gramedia, 2011) 9.
[299] BPUPKI originally consisted of 63 people and later six more people were added. The Japanese government invited these representatives in the team: political activists, Islamists, bureaucrats, royals (local kingdoms), Indonesian–Chinese, Indonesian-Arabs and Indonesian-Dutch. Among the 69 members, two were females. This, according to Latif, fairly represented the sociopolitical diversity in Indonesia at the time. See Latif (n 298) 9–10.
[300] Ibid.
[301] See Saafroedin et al (n 76) xxvii; Latif (n 298) 9; Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002—II: Sendi-Sendi/ Fundamen Negara* (Internal Edition, 2008). Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi; Nasution (n 72); Valina Singka Subekti, 2008, Menyusun Konstitusi Transisi, Rajawali; Indrayana (n 76).
[302] Effendy (n 75) 92.
[303] Subekti (n 72) 115.

31 May 1945, Ki Bagoes Hadikoesoemo delivered his speech on behalf of the Islamist party. His claim was that religion (Islam) is the base of unity as it builds fair government and upholds justice, based on democracy and deliberation as well as religious freedom.[304] The Islamists were also proposing Islam to be the foundation of the state (Indonesia). Subsequently, the Islamists firmly proposed that sharia or Islamic law should be applied in Indonesia; that the Indonesian president must be Muslim; and that Islam will be the official religion of Indonesia.[305]

As a counter-opinion, the nationalists also delivered speeches before the meeting. There were three important speeches delivered in BPUPKI on the issue of state ideology from the nationalists' perspective helping them to conclude the agreement in BPUPKI: Yamin's speech on 29 May 1945; Soepomo's speech on 31 May 1945; and Soekarno's speech on 1 June 1945.[306] Yamin as the first speaker in the team promoted what he called '*negara kebangsaan yang berketuhanan*' (nation-state based on theism).[307] In his concept, Yamin introduced five ideas to be the base of Indonesia as a state: nationalism, humanism, theism, democracy, and social welfare.[308] Along with this conception, Yamin also proposed his draft of the Constitution containing his operational legal term from the above mentioned five principles: The One and Only God (*Ketuhanan Yang Maha Esa*), Unity-based Nationalism (*Kebangsaan Persatuan Indonesia*), Just and Civilized Humanism (*Rasa Kemanusiaan yang Adil dan Beradab*), Wisdom and Deliberation in Representative Democracy (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan*), and Social Justice (*Keadilan sosial bagi seluruh rakyat Indonesia*).[309]

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[304] Latif (n 298) 70. This argument of religious freedom under Islamic law may not be popular today because there are many contradictions in the practice of Islamic states/laws around the world, such as in death penalty laws for apostate in Iran and Saudi Arabia. Even in today's Indonesia, there is a special case for the province of Aceh, where Islamic law is used by the local government. Islamic women in Aceh must wear the hijab. See T Saiful, 'Gender Perspektif dalam Formalisasi Syariat Islam di Aceh' (Gender Perspective in Formalization of Islamic Law in Aceh) (2016) 18(2) *Kanun Jurnal Ilmu Hukum* 235, 244.
[305] Subekti (n 72) 115.
[306] Ibid 116; Nasution (n 72) 57.
[307] Subekti (n 72).
[308] Ibid. The Indonesian terms used by Yamin are: *Peri-Kebangsaan, Peri-Kemanusiaan, Peri-Ketuhanan, Peri-Kerakyatan*, and *Kesejahteraan Rakyat*. *Peri* is an old Indonesian word meaning 'idea'. *Kebangsaan* is an adjective from the noun *bangsa*, which means 'nation'. Therefore, *peri-kebangsaan* means 'nationalism'. *Kemanusiaan* is an adjective from the noun *manusia* (human); thus, *peri-kemanuasiaan* means 'humanism'. *Ketuhanan* is an adjective from *Tuhan* (God); thus, *peri-ketuhanan* means 'theism'. *Kerakyatan* is an adjective from the word *rakyat* (people within the state/citizen); thus, the contextual translation of *peri-kerakyatan* will be 'democracy'. *Kesejahteraan* is an adjective from *sejahtera* (welfare); thus, the contextual meaning of *kesejahteraan rakyat* is 'social welfare'.
[309] Subekti (n 72) 117.

Yamin's speech is remarkably similar to today's *Pancasila* although Soekarno is the one widely known as the creator of *Pancasila*. A.B. Kusuma and RWE Elson argue that there is controversy surrounding who should be credited as the original thinker behind *Pancasila*. The so-called 'De-Soekarnoization' was conducted by Soeharto's supporters (the later president of Indonesia after Soekarno), such as Nugroho Notosusanto, who was given a task to write a textbook on Indonesian history to be used across school education in Indonesia. In this 'New Order' (*Orde Baru*) era, it was promoted that Yamin was the one who originally conceptualised *Pancasila* before Soekarno, and that Soekarno just summarised what Yamin already said during the meeting on 29 May 1945.[310]

The second speaker in the meeting was Soepomo on 31 May 1945. He started his opinion by rejecting the idea of Islamic state in Indonesia and approving Hatta's position that religion must be separated from the state.[311] This is mainly because Indonesia consists of different religions. He thought that to prefer the majority's religion would discriminate against minority ones.[312] Soepomo said, 'To establish Islamic state in Indonesia means to not have a unity. The state will only embrace majority, Islam. There will be '*minderheden*' (Dutch term for minority), left out by the state.'[313] For Soepomo, the unity of Indonesia was more important. He argued for an 'integralist' state, that was designed to unite all the different social classes and statuses in Indonesia. In this model of the state, each of the groups in the society, whether they are majority or minority, would be protected and their differences would be honoured.[314] However, Soepomo's integralism has been criticised as a 'naïve notion of a romanticised union of state and people' by Tim Lindsey.[315] This is because state and the people, according to Lindsey, do not think and act as one.[316] He explains further that 'an obligation on citizens to 'uphold the government' in this model of state therefore quickly becomes the grant to the government of the right to repress them.'[317]

Soekarno delivered the third and final speech from the nationalists' side on 1 June 1945. This day marked the birthday of *Pancasila* as it was formally introduced as a term. Before arguing

[310] See AB Kusuma and RE Elson, 'A Note on the Source for the 1945 Constitutional Debates in Indonesia' (2011) 167(2.3) (2011) 196, 206.
[311] Subekti (n 72) 117.
[312] Nasution (n 72) 60.
[313] Ibid 60; Latif (n 298) 71.
[314] Subekti (n 72) 117.
[315] Tim Lindsey, 'Indonesia Constitutional Reform: Muddling Towards Democracy' (2002) 6 *Singapore Journal of International & Comparative Law* 244, 253.
[316] Ibid 254.
[317] Ibid.

for his idea of the state ideology, Soekarno set to clarify the definition of the foundation of state itself. He said, 'what we are being asked is, what in Dutch we call it '*philosofische grondslag'* of independent Indonesia. *philosofische grondslag* is a fundamental, philosophy, the deepest thought, soul, the deepest yearning to build an independent Indonesia.'[318]

After defining his idea of the philosophical foundation of the state, Soekarno continued his speech by proposing his five principles to be used as the philosophical foundation of Indonesia: Indonesian nationalism, internationalism or humanism, deliberation or democracy, social justice and theism.[319] Later in his speech he called these five principles '*Pancasila*':

> Gentlemen! I have proposed to you the foundations of the state. Five of them. Is it 'Panca Dharma'?[320] No! the name 'Panca Dharma' is not suitable here. Dharma means duty (obligation), while we are talking about foundation. I like symbolism. Numeric symbolism it is. Islam has five pillars. Each of our hand has five fingers. We have five senses. What else have five elements? [One audience member answered: Pandawa Lima].[321] The Pandawas are five people. Now the number of the principles: nationalism, internationalism, deliberation, welfarism, theism. Five it is. The name is not Panca Dharma. I want to name it, with a reference from my linguistic friend, as Panca Sila, meaning principle, or basis. With this basis, we build Indonesia as a state, forever, eternal.[322]

On theism, Soekarno emphasised,

> Theism! Not only our nation believes in God, but also each of the people (Indonesian) should believe in his own God. The Christians worship God based on the teaching of Jesus, Muslims worship God based on the teaching of Muhammad, Buddhists follows their own holy books. Still, let us believe in God. Thus, Indonesia is a state where each of its people is able to worship God in their own way.[323]

He continued, 'All the people should believe in God in a civilised way',[324] with no 'religious selfishness'. 'Indonesia is supposed to be a theistic state! Let us practice religions, be it Islam

[318] Nasution (n 72) 60.
[319] Ibid; Subekti (n 72) 118.
[320] *Panca* is an old Indonesian word meaning 'five'; *dharma* means duty or obligation.
[321] *Pandawa Lima* is five siblings in Indonesian folktale.
[322] Subekti (n 72) 118.
[323] Nasution (n 72) 61.
[324] His Indonesian term is *ber-Tuhan secara kebudayaan*, which literally means 'Believe in God in a cultural way'. However, the term *kebudayaan* in this context is more suitable to be translated as 'civilised' as he explained how each of the people should respect each other.

or Christianity, in a civilised way. What does a civilised way mean? It means respecting one another.'[325]

This speech was phenomenal and was known as 'The birth of *Pancasila*'. The applause from the audience was perceived as acceptance of Soekarno's idea as well as the end of the debate between Islamists and nationalists in BPUPKI.[326] When the members of BPUPKI voted for the state ideology, the result was 15 people out of 60 members of BPUPKI voted in favour of Islam as the foundation of the state while the other 45 members chose for nationalism.[327]

After the vote, the members of BPUPKI agreed to create a small team consisting Islamists representatives, nationalists' representatives and Christian representative. The team was led by Soekarno, to create the preamble of the Constitution named Jakarta Charter (*Piagam Jakarta*). For this regard, BPUPKI created an internal team of eight members to gather ideas from all the other members of BPUPKI to draft the preamble of the proposed constitution. However, Soekarno as the head of the team thought it was not proportional to have only two representatives of Islam in the team. He then revised the team by adding more Islamist representatives. The new team named *Panitia Sembilan* (Team Nine) consisted of five representatives of the nationalist side (Soekarno, Hatta, Yamin, Maramis, and Soebardjo) and four representatives of the Islamist side (Wachid Hasjim, Kahar Moezakkir, Agoes Salim and Abikoesno Tjokrosoejoso).[328] The idea to add more Islamist representatives in the team was to reach a better agreement between the Nationalists and the Islamists[329]. The meeting of Team Nine was held on 22 June 1945.[330] They debated whether to adopt this proposal:

> …. which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in God, with the obligation to observe Islamic law for adherents of Islam, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, so as to realize social justice for all the people of Indonesia.[331]

[325] Nasution (n 72) 61.
[326] Ibid.
[327] See Latif (n 298) 70.
[328] See Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002—II: Sendi-Sendi/ Fundamen Negara* (Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, internal ed, 2008) 8.
[329] See Saafroedin et al (n 76) xxxv.
[330] Djoko Utomo, 'Arsip Sebagai Simpul Pemersatu Bangsa' (2012) 7 *Jurnal Kearsipan* 3, 13.
[331] Ibid.

The most controversial words, widely known in Indonesia as '*tujuh kata'* (seven words), are: 'with the obligation to observe Islamic law for Muslims' (*dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya*). The mention of Islam in the Constitution can be viewed as a preference to Islam in Indonesia. Before they reach agreement on the seven words, an unexpected war-related event paused their discussion. On 9 and 11 August 1945, the United States bombed Hiroshima and Nagasaki, marking Japan's loss of World War II. This bombing changed the whole circumstances of the debate between the Islamists and the nationalists.[332] Occupied by their own domestic business, the Japanese army and government in Indonesia left a vacuum of power in Indonesia. Indonesia was not given independence yet as promised by the Japanese. Facing the uncertainty from the Japanese government, the Nationalists and the Islamists shifted their interest from debating Islamic law to declaring independence.

On 17 August 1945, Soekarno and Hatta declared Indonesian independence and soon after, the premature draft of the Constitution with its unsettled discussion on Islamic law was set to be the Indonesia Constitution. At that time, the current version of the Preamble of the Constitution was the version 22 June with the controversial seven words still attached to it. On 18 August 1945, the team realised it would be discriminatory to mention Islam in the Constitution.[333] Hatta, the then-vice-president, proposed to erase the seven words to maintain the unity of the newly established state.[334] He was approached by the Christian parties from the eastern part of Indonesia, claiming they will separate themselves from Indonesia if Islamic preferences continued to appear in the Constitution.[335] The Islamists agreed to remove the Islamic provisions for two reasons: (1) for the sake of the unitary republic that was just one day old; and (2) they were assured that the Constitution will only be temporary as Soekarno (the President) said.[336] Thus, there would be more time to negotiate the provisions as the new Parliament would create the comprehensive constitution in the near future.[337] The agreement is known as a 'gentlemen's agreement' in Indonesian history as the Islamists and nationalists compromised to end their debate.[338]

[332] See Saafroedin et al (n 76) xlii.
[333] Mujar Ibnu Syarif (2016) "Spirit Piagam Jakarta Dalam Undang-Undang Dasar 1945" (2016) 4(1) *Jurnal Cita Hukum, Fakultas Syariah dan Hukum UIN Jakarta* 15–32.
[334] See Saafroedin et al (n 76) 533; Subekti (n 72).
[335] Subekti (n 72) 122–123; Nasution (n 72) 62.
[336] Subekti (n 72).
[337] Ibid.
[338] Ibid 119; Latif (n 298) 24.

The result of the work by the nine-member team was the adoption of *Pancasila* in the last several clauses of the preamble to the Constitution ('with people's sovereignty …').

> Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in a form of the State of the Republic of Indonesia, with people's sovereignty based on the belief in One and Only God, Just and Civilized Humanity, the Unity of Indonesia and a Democratic Life guided by wisdom in Deliberation/ Representation, and by realizing Social Justice for all the people of Indonesia.[339]

Since then, *Pancasila* becomes state ideology as well as the ideology of law in Indonesia.[340] As sacred as it sounds, *Pancasila* always become the ultimate source of laws in Indonesia. This means, all the laws in Indonesia may not contradict *Pancasila*. Today, the first principle of *Pancasila*, 'The One and Only God' becomes filter for religions and religious activities to be allowed to exist in Indonesia. Moreover, this principle also set a standard for religiosity in Indonesia: that Indonesia is a religious state, instead of secular state.[341] Simon Butt and Tim Lindsey discuss this matter in their book, *Indonesian Law*.[342] I slightly disagree with the mention of Indonesia as a religious state. Although it can be understood as a state that uses a lot of religious values within its legal system, I would not call it a 'religious state'. Instead, I regard Indonesia more as a 'politically religious driven state'. This is because the state as an institution may not be religious. The people and elites holding the regime may be religious and their religious values drive the state's law and policy. It can be problematic because one religious view endorsed by the regime or the elites may disregard and discriminate against other religious views. This is the case of the controversial seven words under the Jakarta Charter.

The original old-Indonesian version read as follows: *Bahwa kami berkejakinan bahwa Piagam Jakarta tertanggal 22 Djuni 1945 mendjiwai Undang-Undang-Dasar 1945 dan adalah*

[339] *Constitution of the Republic of Indonesia* (n 8).
[340] Notonagoro, *Pancasila* (n 56).
[341] Note that the wording religious state should not be read as Islamic state.
[342] Butt and Lindsey (n 5) 10–11 when discussing the *Jakarta Charter*.

merupakan suatu rangkaian-kesatuan dengan Konstitusi tersebut.[343] These seven words were agreed by the drafter of the Constitution on 22 June 1945. However, the seven words were removed from the official version of the Constitution declared after the independence dated 18 August 1945. This happened after Vice-President Hatta proposed to delete the controversial words to avoid separatism from the Christian groups living on the eastern parts of Indonesia. The team agreed to remove the seven words because President Soekarno affirmed that the current priority is the establishment of the state, while the debate between the Islamists and nationalists could be continued later after the state being established.[344]

Various attempts to renegotiate the Islamist interest over the Constitution were delayed by the war against the Dutch until Indonesia reclaimed its position as a unitarian state in 1950 and the first election in 1955 to vote for *Konstituante* (elected body dedicated to draft a new constitution). Konstituante's work to draft the Constitution was not smooth as the heated debate between the Islamists and the nationalists continued.[345] This deadlock was shut down by Soekarno using his Presidential Decree dated 5 July 1959. While Butt and Lindsey say in their book that after the deadlock in *Konstituante* work in 1959, Soekarno was reinstating the 1945 Constitution minus the seven words, the original wording of the Presidential Decree by Soekarno to reinstate the 1945 Constitution explicitly contains the phrase, 'That we are certain the Jakarta Charter dated 22nd June 1945 inspires the 1945 Constitution and is part of the Constitution (continuum)'. One month after the 1959 Decree, Soekarno in his official presidential speech 17 August 1959 titled '*Penemuan Kembali Revolusi Kita'* (Rediscovery of Our Revolution) addressed his Decree and the reason behind his decision to dissolve *Konstituante* and reinstal the 1945 Constitution. However, he did not explain the meaning of the statement 'that Jakarta Charter version 22 June (which includes the controversial seven words) inspires the 1945 Constitution and is part of the Constitution (continuum)'.[346] This leaves an ambiguity of the status of the seven words. Notonagoro, a prominent expert on *Pancasila*, in his book, *Pancasila Secara Ilmiah Populer* (*Pancasila* as a Popular Science) claims the Presidential Decree of 1959 reinstalls the obligation to practice Islamic law (Syariah) to Muslim.[347]

[343] See Dekrit Presiden 5 Juli 1959 [Presidential Decree 5 July 1959] (Indonesia).
[344] See Subekti (n 72) 122.
[345] See Nasution (n 72).
[346] See Soekarno, *Dibawah Bendera Revolusi II* (Panitya Penerbit, 2nd ed, 1965) 351–90.
[347] See Notonagoro, *Pancasila* (n 56) 70.

For decades under Soeharto's regime, there was no further discussion of the seven words. This changed after the 1998 *reformasi* because of demands to amend the Constitution. During the constitutional debates in the amendment, Zain Badjeber, a member of Parliament from Islamist party, PPP (*Partai Persatuan Pembangunan),* brought back this discussion in a parliamentary meeting to discuss religious issues during the amendment of the Constitution, dated 14 June 2000. Badjeber stated:

> We all know that the 1945 Constitution was meant to be temporary and we were promised the discussion over Islam in the Constitution will continue when the Parliament works on the Constitution. On 5 July 1959 when President Soekarno declare the Presidential Decree 1959, it was stated that 'we believe the Jakarta Charter inspires the Constitution.[348]

Bajeber's statement during the amendment meeting was meant to reopen the discussion over Islam using the 1959 Presidential Decree as the justification. Badjeber's argument to bring back the seven words during constitutional amendment in 2000 indicates that the Nationalists and the Islamists were not settled yet on the conception of religion (Islam) and the state in Indonesia. With Article 29 'The State is based on The One and Only God' remained unchanged during the amendment, the remaining question is whether it needs to be read as 'The State is based on The One and Only God with the obligation to perform Islamic Law for Muslims', as suggested by Badjeber, referring to the 1959 Presidential Decree. Such unsettled position makes the Indonesian legal system fragile and allows it to be manipulated to give preference to Islam and disregard the minority's interest by arguing that 'The One and Only God' (which also is the first principle in *Pancasila*) reflects Indonesia as a whole, although in fact, it was referring to the Islamic values only.

With a clear segregation between the nationalists and the Islamists in BPUPKI's team, the discussion in the team was heavily on the Islamists' interest, such as the proposal to adopt Islamic law in Indonesia. The nationalist side tried to balance the Islamist's demand by negotiating a middle way. As a result, the Constitution and its preamble contains Islamic values, such as monotheism, in a subtle way under the clause, 'The One and Only God'. For the weighty influence of Islam within the creation of the state, it can be explained that the role

[348] See Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002—VIII: Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama* (Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, internal ed, 2008) 269.

of Islamist parties during the independence movement was substantial.[349] However, there were also the interests of non-Islamist and non-nationalist parties that needed to be accommodated as well. On the issue of monotheism, for example, there was an ignorance that other believers might adopt different conceptions of deity, such as polytheism or atheism. Such specific non-Islamic thought was never discussed in the team while they were busy debating whether religious obligation (Islamic law) be put in the Constitution.

In conclusion, *Pancasila* as the state's fundamental norm and the ultimate source of law in Indonesia was a product of political negotiation between the Islamists and the nationalists during the making of the preamble of the Constitution in 1945. The first principle, 'The One and Only God' was a result of compromise between the two parties after the Islamists proposed to adopt Islamic law in the Constitution while the nationalists tried to reduce the demand by prioritising the establishment of the state.

3.3 The Constitutional Debate on Islam and Religious Freedom Under the Constitutional Articles

Discussion on the Constitution in this chapter focuses on the articles on religious freedom. At the constitutional level, heated debate between the two conflicting parties, nationalists and Islamists, was never settled. In 1945 they decided to hold the debate by prioritising the establishment of the state. In 1959, their debate was interrupted after 4 years with an ambiguous Presidential Decree. In 1999–2002 constitutional amendment, they decided to not touch the chapter of religion in the Constitution. The unsettled discussions of religious matters in the Constitution results in a dynamic interpretation of the constitutional protection of religious freedom in Indonesia.

[349] Study on the role of Islamist parties in Indonesia during the revolution/pre-Independence era can be read in Anthony Reid, *To Nation by Revolution: Indonesia in the 20th Century* (NUS Press, 2011), especially Chapter 1 and in MC Ricklef, *A History of Modern Indonesia since C. 1300* (2nd ed, Standford University Press, 1993) and *Islamisation and Its Opponents in Java* (n 285). The first book does not specifically discuss Islam in Indonesia as a dedicated topic. However, we can observe the discourse involving Islamists—for example in 'Revolution, 1945–1950', in which he explained the bitter struggle between competing social forces in Indonesia. His later book, although focused on Java, elaborates on Islam. His third chapter, 'War and Revolution, 1942–9: The Hardening of Boundaries' portrays a clear process of politicisation of Islamic leaders (see eg, 65), although some of the Islam-affiliated movements have been long established since the beginning of 1900s, such as Sarekat Islam.

After the long discussion on the preamble of the Constitution in 1945, the drafters of the Constitution[350] continued to work on the articles of the Constitution. Islamic values were still prominent in the debate, particularly on two issues: that the president of Indonesia must be Muslim; and the obligation to practice Islamic law (sharia) for Muslims to be incorporated in the constitutional articles (Article 6 on Presidential Candidate and Article 29(1) on Religion). The team, following their agreement on the preamble of the Constitution, agreed to also remove these two issues from the articles of the Constitution.

The first proposal, that the Indonesian president must be Muslim, was revoked from the draft of Article 6 of the Constitution regarding requirement for presidency. In the meeting, Hatta concluded the meeting by saying,

> 'President is a native Indonesian. (The phrase) Muslim is deleted. (Because) the second option (that) says 'the president of the republic is Muslim' is offensive and useless. With the fact that 95% Indonesian population are Muslim, it is most likely that Muslim will be the president. By erasing the word Muslim in this article, all of the stipulations in the Constitution can be accepted by all regions across the country including those having non-Muslim population. This agreement (to delete the word Muslim) also supported by other groups, thus it eases our work for now.'[351]

After being agreed, Article 6 of the 1945 Constitution reads as follows:

1. President is a native Indonesian
2. President and Vice-President elected by Majelis Permusyawaratan Rakyat with the majority vote.

The second issue on the obligation to practice Islamic law for Muslims was proposed to be written in a dedicated chapter for religion in the Constitution (Chapter XI). This chapter is the operational legal norm from the first principle of *Pancasila*, 'The One and Only God'. The proposal was to have an article stating, 'The state shall be based on the One and Only God,

[350] On 7 August 2020, BPUPKI changed to PPKI. See Saafroedin et al (n 76) xliii. The changing of the team was to accommodate more representatives from across Indonesia. While BPUPKI had more members, most were from Java. PPKI with fewer members to represent other territories. See eg, xxviii, xliii.

[351] See Saafroedin et al (n 76) 533.

with the obligation to practice Islamic law to Muslim'. Using the agreement during the discussion on the preamble of the Constitution[352], again Hatta cut off the article in his speech,

> We will also change Article 29. It relates to the preamble of the Constitution. Article 29 1 is now written 'The State based on the One and Only God.' The rest of the proposal, 'with the obligation to practice Islamic law to Muslim' is deleted. This is an important change that will unite the nation.[353]

Although the agreement of the team reduced the tension between the Nationalists and the Islamists, Article 29(1) marks an important statement of the relation between state and religion in Indonesia. The wording of the article, 'The State based on the One and Only God' is the state's endorsement of monotheism. This article set a law for the state. It obliges the state to embrace a particular religious belief: monotheism. To be more precise, this constitutional article closes the door for secularism[354] in Indonesia because the state has brought the idea of religion into the public law. However, the state also rejected the proposal to adopt Islamic law, thus Indonesia is not an Islamic state.[355] Some academics claim Indonesia as a religious state.[356] This claim is substantially true, given also the fact that various religious values are incorporated within the Indonesian legal system.[357] However, it is also problematic because claiming the state to be religious may give the impression that the state must embrace a certain or particular idea of religion, Islam in this case. As I mentioned before, I would rather say that Indonesia is a politically religious driven state. This is because the 'religiously driven laws' were politically constructed and negotiated. It was not natural, and it was not meant by the original idea of *Pancasila* set by Soekarno.

Soekarno's very first idea was even to differentiate between religious state and theistic state. His idea of the first principle in *Pancasila* was about a theistic state, not a religious state, which refers to a certain religion. Soekarno stated, 'All the people should believe in God in a civilised way with no religious selfishness. Indonesia is supposed to be a theistic state. Let us practice religions, be it Islam or Christian, in a civilised way. What does a civilised way mean? It means

[352] Subekti (n 72) 112
[353] Ibid.
[354] See discussion on religious freedom in Chapter 2 when I discuss the notion of state neutrality in secular states.
[355] See Butt and Lindsey (n 5) 11.
[356] See eg, ibid; Notonagoro, *Pancasila* (n 56) 72.
[357] See eg on *Marriage Law*, in which the state endorses religiosity for a legal marriage in Indonesia. The wording 'One and only God' was also proposed by the Islamist based on Islamic teaching of tawhid (monotheism).

respecting one another.'[358] Therefore, according to Soekarno's idea, Indonesia is a monotheistic state, instead of a religious state. The implication for this, are: (1) Indonesia is not a secular state; and (2) the state does not endorse any religion but the belief in One and Only God. Therefore, the controversial seven words endorsing Islamic law is not relevant in Soekarno's idea of *Pancasila*. Although theoretically I disagree with Soekarno's idea of a theistic state because it can have the same discriminatory consequences as a religious state, the concept of theistic state is somewhat better than religious state because it does not endorse a certain religious value.

Article 29 (2) of the Constitution approves Soekarno's speech on the importance of embracing toleration towards different believers. The state gives a constitutional guarantee for everyone to be religious in their own way. Even without a bill of rights in the Constitution, the drafter of the Constitution agreed to include this clause of religious freedom in 1945. This article remains untouched until today and becomes a solid foundation for religious freedom in Indonesia.

However, the wording of the article creates ambiguity in term of what right is guaranteed by the state. In interpreting this article, the Constitutional Court stated that the Indonesia Constitution does not give room for campaign on freedom to not adopt religion and freedom to promote anti-religion.[359] The difficulty is that positively, the Constitution gives the right to people to practise their religion. It does not say the right of people to not practise religion. However, in legal terms, it does not mean that the Constitution prohibits it. For a comparative purpose, in the United States for example, the religious freedom clause offers protection for both adopting religion or rejecting it. The United States Supreme Court in the case of *Torcaso v Watkins* stated that the Constitution (of The United States) attaches equal value to belief and disbelief, and that the important thing is the choice, not the outcome.[360]

Despite the ambiguity of the religious freedom clause and the state's endorsement of monotheism in the Constitution, the 1945 Constitution was enacted on 18 August 1945 with the promise of the president to review the Constitution once the state was in a better situation to do that. The priority during the era was to maintain the independence of the newly established state. During the first decade of the state, recurring war with the Dutch endangered

[358] See Nasution (n 72) 61.
[359] Constitutional Court of Indonesia, Court Decision Number 140/PUU-VII/2009, 275 [3.34.11].
[360] John H Garvey 1996, "An Anti-Liberal Argument for Religious Freedom" (1996) 7 *Journal of Contemporary Legal Issues* 276.

the establishment of the state. It was not until 1955 that Indonesia was able to have its first election to establish *Konstituante,*[361] a dedicated parliamentary body to create a new constitution promised by Soekarno.

3.3.1 The Work of *Konstituante* and the 1959 Presidential Decree

Elected in 1955, *Konstituante*, Indonesia's first elected parliamentary body worked to create a new draft of the Constitution. A similar debate to what happened during the work of BPUPKI in 1945 re-emerged. The Islamists and the nationalists continued their negotiation on the issue of Islam and the state.[362] The difference was a third party joining the debate in *Konstituante:* the socialists (socio-economic).[363] The socialists proposed socialism as the foundation of the state, using Article 33 of the 1945 Constitution as their main idea. The article reads as follows:

1. The economy shall be structured as a joint enterprise by virtue of the principles of kinship (*asas kekeluargaan*).
2. Production sectors important for the state and vital for the livelihood of the people at large shall be controlled by the state.
3. The land and waters and the natural wealth contained in it shall be controlled by the state and utilised for the optimal welfare of the people.[364]

The socialist members of Parliament only had a small number of representatives in the *Konstituante.* They only had 10 representatives out of 514 members of the Parliament from the elected political parties. The Islamists had 230 seats, while the nationalists had 274.[365] The government invited 30 representatives of minorities to join *Konstituante*. They were 12 Indonesian Chinese representatives, 12 Indonesian-European representatives, and 6 representatives from Irian Jaya (today's province of Papua), which was still under the Dutch colony. All these additional representatives joined the nationalists (*Pancasila*) block in *Konstituante*.[366]

[361] See Nasution (n 72) 28.
[362] Ibid 29.
[363] Ibid 32.
[364] *Constitution of the Republic of Indonesia* (n 8). The one written in this chapter is the old version, before the amendment. In the manuscript by the Constitutional Court, it can be identified as the articles without a start mark at the end of the sentence. The start mark itself is a code of the amendment period (eg, an article with two stars marked at the end of its sentence means the article was the product of the second amendment in 2000).
[365] Nasution (n 72) 32–3.
[366] Ibid 34.

Although the nationalists had the most seats in *Konstituante,* they needed at least 2/3 support (360 seats) to win a vote. Not a single block was able to consolidate this number. Thus, until 1959, more than 3 years after its establishment, *Konstituante* failed to create the new promised Constitution. Like the 1945 debate, the failure of *Konstituante* was the result of a deadlock on the issue of religion and state ideology.[367]

Soekarno as the president at the time did not want to wait any longer for *Konstituante* to finish the work of amending the Constitution. Because of national crisis, symbolic significance of 1945 Constitution, and the need of a stronger government,[368] Soekarno established a Presidential Decree in 1959 to dissolve *Konstituante* and declared Indonesia to use the original 1945 Constitution along with a statement that Jakarta Charter is included in the Constitution.[369]

As to the concern of this thesis, the important thing to be noticed from the Decree is the statement from Soekarno that 'the Jakarta Charter inspired the 1945 Constitution and is part of the chain of unity with the aforementioned Constitution'.[370] It gives a significant difference in the reading of the Decree: that Jakarta Charter, once edited by Team Nine in BPUPKI, was reintroduced.

The question is, which version is implied by Soekarno's 1959 Decree? The original Jakarta Charter containing the seven controversial words, 'with the obligation to observe Islamic law for Muslim' (*dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya*), or the one without the seven words after the gentlemen's agreement? This remains unsettled today. While some other parties decided to not talk about what Soekarno meant by attaching the Jakarta Charter to the Constitution, some experts such as Notonagoro and AM Fatwa[371] refer to the original version with the seven words attached.

Notonagoro explains that with the 1959 Presidential Decree, the first principle of *Pancasila* 'One and Only God' is unchanged in its wording but the meaning of it should be given additional interpretation and should be read as follows: 'Conformity with the essence of One

[367] Ibid 41; Subekti (n 72) 124.
[368] Nasution (n 72) 46.
[369] See Soekarno (n 346) 359.
[370] Ibid.
[371] Discussion on Fatwa's opinion will be assessed further in this chapter during discussion of the amendment of the Constitution in 2000.

and Only God, with the obligation to practice Islamic law (shariah) for Muslim on the basis of just and civilized humanity.'[372]

According to Notonagoro, the statement was not meant to require all Indonesians to follow Islamic law. It will only bind Muslims in Indonesia. It may still be read as a violation of religious freedom (thus, a violation of Article 29 (2) of the Constitution) because it requires Indonesian Muslims to observe sharia. The *Dewan Pertimbangan Agung* (Supreme Consultative Council) explained that the realisation of Jakarta Charter will not reduce the meaning of Article 29 (2) of the Constitution.[373] This implies that Muslims would not be forced to follow sharia. Yet although it is a right for anyone to choose religion, once a person chose to be Muslim, he is bound by the Islamic law and the state (Indonesia) obliges him to follow Islamic law. Problems occur when a Muslim follows a different interpretation of Islamic law compared with the state's interpretation of it.

The reintroduction of Jakarta Charter in Presidential Decree 1959 remains ambiguous on the issue of Islamic law in Indonesia. In addition, the 1960s chaotic situation created another problem. MC Ricklefs, a prominent expert on the history of Indonesia asserted, 'Down to the mid-1960s religious, social, cultural and political polarization gravely threatened social harmony, leading in the end to the horrific slaughters of 1965–6 that ushered in Soeharto's regime.'[374] This led to the enactment of the Indonesian Blasphemy Law that will be discussed further below in the next chapter. Meanwhile, the 1945 Constitution was used until 1999 when the Constitution was comprehensively amended.

3.3.2 1999–2002 constitutional amendment

In 1998, Soeharto resigned from his position as the Indonesian president after 32 years. Habibi, the then-vice-president, took over the position as the Indonesian president[375] and scheduled an election to form a new government.[376] The newly elected Parliament decided to amend the Constitution instead of creating a new one.[377] The Parliament decided to amend the existing Constitution, rather than draft a new constitution, because drafting a new constitution would have given wider opportunities for the Islamist political parties. By simply amending the

[372] Notonagoro, *Pancasila* (n 56).
[373] Ibid 68–9.
[374] MC Ricklefs, *Islamisation and Its Opponents* (n 295) 259.
[375] Indrayana (n 76) 106.
[376] Ibid 108.
[377] Ibid 121.

existing Constitution, PDIP, as the largest political party based on *Pancasila* at the time, felt that it would be easier to defend *Pancasila* as the basis of the state and reject any claims to make Islam the basis of the state.[378] With the new Parliament's agreement to not amend the preamble of the Constitution, the Islamists demand to re-talk about Islam as the foundation of the state was declined.[379]

The amendment of the Constitution took 4 years from 1999–2002,[380] with each year dedicated to discussing certain issue in the Constitution. It was a total rewrite of the 1945 Constitution.[381] In 1999, the first amendment concerned the issue of limitation of power of the government;[382] the second amendment in 2000 focused on local autonomy and human rights among other things;[383] the third amendment in 2001 continued the discussion on limitation of power and redefining the presidential system;[384] the fourth amendment in 2002 continued the discussion on election,[385]economy,[386] and amendment provision among other things.[387]

Due to the focus of this thesis, I will only focus on the result of the second amendment regarding human rights. It was a great achievement to incorporate human rights into the Constitution, moreover, in the form of a new dedicated chapter consists of 10 new articles (Article 28A to 28J). Although Chapter XI on Religion was not amended, Chapter XA on Human Rights incorporates more ideas on religious freedom. There are three new dedicated constitutional articles in regard to religious freedom: Articles 28 E(1), 28 E(2) and 28 I(1).

These numerous constitutional articles protect religious freedom in the sense of: the freedom to believe and express thought according to one's conscience (Article 28E (2)); the freedom to choose and practice religion (Article 28 E (1)); and most importantly, a constitutional statement that the right to hold religion is an absolute right (Article 28 I).

However, there is a rather tricky article within the Human Rights Chapter in the Constitution, that is Article 28 J (2). The article reads:

[378] Ibid.
[379] Ibid 124.
[380] Ibid 245.
[381] Ibid 145.
[382] Ibid 130.
[383] Ibid 160.
[384] Ibid 198.
[385] Ibid 232.
[386] Ibid 234, 235.
[387] Ibid 236.

> In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for moralities, religious values, security, and public order in a democratic society.[388]

The Constitutional Court in interpreting human rights clauses in the Constitution stated that Article 28 J(2) limits all rights stated in the previous constitutional articles. This is the case for religious freedom. The Court stated:

> In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedom of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.[389]

I would argue against the Constitutional Court in this regard, especially for absolute rights stated under Article 28 I(1), including the right to hold religion. The Constitutional Court argued that Article 28 J(2) is *lex specialis* to other articles of human rights in the Constitution because of its position as the last article in the human rights chapter of the Constitution.[390] I disagree with the Constitutional Court's view, based on the reason that the articles are not contradictory, and that the rights referred to in Article 28 I(1) and 28 J(2) are different.

First and foremost, the articles in the human rights chapter of the Constitution were made in the same amendment process. There is no possibility that the creator of the articles would make two conflicting articles. If they would limit the 'right of religion' (the right to hold a religion) or the right to life, they will not put these rights in Article 28 I or simply would not create Article 28 I(1). Article 28 I(1) and 28 J(2) regulate different matters and they are not in contradiction. Article 28 I states the absolute rights in Indonesia that should not be limited, including the right of religion/ the right to hold a religion. Article 28 J(2) makes provision for limiting the freedom to manifest one's religion These are not the same thing. For example, the right of religion/ the right to hold a religion covers internal belief in the teaching of a religion, while the external manifestation is conduct. Someone may be prohibited to pray in the middle

[388] Ibid.
[389] Constitutional Court of Indonesia, Court Decision Number 140/PUU-VII/2009, 277 [3.34.15].
[390] See Constitutional Court of Indonesia, Court Decision Number 2-3/PUU/2007, 412.

of the road as it limits his manifestation of religious freedom, but his religious freedom is not violated. He still holds his belief and can pray somewhere else. But, if someone is prohibited to believe, then his right of religion/ right to hold a religion has been infringed, which is impermissible.

3.4 The Approach of the Constitutional Court to Religious Freedom

The development of religious freedom in the Indonesian Constitution does not stop in the wording of the constitutional articles. The third constitutional amendment in 2001 authorises the establishment of the Indonesian Constitutional Court. According to Article 24 C of the Indonesia Constitution, which was added during the third amendment in 2001, the Constitutional Court is given authority to conduct constitutional review of law (*undang-undang*);[391] resolving dispute over the competence of state institutions; dissolving political party; *forum previlegiatum* for impeachment;[392] and resolving electoral disputes. From 2003 to January 2020, the Court has made 1,296 decisions from 2025 judicial review applications, while 664 remaining cases are still in the hearing process.[393] Judicial review has the highest number of cases compared with the Court's other authorities such as electoral dispute[394] and dispute over state institutions' competence.[395] Meanwhile, no impeachment case has yet been heard by the Court although it was broadly claimed that President Wahid's impeachment was the primary reason to establish Constitutional Court.[396]

Most of the applications for constitutional review/ judicial review before the Constitutional Court are related to human rights articles in the Constitution. However, the proportionality test seems to be unpopular for the Indonesian Constitutional Court in settling judicial review cases. The Constitutional judges have not yet explicitly promoted this concept nor expressing it in their decisions. Instead of using the proportionality test and balancing rights in examining judicial review, The Court generally examines the law in question in a more formal way by looking at conflicting norms between the reviewed law and Constitutional article/s. This is

[391] The Constitutional Court in this regard receives application to review the law (*undang-undang*) in light of the Constitution.
[392] In the process of impeaching the president/vice, the Constitutional Court will examine the political statement of impeachment by the Parliament (DPR), giving legal consideration before the full impeachment hearing proceeds with the Parliament and senate (MPR).
[393] https://mkri.id/index.php?page=web.RekapPUU
[394] The Court deliberated upon 657 electoral disputes in 2014; 11 in 2019; and 251 in 2020, bringing the total number to 919 cases of electoral dispute. See https://mkri.id/index.php?page=web.RekapPHPU&menu=4
[395] Until January 2020, the Court has settled 26 cases of state institutions' competence disputes from 37 applications. See https://mkri.id/index.php?page=web.RekapSKLN&menu=4
[396] See Butt (n 58) 11, 15–16.

based on the formal absolute-competence of the Constitutional Court mentioned as its authority under Article 24 C of the Indonesian Constitution. Further, the Court emphasises on the lost or potential lost claimed by the applicant caused by the law. This means, the Court uses a single lens to analyse the Constitutional article/s claimed to be violated (or potentially violated) by the law in review.

This is because, for the application to be assessed by the Court, the applicant has to explain his constitutional right authority impaired by the reviewed law.[397] Because the Indonesia Constitution explicitly mention religious freedom under its human rights chapter, along with the existing article 29 (2) on religious freedom, a number of cases in relation to religious freedom have been lodged to the Court. This thesis will examine three laws which have been reviewed by the Court in relation to religious freedom: The Blasphemy Law, Marriage Law and Civil Administrative Law.

The Blasphemy law has been reviewed by the Court multiple times. The Constitutional Court case-tracking page mentions 48 decisions of judicial review related to the Blasphemy Law although not all of them directly reviewed the Blasphemy Law.[398] Among these numbers, Chapter 4 of this thesis will emphasise three of the most prominent cases in regard to Blasphemy Law. Despite the large number of judicial review cases, the Constitutional Court still upholds the constitutionality of Blasphemy Law until today. No application for judicial review of the Blasphemy Law has ever been successful. The latest decision of Blasphemy Law judicial review was made on 13 March 2019 which was declared inadmissible by the Court.[399] In its later decision, the Court refers to its first decision on Blasphemy Law (Case No 140/PUU-VII/2009) in emphasising the need for Blasphemy Law in Indonesia although the Court recognises that the law is far from perfect.[400]

The Marriage Law has also been judicially reviewed many times before the Constitutional Court. Among various issues that emerged during the judicial review of the Marriage Law, I will focus on the issue of polygamous marriage, children born out of wedlock, and interfaith marriage, which will be discussed in Chapter 5 of this thesis. I chose these three topics in

[397] Pasal 51 ayat (1) Undang-Undang No 24 Tahun 2003 tentang Mahkamah Konstitusi [art 51(1) of *Law No 24 2003 on Constitutional Court*] (Indonesia).
[398] https://search.mkri.id/?q=1%2FPNPS%2F1965%20penodaan%20agama
[399] Putusan Mahkamah Konstitusi No 5/PUU-XVII/2019 [Constitutional Court Decision No 5/PUU-XVII/2019] (Indonesia) 13 March 2019.
[400] Mahkamah Konstitusi Republik Indonesia [The Indonesia Constitutional Court No 84/PUU-X/2012] 143

relation to the Marriage Law judicial review cases to understand the Court's conception of religious freedom in the case of marriage (private matter) of citizen in Indonesia. Religion plays an important role in the private life of the citizens in Indonesia and some other religious countries. However, with its dominant political pressure, the Islamist parties in Indonesia determine the Marriage Law which to some extent reduces the exercise of religious freedom in Indonesia. Moreover, as I will show in Section 5.2.3 of this thesis, religious values are also used to limit the right to marriage in Indonesia. The Constitutional Court in its decision regarding 2014 interfaith marriage upholds this practice of using religious values to limit the private right of a citizen to marriage.

The third law to be examined in this thesis is the Civil Administrative Law. The law also has been reviewed multiple times, but I will only focus on one particular case, that is Case No 97/PUU-XIV/2016, because this case specifically addresses the issue of religious freedom in Indonesia, while the other cases of judicial review of the law do not address the issue of religious freedom. The sixth chapter of this thesis will show how the Constitutional Court addresses the issue of religious freedom in Indonesia's administrative law. Interestingly, the Court in its decision referred to Article 28 I (1) of the Indonesia Constitution and stated that that the right to hold a religion is among the absolute rights that may not be limited.[401] This is an important development in the Constitutional Court's view in regard to absolute rights in Indonesia, because ten years before the Constitutional Court had decided that the right to life, which is also classified as an absolute right under Article 28 I (1), can be limited in terms of the death penalty.[402]

The 2017 Civil Administrative Law shows the progress made by the Constitutional Court in understanding human rights, particularly regarding the conception of absolute rights. However, regarding religious freedom, the 2017 Civil Administrative Law case does not solve the problem of the unclear conception of religion and belief in the Indonesian legal system. The vague conception of official religions in Indonesia was still endorsed by the Court,[403] despite the fact that there is no single legal document affirming the official religions in Indonesia.[404] Further, the Court also supports an unclear conception of belief that somehow limits the legal

[401] Putusan Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] ('*Constitutional Court Decision, Case No 97*') 139–40.
[402] Putusan Mahkamah Konstitusi Nomor 2-3/ PUU-V/2007 [Constitutional Court Decision, Case No 2–3/PUU-V/2007] 412.
[403] *Constitutional Court Decision, Case No 97*, 151.
[404] On this matter, please see Chapter 6 of this thesis.

definition of belief to monotheistic belief only. It relates to the first principle of *Pancasila*, 'The One and Only God' that was explained in the previous part of this chapter. Consequently, other kinds of belief such as polytheism or atheism are still discriminated against under the Indonesian legal system. As I will explain further in Chapter 6 of this thesis, this narrowing of the term 'belief' is not in accordance with the international human rights conception of belief.

3.5 Conclusion

In conclusion, legally speaking, the wording of the Constitution has provided the legal basis for protecting religious freedom. In the original 1945 Constitution, the religious freedom clause was contained in Article 29 (2). The failure of Konstituante to create a new Constitution led Soekarno to reinstall the 1945 Constitution. In 1999–2002, the Constitution was amended by adding a dedicated chapter on human rights. The 'right of religion'/ right to hold a religion was given a special position as an absolute right under Article 28 I (1). However, in 2007, the Constitutional Court provided a problematic interpretation of the human rights articles, saying that even the absolute rights in the Constitution can be limited by law. This is including the 'right of religion'/ right to hold a religion. However, Chapter 6 of this thesis will explain the latest development of the Court's opinion on the right to hold religion as an absolute right after 2017.

The constitutional debates between the Islamists and the nationalists regarding religious freedom were never settled. In 1945, the debate was postponed, giving priority to establish the state as it was promised by the president that the debate will be continued in the later constitutional work. in 1959, the four years debate forced to deadlock resulted in the reinstalment of the 1945 Constitution with an ambiguous phrase of 'Jakarta Charter version 22 June 1945 inspires and part of the Constitution'. During the constitutional amendment 1999–2002, there were two separate discussions: on human rights (chapter XA of the Constitution) and on religion (chapter XI of the Constitution). The chapter on religion remained untouched while the Parliament introduced the new dedicated chapter on human rights. There are two seemingly contradictory articles regarding (1) the right to hold religion as an absolute right and (2) limitation of rights. I disagree with the Constitutional Court decision saying that the Constitutional article on limitation of rights (Article 28 J (2)) prevails over the Constitutional article on absolute rights (Article 28 I (1)).

Chapter 4: The Blasphemy Law: Unjustifiable Limitation to Human Rights

The constitutional debates on religious freedom are furthered analysed in Chapters 4–6. These chapters discuss case studies involving the interpretation of the constitutional articles regarding religious freedom (mainly Articles 28 E(1), 28 E(2) and 28 I(1) before the Indonesia Constitutional Court). Chapter 4 will elaborate the case of the Blasphemy Law; Chapter 5 will discuss the Marriage Law and Chapter 6 will explore the Civil Administrative Law, particularly regarding the religion column in the national identity card. The discussion in each of the chapters has three parts: the law which will explain the making of the law and its controversial articles; the case/s which will explain the judicial review case/s of the discussed law before the Constitutional Court; and my analysis of the Constitutional Court decision/s.

The case studies are central to this thesis, highlighting the Constitutional Court's interpretation of the protection for religious freedom in Indonesia. As discussed in the previous chapter (see Chapter 3), Indonesia has several constitutional articles guaranteeing religious freedom (Articles 28 E (1), (2), 28 I(1) and 29(2)). However, these constitutional articles need to be further interpreted by the Constitutional Court in testing the validity of laws (judicial review) related to the issue of religious freedom. Throughout the case studies, I will show how the Court's interpretation of religious freedom in Indonesia tends to justify limitations on religious freedom. Although limiting religious freedom in the sense of *forum externum* (manifestation) is allowed both in moral theory and under international and domestic law in Indonesia, the limitation must be proportional and not imposed in a discriminatory manner. I will argue that the Constitutional Court in interpreting the right to religious freedom in Indonesia is not always balanced in its judgment and discriminate against religious minorities.

In the case of Blasphemy Law, the law was judicially reviewed before the Constitutional Court for five times (2009, 2012, 2017, 2018 and 2019).[405] The last two cases were lodged by the same applicant, a student, who asked the Court to declare the Blasphemy Law conditionally constitutional as long as the word '*golongan*' (group) is interpreted to exclude 'religious group'.[406] The 2018 case was rejected by the Court as it argued that the application had no legal

[405] Case No 140/PUU-VII/2009; 84/PUU-X/2012; 56/PUU-XV/2017; 76/PUU-XVI/2018; and 5/PUU-XVII/2019.
[406] Mahkamah Konstitusi [Indonesia Constitutional Court] No 76/PUU-XVI/2018, 13 December 2018, 20.

basis (*tidak beralasan*)[407] referring to previous case law (precedent) interpreting the word 'group' under other laws to include 'religious group'.[408] In 2019 the same applicant relodged a similar case to review the Blasphemy Law. This time, the applicant asked the Court to compel the law maker to revise the law.[409] The 2019 case was declared inadmissible (*tidak dapat diterima*) by the Court as it argued that the application is *error in objecto* -in the sense that the law being disputed (Blasphemy Law) was already declared constitutional by the Constitutional Court in its previous decisions,[410] and a request for the law maker to revise the law should not be addressed to the Court.[411]

The first three cases (2009, 2012 and 2017) involved more substantial discussions in relate to religious freedom. The first case (No 140/PUU-VII/2009) was submitted by NGOs and individuals working on the issue on religious freedom in Indonesia, including the former Indonesian President, Abdurrahman Wahid. This was the first judicial review case on the Blasphemy Law and the Court reasoning was developed at length in its decision; the second case (No 84/PUU-X/2012) was submitted by the Shia community; the third case (No 56/PUU-XV/2017) was submitted by the Ahmadiyya community. Following the first case, the discussion in the second and third case were also extensive. One of the reasons for it is because the cases were submitted by religious minorities who claim to be victims of the Blasphemy Law in Indonesia. These three cases are the cases I will elaborate on in this chapter (see Section 4.2.) following the discussion of the making and content of the Blasphemy Law (see Section 4.1.).

The final part of this chapter (see Section 4.3) will critically examine the Constitutional Court decisions on Blasphemy Law, emphasising the political and social intervention from Islamist groups as a factor that influenced the Court reasoning.

[407] Ibid 35.
[408] Ibid 34; other laws here referred to the Case No 76/PUU-XV/2017 on judicial review of Electronic Information and Transaction Law.
[409] Ibid 21.
[410] Mahkamah Konstitusi [Indonesia Constitutional Court], No 5/PUU-XVII/2019, 6 March 2019, 30.
[411] Ibid.

4.1 The Making of the Law

The Blasphemy Law was enacted on 27 January 1965. Like other blasphemy laws across the world,[412] this law was designed to protect religion, instead of protecting individuals. Like in contemporary Indonesia, in the 1960s, religion was an important aspect both in Indonesian politics and society.[413] The demand for protecting religion emerged from the Islamist movements' aspiration. It has been claimed that the enactment of Blasphemy Law was due to the tension between the Islamists and the communists. In an expert opinion to the Constitutional Court, Professor Eddy Hiariej, criminal law expert from Universitas Gadjah Mada, provided his written expert opinion and paper titled '*Pasal Penistaan/ Penodaan Agama'* (Article on Blasphemy Law). Hiariej explained that the conflict between Islamists and communists escalated on 13 January 1965 in Kanigoro, East Java when the accused communists attacked and murdered Muslims who were praying inside a mosque in early dawn. The perpetrators also tore and stepped on the Quran (Islamic scripture). According to Hiariej, the Kanigoro massacre forced President Soekarno to establish the Blasphemy Law under emergency law two weeks after the tragedy on 27 January 1965.

I will explain the sociopolitical context behind the making of Blasphemy Law chronologically. The key years are 1948, 1955, 1960, 1962 and 1965. There was societal conflict between the Islamists and the communists which also involved the army. In 1955, the Islamists, socialists (including the communists) and nationalist parties competed in national elections.

I will begin this discussion in 1948, three years after Indonesia's declaration of independence. Socialism and Islam were the two major political powers in Indonesia along with nationalism. The use of such groupings in this thesis (Islamist, nationalist and socialist) is based on the grouping of political parties in the early years of Indonesian independence (c.1940–1950s).[414] Some of the biggest political parties during that era were *Nahdlatul Ulama* and *Masyumi* (Islam); *Partai Sosialis* and *Partai Komunis Indonesia* (Socialist/ communist); and *Partai Nasional Indonesia* (Nationalist).[415] The so-called 'big four' parties emerged to be the winner

[412] See Jeroen Temperman and Andrãs Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (Cambridge University Press, 2017) 2–4.
[413] See eg, David Bourchier and Vedi R Hadiz (Eds.), *Indonesian Politics and Society* (Routledge, 2003) 2; Faisal Ismail, Islam, 'Politics and Ideology in Indonesia: A Study of the Process of Muslim Acceptance of the *Pancasila*' (PhD Thesis, McGill University, 1995).
[414] See Ricklefs (n 295) 69.
[415] Ibid.

of Indonesia's first election in 1955, particularly in Java, which included: *Partai Nasional Indonesia (PNI), Nahdlatul Ulama (NU), Partai Komunis Indonesia (PKI),* and *Masyumi.*[416]

Scholars such as Adriaan Bedner examines four basic political ideologies in Indonesia: liberalism, integralism, socialism and Islamism.[417] He is not concerned with political parties but focuses more on the ideologies that have informed constitutional developments in Indonesia. Bedner explains that the Indonesian version of liberalism embraces a 'relatively social-democratic outlook' with a stronger emphasis on collectivism and social justice compared to Rawlsian liberalism.[418] Integralism is a unique Indonesian view of 'deliberation and consensus' (*musyawarah mufakat*) which, according to Bedner, has its root in German romantic thought close to fascism.[419]

The communists worked closely with the socialists in Indonesian politics.[420] Amir Sjarifuddin who was Indonesia's prime minister at that time (1947–1948) was nominated by the Indonesian Socialist Party (*Partai Sosialis Indonesia*) but he also known as a prominent figure in the Indonesian communism.[421] In January 1948, Amir Sjarifuddin resigned to focus on his communist movement. In 18 September 1948, he declared the establishment of a communist government in Indonesia and the so-called 'agrarian reform'.[422] The communist's agrarian reform idea was to dismiss individual ownership of land.[423] This was a threat for landowners, many of whom were also Muslims and some of them were Islamic clerics.[424] The agrarian reform campaign by the communists was opposed by the Islamist clerics.[425] The clerics then led the other landlords and farmers in protesting the communist's proposed land reform.[426] The rivalry between the Islamists and the communists was at risk of bloodshed.[427] In 1948, the

[416] Ibid 99–100.
[417] Adriaan Bedner, 'The Need for Realism: Ideals and Practice in Indonesia's Constitutional History' in M Adams, A Meuwese and E Bailin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017) 159, 161.
[418] Ibid 161.
[419] Ibid.
[420] Ibid 162.
[421] Ricklefs (n 295) 72.
[422] Akiko Sugiyama, 'Remembering and Forgetting Indonesia's Madiun Affair: Personal Narratives, Political Transitions, and Historiography, 1948–2008' (2011) 92 *Indonesia* 19, 33.
[423] Robert W Hefner, *Civil Islam; Muslims and Democratization in Indonesia* (Princeton University Press, 2000), 48.
[424] Ibid 50.
[425] See Hefner (n 413) xv and Ricklefs (n 295) 67.
[426] Ricklefs (n 295) 67.
[427] See also Greg Fealy and Katharine McGregor, 'Nahdlatul Ulama and the Killing of 1965–66: Religion, Politics, and Remembrance' (2010) 89 *Indonesia* 37–60.

tension soon escalated into sociopolitical conflict and the army captured Amir Sjarifuddin and his fellows communists.[428] Several of communist leaders, including Amir Sjarifuddin were executed and thousands of accused communists were also killed.[429] Ricklefs reported that around 8,000 people were killed and around 35,000 people were imprisoned.[430]

The rivalry between the Islamists and the communists continued in the high-level politics. As explained in the previous chapter on constitutional history, Islamist movements have influenced Indonesian politics including the drafting of the Constitution and the law. Their aim is to incorporate Islamic provisions into Indonesian law.[431] Islamist movements in Indonesia creates political parties to gain support from society. Masyumi, NU (*Nahdlatul Ulama*), and PSII (*Partai Sarikat Islam Indonesia*/ Islamic Council of Indonesia-Party) were among the top five parties of the first Indonesia's general election in 1955.[432] Their biggest rivals during the election were PNI (*Partai Nasional Indonesia*/ Indonesia's Nationalist Party) and PKI (*Partai Komunis Indonesia*/ Indonesia's Communist Party) who was, respectively, the first and third winners of the election.[433]

The 1955 election was also to elect members of for the Constituent Assembly *(Konstituante*) who were given the task to draft the new constitution. However, after four years of unsettled debate, the Konstituante was dismissed by President Soekarno by Presidential Decree dated 5 July 1959. Soekarno, on his famous speech dated 17 August 1959 titled '*Penemuan Kembali Revolusi Kita'* (Rediscovery of Our Revolution) explains his decision to establish the Presidential Decree dated 5 July 1959 which dissolved *Konstituante* (Parliament) and reinstalled the 1945 Constitution. In that speech, Soekarno explains his anti-liberal views and his preference for socialism to be used in Indonesia, as illustrated by his idea of 'guided democracy'.[434] Nasution argued that Soekarno's guided democracy was a new political formula for authoritarian government.[435] The confidence of the president to dissolve the *Konstituante* was because of the support given by the army.[436]

[428] Ricklefs (n 295) 72.
[429] Ibid.
[430] Ibid.
[431] Ibid 96.
[432] See eg, ibid 84.
[433] Ibid.
[434] Soekarno (n 346) 372.
[435] Nasution (n 72) 301.
[436] Ibid.

Interestingly, Soekarno made a controversial statement regarding the preamble of the Presidential Decree, saying that 'the Jakarta Charter version 22 June inspired (*menjiwai*) the 1945 Constitution and is part of the chain of unity with the aforementioned Constitution'.[437] As I explain in Chapter 3, the mention of Jakarta Charter version 22 June refers to the controversial seven words 'with the obligation to perform Islamic law to Muslims'. However, the mention of Jakarta Charter version 22 June in the Presidential Decree 1959 was not meant to confirm that the Islamists won the 'war of influence' in the Indonesian politics. This is because, just one year afterwards in 1960, Masyumi, which came second in the 1955 election and was the biggest Islamist party at that time, was banned for its involvement in regional rebellions.[438] The rivalry between Islamist and communist movements continued, evidenced by the establishment of branch organisations both by PKI (*Partai Komunis Indonesia*/ Indonesia's Communist Party) and NU, the biggest Islamist organisation in Indonesia). PKI's women movement Gerwani was challenged by NU's Muslimat and Fatayat.[439] For the youth, PKI established Pemuda Rakyat, while NU established Banser.[440] The rivalry went further by creating affiliated organisations for other groups such as farmers and fishermen, businesspeople, students and academia.[441] The arts was also politicised when PKI's arts branch Lekra vis a vis NU's Lesbumi in campaigning their political idealism during their performances.[442]

Still in 1960, the Parliament established Parliamentary Decree No 1 1960 on the Indonesia's Political Manifesto. The Parliamentary Decree approved Soekarno's Presidential Decree one year earlier which highlighted his anti-liberalism and support for socialism.[443] The Parliament also created Parliamentary Decree No II (read as 2) 1960 as a follow-up Decree from the Parliamentary Decree No 1 1960. Article 2(1) of the Parliamentary Decree No II 1960, was later mentioned as a legal consideration in the 1965 Blasphemy Law.

Article 2(1) of the Decree states:

> Carrying out political manifesto in the field of mental/ religious/ spiritual and cultural development by guaranteeing spiritual and material conditions so that every citizen can

[437] See Soekarno (n 346) 359.
[438] Ricklefs (n 295) 101.
[439] Ibid 102.
[440] Ibid.
[441] Ibid.
[442] Ibid 103.
[443] See Soekarno (n 346) 372.

develop their personality and the Indonesian national culture, as well as rejecting the bad influence of foreign culture. [author trans].

One of the keywords from the above article is that it wanted to eliminate what it claimed as 'bad influence of foreign culture' in Indonesia's religious affairs. It relates to the other legal consideration mentioned in the preamble of Blasphemy Law, that is Presidential Decree No 2 of 1962 on the prohibition of organisations which are not in line with the ideals of Indonesian socialism. This Presidential Decree had one implementing law, that is Presidential Decree No 264 of 1962 prohibiting the following organisations: '*Liga Demokrasi'* (Democracy League); 'Rotary Club'; 'Devine Life Society'; 'Vrijmetselaren-loge (Loge Agung Indonesia)'; 'Moral Rearmament Movement'; 'Ancient Mystical Organization of Rucen Cruicers (AMRC)'; and 'Baha'i'. This implementing law was revoked in 2000 by President Abdurrahman Wahid[444], the same president revoking the banning of Confucianism in the same year of his presidency.[445] The establishment of this Decree back in the 1960s shows that what was referred to as a bad foreign influence was liberalism and not socialism or communism. If we read the preamble of the Blasphemy Law, it can be argued that the law was designed to protect religion (Islam) from liberal or Western influence.

The fact that the 1962 Decree is being used as a legal consideration to establish the Blasphemy Law in 1965 can be understood that Soekarno's regime designed the Blasphemy Law to protect religion (particularly in this case, Islam), not from socialist or communist attack, but merely from Western influence.[446] However, we cannot ignore the social tensions between communist and Islam in society during this era, which contributed to the making of the Blasphemy Law. The timeframe of the making of the Blasphemy Law also reinforces this claim. The establishment of the Blasphemy Law as an emergency law was only two weeks after the *Kanigoro* massacre, a tragedy when the communists attacked Muslims during their dawn prayer at the mosque.[447] There is no clear number of death reported, but 120 people inside the mosque were attacked and dragged out from the mosque by 2,000 people.[448] During the police investigation, the Muslim representation Abiyoso claimed that the perpetrators (members of

[444] See *Presidential Decree No 69 2000 on Annulment of Presidential Decree No 264 1962*.
[445] See *Presidential Decree No 6 2000 on Annulment of Presidential Instruction No 14 1967*. For more on this topic, see Chapter 5 of this thesis.
[446] See *Parliament Decree No II 1960* art 2.
[447] On the Kanigoro massacre, see eg, E Katharine McGregor, 'Confronting the Past in Contemporary Indonesia; The Anticommunist Killing of 1965–66 and the Role of Nahdlatul Ulama' (2009) 41(2) *Critical Asian Studies* 195, 198.
[448] Hermawan Sulistyo, *Palu Arit di Ladang Tebu* (Kepustakaan Populer Gramedia, 2000) 139–140.

the Communist Party) took the Quran (Holy book), tore, and threw it on the floor while saying, 'this is what causes the scabies'.[449] Although the Blasphemy Law was already enacted at the time, it was not being used to prosecute communists. Instead, Abiyoso (Islamist) was charged for subversive activity.[450] However, the rumour that this incident involved blaspheming Islam spread throughout East Java and Muslim solidarity started to rise.[451]

The communists were later accused of the September 1965 coup.[452] The official name given by the government (Soeharto regime) to address the 30 September 1965 tragedy was G-30-S/PKI, which stands for Gerakan 30-September/Partai Komunis Indonesia, or the 30 September Movement/the Communist Party of Indonesia. The name, according to Sulistyo implied 'a dividing term in political grouping between those who won the conflict and those who lost their power' and a 'distinctive academic discourse as well'.[453] This, Sulistyo further stated, 'would later influence patterns of historical interpretation and analysis.'[454] This explains how the communists became the loser party in 1965 and when the regime changed, it was politically oppressed with the establishment of the Parliament Decree No 25 Year 1966 on the Dissolution of the Indonesian Communist Party (TAP MPR No 25 Tahun 1966 tentang Pembubaran Partai Komunis Indonesia). The Blasphemy Law was also being used to criminalise communists because communists in Indonesia are perceived to be atheist, and thus a negative influence on Muslims.[455]

The case of HB Jassin back in 1968 shows how the Islamists used the Blasphemy Law to prosecute someone they accused of being communist. Jassin was sentenced to one-year imprisonment for publishing an article in his magazine, 'Majalah Sastra' edition 8 August 1968.[456] The article titled '*Langit Makin Mendung'* (The sky is getting cloudy)

[449] Ibid 140.
[450] Ibid.
[451] Ibid 141.
[452] See Hernawan Sulistyo, 'The Forgotten Years: The Missing History of Indonesia's Mass Slaughter (Jombang-Kedisi 1965–1966)' (PhD Thesis, Arizona State University, 1977) 9.
[453] Ibid.
[454] Ibid.
[455] LBH Jakarta, *Amicus Brief Pada Perkara Penodaan Agama Sdr. Basuki Tjahaja Purnama alias Ahok* (LBH Jakarta, 2017) 19.
[456] Mudzakkir, *Tindak Pidana Terhadap Agama dalam Kitab Undang-Undang Pidana (KUHP) dan Undang-Undang Nomor 1/PNPS/1965 tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama* (Kementerian Hukum dan Hak Asasi Manusia, 2010) 119.

allegedly blasphemed Islam.[457] Out of the courtroom, demonstrations were held in the magazine office condemning Jassin as a communist[458] and the magazine office was closed.[459]

In conclusion, the Blasphemy Law was originally enacted by Soekarno in 1965 to oppose liberalism as he himself was partial to communism. However, the making of Blasphemy Law was also coloured by conflict between Islam and Communism. Just eight months after the law was passed, the communist tragedy of 1965 occurred and Soeharto took over the regime. Among the first cases charged under the Blasphemy Law was HB Jassin case. However, in recent years, the Blasphemy Law is also being used to charge religious minorities or those having different interpretations of religions. In part 4.2. I will start the discussion with some of the blasphemy cases (criminal cases) to illustrate why cases for judicial review were lodged with the Constitutional Court.

4.2 Case Law

There have been hundreds of Blasphemy Law cases lodged before the courts since its establishment in 1965 until today. Although the exact numbers of the cases are unknown, as different researcher has come with different figure, the number seems to be significantly increasing after *Reformasi* in the late 1990s. According to Setara Institute, during 1965–2017, there were 97 Blasphemy Law cases, with 9 cases before *Reformasi* and 88 cases after *Reformasi* until 2017.[460] Melissa Crouch lists over 120 people who were accused before a court under the Blasphemy Law.[461] Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI) claims during January–May 2020 alone, the number of Blasphemy Law cases reached 38 cases.[462]

Among these numerous cases, I will discuss some which drew public attention. However, the criminal court cases shown here are not the main concern in this chapter. Section 4.2 will mostly discuss the judicial review cases of the Blasphemy Law before the Constitutional Court.

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[457] Ibid.
[458] Ibid 120.
[459] Ibid.
[460] Fathiyah Wardah, 'Setara Institute: 97 Kasus Penistaan Agama Terjadi di Indonesia', (webpage, 12 May 2017) https://setara-institute.org/setara-institute-97-kasus-penistaan-agama-terjadi-di-indonesia/
[461] Melissa Crouch, 'Law and Religion in Indonesia: The Constitutional Court and the *Blasphemy Law*' (2012) 7(1) *Asian Journal of Comparative Law*, 1, 12; see also Melissa Crouch (2014) *Law and Religion in Indonesia: Conflict and the Courts in West Java*. Routledge; Melissa Crouch (2016) 'Constitutionalism, Islam and the Practise of Religious Deference: The Case of the Indonesian Constitutional Court' 16(2) *Australian Journal of Asian Law* 1-15.
[462] Asfinawati, et al, 'Laporan YLBHI tentang Penodaan Agama Januari-Mei 2020' (webpage, 9 June 2020) https://ylbhi.or.id/wp-content/uploads/2020/06/Laporan-YLBHI-Penodaan-Agama-2020.pdf

The criminal court cases are illustrated here to provide the contextual background to the judicial review applications.

The detail of the first criminal case under the Blasphemy Law have not been reported. However, the HB Jassin case I mentioned earlier in this chapter may be considered among the first cases, just three years after the establishment of Blasphemy Law. A similar case, also involving journalistic work happened in 1990 when Arswendo Atmowiloto was found guilty of blaspheming Islam and sentenced to five years imprisonment for distributing a survey when he worked as journalist.[463] The survey was about the most inspiring people, and it lists Prophet Muhammad as the eleventh most inspiring person (in the list of choices).[464] The survey was later considered problematic and angered some Muslims who believe the Prophet should be listed in number 1.[465]

In 2006, Lia Aminuddin, also known as Lia Eden, was sentenced to jail after claiming herself to be the Angel Gabriel (Jibril) and a prophet sent by God.[466] Lia Eden and her followers were prosecuted individually because their group is small and has no international network. Three leaders from her group were convicted for blaspheming Islam under article 156 A of the Criminal Code in 2006.[467] In 2009, Lia Eden was again sentenced to two years jail under the Blasphemy Law.[468]

Other people charged under the Blasphemy Law are, among other: Antonius Bawengan.[469] Muhammad Rokhisun;[470] and Abdul Fatah.[471] Among these cases, it may be worth noting that the most controversial case was the Ahok case In the North Jakarta District Court, Basuki Thajaja Purnama, known as 'Ahok', was found guilty in 2017 for blaspheming Islam. The then-incumbent Christian governor candidate for Jakarta was giving a speech while campaigning to be re-elected when he said, '*....dibohongi pakai Surat Al Maidah*.' Translated, this means 'Surah Al Maidah was used to deceive'. A few days later, an edited video of his speech went

[463] Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court/ Magistrate] No 09/IV/Pid.B/1991/PN. JKT-PST, 8 April 1991.
[464] See Crouch (n 461) 22.
[465] Ibid.
[466] Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court/ Magistrate], No 677/PID.B/2006/PN.JKT.PST, 29 June 2006.
[467] Melissa Crouch, *Law and Religion in Indonesia: Conflict and the Court in West Java* (Routledge, 2014), 145.
[468] Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court/ Magistrate], No PDM-577/JKT.PST.03/2009; See Melissa Crouch above n58, 22.
[469] Pengadilan Negeri Temanggung [Temanggung District Court/Magistrate] No 06/Pid.B/2011/PN.TMG.
[470] Pengadilan Negeri Pati [Pati District Court/ Magistrate] No 10/Pid.Sus/2013/PN.PT.
[471] Pengadilan Negeri banda Aceh [Banda Aceh District Court/Magistrate] No 80/Pid.B/2015/Pn Bna.

viral on the internet, cutting the word '*pakai*' (using). This gave a different meaning to the speech, namely: 'Surah Al Maidah was a lie' (*Dibohongi surah Al Maidah*).

Surah is a chapter or part of the Quran (Islamic holy script).[472] Muslims maintain the important purity and holiness of the Quran as they believe in its truth and revelation.[473] Al Maidah (means 'the food' in English) is the fifth surah (chapter) from the Quran consisting in 120 verses. Verse 51 of this surah reads, 'O you who believe! Do not take friends from Jews and the Christians, as they are but friends of each other. And if any among you befriends them, then surely, he is one of them.'[474] During the campaign, supporters from Muslim candidate used this verse from the Quran to ask people not to choose the Christian candidate (Ahok).[475]

These cases are just the tip of the iceberg. Both Human Rights Watch's Report[476] and Amnesty International's Report on Indonesia[477] in 2018 have highlighted the widespread problems caused by the Blasphemy Law in Indonesia. In a statement to the United Nation Human Rights Council in 2018, the Asian Legal Resource Centre stated that minority groups' religious freedom and belief in Indonesia are only protected on paper but not in practise.[478] The reports demonstrated that there is concern that the Blasphemy Law interferes with constitutional rights guaranteed under the Indonesian Constitution. As a result, numerous cases have been lodged before the Constitutional Court to test the constitutionality of the Indonesian Blasphemy Law.

Among these cases, I will highlight three important cases from three different applicants: Case No 140/PUU-VII/2009 submitted by NGOs and individuals working on the issue on religious freedom in Indonesia, including the former Indonesian President, Abdurrahman Wahid; Case No 84/PUU-X/2012 submitted by Shia community; and Case No 56/PUU-XV/2017 submitted by the Ahmadiyya community. All the cases were rejected by the Constitutional Court,

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[472] Pengadilan Negeri Jakarta Utara [North Jakarta District Court/Magistrate] No 1537/Pid.B/2016/PN.Jkt Utr, 9 May 2017, 604.
[473] Ibid.
[474] Imad ud Din Kathir, Tafisr Ibn Kathir, *Schenellmann.org* (webpage, 19 February 2013) <*schnellmann.org/quran4u_com_Tafsir_Ibn_Kathir_5_Maidah.pdf*>
[475] Alexander R Arifianto, 'Jakarta Governor Election Results in a Victory for Prejudice over Pluralism' The Conversation (20 April 2017) http://theconversation.com/jakarta-governor-election-results-in-a-victory-for-prejudice-over-pluralism-76388.
[476]Human Rights Watch, *Country Summary: Indonesia* (webpage, January 2018) <https://www.hrw.org/sites/default/files/indonesia_2.pdf>
[477] Amnesty International, Indonesia 2017/2018 (webpage, 21 July 2018) <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/>
[478] The statement was discussed during the Human Rights Council 37th sess, 26 February–23 March 2018. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/025/16/PDF/G1802516.pdf?OpenElement.

affirming the constitutionality of the Blasphemy Law. This also reflects the current position of the Court regarding the importance and the need of the Blasphemy Law.

In discussing these three cases, I will initially explain each of the case's circumstances (the parties involved in each of the case) without going deeper into the Court reasoning. The discussion of the Court reasoning will be elaborated in the next part of this chapter (4.3.). This is because the Court provided strong reasoning in the first case (Case 2009), with only minor additions to its reasoning found in the 2012 and 2017 cases. Therefore, instead of examining the reasoning in each of the cases separately, I will offer one discussion of the court's reasoning to refer to all three cases. This will also make it easier to understand the sequence and development in the Constitutional Court reasoning of justifying the constitutionality of Blasphemy Law.

4.2.1 Case 2009: NGOs and Activists

The first case I will analyse is Case No 140/ PUU-VII/ 2009. This is the first case regarding Indonesian Blasphemy Law to be examined before the Constitutional Court. The case was submitted by 11 applicants of 7 organisations (IMPARSIAL, ELSAM, PBHI, DEMOS, Perkumpulan Masyarakat Setara, Desantara Foundation, and YLBHI)[479] and 4 individuals (Abdurrahman Wahid, Musdah Mulia, Dawam Rahardjo and Maman Imanul Haq). All seven organisations and four other individual applicants in the case shared the same concern regarding the importance of religious freedom in Indonesia because they have been working to promote religious pluralism and tolerance in Indonesia.

The seven organisations are: IMPARSIAL, a prominent human rights organisation dedicated to overseeing human rights violations in Indonesia since 2002; ELSAM, another human rights organisation established in 1993, working to develop, promote and protect civil and political rights in Indonesia; PBHI, a law firm dedicated to advocate human rights; DEMOS, a study centre specialising on the issue of human rights and democracy in Indonesia; Setara Institute,

[479] IMPARSIAL (*Perkumpulan Inisiatif Masyarakat Pratisipatif untuk Transisi Berkeadilan*) was represented by Rachland Nashidik as its executive director; ELSAM (*Lebaga Studi dan Advokasi Masyarakat*) was represented by Asmara Nababan as head of the organisation; PBHI (*Perkumpulan Perhimpunan Bantuan Hukum dan Hak Asasi Manusia*) was represented by Syamsuddian Radjab as the head of the organisation; DEMOS (*Perkumpulan Pusat Studi Hak Asasi Manusia dan Demokrasi*) was represented by Anton Prasodjo as its executive director; *Perkumplan Masyarakat Setara* was represented by Hendardi as its head of organisation, Desantara Foundation (Yayasan Desantara) was represented by Muhammad Nur Khorion as its head of organisation; YLBHI (*Yayasan Lembaga Bantuan Hukum Indonesia*) was represented by Patra Mijaya Zen as its head of organisation. The seven organisations work on human rights issues in Indonesia, including religious freedom.

an organisation that works to promote pluralism, humanitarianism, democracy and human rights; Desantara Foundation, which focuses on the rights of minorities; and YLBHI, a legal aid organisation that helps the poor access justice in Indonesia.

The case also involved four prominent individuals. Abdurrahman Wahid was the former Indonesian president (1999–2001) and a prominent figure in Nahdlatul Ulama, the biggest Muslim organisation in Indonesia. Musdah Mulia is highly regarded as a feminist and women's rights activist in Indonesia. Dawam Rahardjo was a prominent Muslim thinker promoting a progressive Islamic movement in Indonesia. Maman Imanul Haq is a young and progressive Muslim activist. The inclusion of these people gave the case a high public profile.

While these organisations and individuals were not the direct victims of the Blasphemy Law, nor were they members of minority groups in Indonesia, the applicants claimed to have a constitutional right individually and in a group to advocate for human rights in Indonesia, specifically on the issue of religious freedom.[480] Further, the claimants said the Blasphemy Law potentially harms their constitutional right as they work to promote religious freedom, tolerance and pluralism.[481] For this, the applicants asked the Constitutional Court to declare the Indonesian Blasphemy Law unconstitutional.[482]

In their application, the applicants argued that each of the articles in the Blasphemy Law contradict the Constitution, particularly the articles on religious freedom (Articles 28 E s (1), (2), 28 I (1), 29 (2) and 28 D (1)) on legal certainty and equality before the law; and article 1 (3) on a state based on law.[483] The applicants also argued that although religious freedom may be limited, the Blasphemy Law is not a permissible restriction because it limits the *forum internum.*[484]

The Indonesian government and Parliament were invited by the Constitutional Court to be respondents in the case. In their argument, the government stressed the importance of permissible limits on human rights as it cites article 28 J (2), which provides, '*In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the*

[480] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 18.
[481] Ibid.
[482] Ibid 82.
[483] Ibid 20, 40, 50, 54, 60.
[484] Ibid 77 [189].

rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society'[485] The Parliament (DPR) emphasised the importance of the Blasphemy Law using the first principle of Indonesia's state ideology, *Pancasila*, 'The One and Only God'. The Parliament asserted, 'The referred law (Blasphemy Law) has a philosophical foundation in Indonesia'.[486] The spokesperson for the Parliament went on to say that, 'Since the establishment of Blasphemy Law, there has been so many religious-deviant sects disturbing the society threatening public order … for the sake of legal certainty, public and legal order… the referred law (Blasphemy Law) is still relevant.'[487]

The Constitutional Court also invites concerned parties (*amicus curiae*) to be heard before the court as parties affected by the law in dispute.[488] Among these 24 related parties invited by the Court, 14 were Islam-affiliated which representing the Muslim majority such as Nahdlatul Ulama and Muhammadiyah who are considered moderate Islamic organisations and MUI as the country's non-state council of Islamic clerics which includes various moderate and radical Islamic organisations including FPI (*Front Pembela Islam*); one Protestant organisation; one Catholic organisation (Indonesia differentiates Catholicism from Christian-Protestantism); one Hindu organisation; one Buddhist organisation; one Confucianist organisation; two traditional belief organisations; one interreligious forum; and two national human rights committees. Among these 24 institutions; 6 agreed with the applicants and asked the Court to grant the petition, 17 institutions disagree with the applicant and asking the Court to uphold the constitutionality of Blasphemy Law, while one institution (FKUB) put forward conditions to whether Court grant or reject the application.[489] The six institutions to agree with the applicants are the Council of Churches in Indonesia (Christian), the Bishops' Conference Indonesia (Catholic), the National Human Rights Committee, the BKOK (Indigenous beliefs

[485] Ibid 120.
[486] Ibid 135.
[487] Ibid 136.
[488] The Court invited 24 related parties: MUI (the Indonesian Ulama Council-Islam); Muhammadiyah (Islam); PGI/Council of Churches in Indonesia (Christian); Nahdlatul Ulama (Islam); KWI/ Bishops' Conference Indonesia (Catholics); Matakin/ Supreme Council for Confucian religion in Indonesia (Confucian); PHDI/ Parisada Hindu Dharma Indonesia (Hinduism); Dewan Dakwah Islamiyah Indonesia (Islam); National Human Rights Committee; WALUBI/ Budhism; Persatuan Islam (Islam); PPP (Islamist Party); BKOK (Indigenous beliefs association); Himpunan Penghayat Kepercayaan (Indigenous Beliefs association); Irena Centre (Islam); Ittihadul Mubalighin (Islam); BASSRA (Islam); Front Pembela Islam-FPI (Islam); Al Irsyad Al Islamiyah (Islam); Hizbut Tahrir Indonesia (Islam); FKUK DKI Jakarta (Interreligious forum); National Commission on Violence against Women; Forum Umat Islam (Islam); and Dewan Masjid Indonesia (Islam).
[489] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 250–4.

association), and the National Commission on Violence against Women. All the Islamic institutions invited to be concerned parties in the case argued that the application should be rejected.

The Constitutional Court also invited 17 individual experts to give their opinion on the Blasphemy Law. The invited experts were criminal law professor Edward OS Hiariej; criminal law professor Andy Hamzah; Islamic studies professor Azumardi Azra; sociologist Thamrin Amal Tamagola; cultural and Islamic activist Emha Ainun Najib; Catholic priest Muji Sutrisno; Islamic liberal activist Ulil Abshar Abdalla; political scientist Siti Juhro; anthropologist Ahmad Fedyani Syaifuddin; Shia activist Jalaluddin Rakhmat; Islamic activist Moeslim Abdurrahman; Film director Garin Nugroho; constitutional-Islamic lawyer Yusril Ihza Mahendra; Islamic liberal thinker and an Ahmadi Djohan Effendi; Poet Taufiq Ismail; Islamic scholar Komaruddin Hidayat; and Christian activist SAE Nababan.

The experts invited by the Court are mostly academics and offer a balanced response to the existence of the Blasphemy Law. Hiariej for example suggested that the Blasphemy Law is being used in practice to limit thought, something that is not possible under the law, based on the principle that '*cogitationis poenam nemo patitur' (no one may be punished for merely intention)*.[490] However, Hiariej also argued that Indonesia still needs the Blasphemy Law to protect religious communities, noting that the enforcement of the law should not violate thought, opinion or conscience.[491] Some of the experts argued in favour of the constitutionality of Blasphemy Law, for example Yusril Ihza Mahendra suggested that if a particular activity or interpretation (of religion) triggers anxieties, conflicts, and (social) tensions, the government must respond to it to preserve harmony, peace and public order.[492] The Court agreed with this view in its reasoning.[493] In its reasoning, the Court also agreed with the experts who suggested that the Blasphemy Law needs to be revised.[494] However, because the Court has no authority to revise the law and it can only decide the constitutionality of Blasphemy Law,[495] it declared the Blasphemy Law constitutional and affirmed its necessity 'to realize the best life possible for the nation state'.[496]

[490] Ibid. 258.
[491] Ibid 259.
[492] Ibid 267.
[493] Ibid 297.
[494] Ibid 304.
[495] Ibid 304–5.
[496] Ibid 295.

4.2.2 Case 2012: Shia

The second case to be examined in this chapter is Case No 84/PUU-X/2012. This case was submitted by a Shia cleric Tajul Muluk alias H. Ali Murtadha, Hasan Alaydrus, Ahmad Hidayat, Umar Shahab and Sebastian Joe Bin Abdul Hadi. While in the first case (140/PUU-VII/2009), none of the applicants were charged under the Blasphemy Law, two applicants in the second case (84/PUU-X/2012)—Tajul Muluk and Sebastian Joe Bin Abdul Hadi—had been convicted before the courts for blaspheming Islam. The other three applicants belonged to the Shia community along with the first applicant.

Tajul Muluk was sentenced to two years imprisonment under the Blasphemy Law for being a Shia cleric which is considered to be blasphemous to Sunni Islam.[497] The case was appealed to the East Java High Court where the judges increased the sentence to four years' imprisonment for the defendant.[498] The final appeal was submitted before the Supreme Court, which rejected the case, making the High Court decision final and binding.[499]

In a separate case, Sebastian Joe Bin Abdul Hadi was sentenced to four years' imprisonment for posting on social media '*Tuhan pelit dan sombong'* (God is stingy and arrogant).[500] This case was appealed before the Bandung High Court and resulted in a sentence of five years imprisonment and IDR 800,000,000 (eight hundred million rupiah) -around 80,000 AUD fine.[501] The case was then further appealed to the Supreme Court and was rejected by the Court. The final decision by the Supreme Court upheld the High Court decision.[502] The amount of the fine was high in this case because the Court (both on appeal and at the Supreme Court) also charged the defendant with the Electronic Information and Transactions Law (EIT Law).[503] Article 28(2) of this law states that 'any person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and inter-group (*SARA*)' and Article 45 (2) states that 'Any person who satisfies the elements as intended by Article 28 (1)

[497] Pengadilan Negeri Sampang [Sampang District Court/Magistrate] No 69/Pid.B/2012/Pn.Spg., 12 July 2012.
[498] Pengadilan Tinggi Jawa Timur [East Java High Court] No 481/Pid/2012.PT.Sby, 20 September 2012.
[499] Mahkamah Agung Republik Indonesia [Indonesian Supreme Court] No 1787 K/ Pid/ 2012, 3 January 2013.
[500] Pengadilan Negeri Ciamis [Ciamis District Court/Magistrate] No 278/Pid.B/2012/Pn.Cms., 6 November 2012.
[501] Pengadilan Tinggi Bandung [Bandung High Court] No 463 Pid/ 2012/ PT.Bdg., 19 December 2012.
[502] Mahkamah Agung Republik Indonesia [Indonesian Supreme Court] No 777 K/ Pid.Sus/2013, 23 April 2013.
[503] Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik [*Law No 11 of 2008 on Electronic Information and Transaction*] (Indonesia).

or (2) shall be sentenced to imprisonment not exceeding 6 (six) years and/or a fine not exceeding Rp.1,000,000,000,- (one billion rupiah).'

The above case is interesting because at first instance court, Sebastian Joe was not charged under the EIT law.[504] He was only charged under the Blasphemy Law. It was on appeal that the EIT law was used alongside the Blasphemy Law to charge the defendant. The appeal court's decision to use EIT law was supported and approved by the Supreme Court. The court decision can be understood as using the ITE Law as a *lex speciale* in dealing with blasphemy case using electronic technology, something that was not specifically classified under the 1965 Blasphemy Law.

Tajul Muluk and Sebastian Joe claim their legal standing to submit judicial review of Blasphemy Law based on their criminal convictions under the Blasphemy Law. There were three other applicants who joined the case. They were Shia clerics who claimed the law potentially harmed their right to religious freedom as they work as preachers, who publicly manifest their belief which is considered deviant by Sunni (Muslim majority).[505]

Under the Constitutional Court's judicial review system, a law or article of a law that has been decided may not be re-appealed or re-submitted, unless using different constitutional reasoning or constitutional articles.[506] For this reason, the applicants claimed to have different constitutional reasoning compared to the 2009 case.[507] The application was focused on Article 4 of the Blasphemy Law. They argued this article lacks legal certainty[508] as there is no clear definition of 'in public', 'enmity', 'abusing', or 'blaspheming a religion' thus it contradicts article 28 D (1) of the Indonesia Constitution stating 'Each person has the right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law.'[509] For this reason, the applicants asked the Constitutional Court to declare Article 4

[504] Pengadilan Negeri Ciamis [Ciamis District Court/Magistrate] No 278/Pid.B/2012/Pn.Cms, 6 November 2012.
[505] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 84/PUU-X/2012, 6.
[506] Undang-Undang [*Law No 8 2011 on the Amendment of Law No 24 2003 on Constitutional Court*] arts 60(1) and (2). Peraturan Mahkamah Konstitusi [Constitutional Court Regulation No 06/PMK/2005] arts 42(1) and (2), stating, (1) 'On the substance of, article, and/or part of law that ever been examined before the Court may not be re-examined.'; (2) 'A side from (1), an application to, article, and/or part of law that ever been examined before the Court may be done using different constitutionality reasons'.
[507] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 84/PUU-X/2012, 8.
[508] Legal certainty is an important concept in the Indonesian legal system to ensure consistent application of law. For more on the issue of legal certainty in the Indonesian court system, see Rifki Assegaf, 'The Supreme Court, Reformasi, Independence and The Failure to Ensure Legal Certainty' in Melissa Crouch (ed), *The Politics of Court Reform: Judicial Reform and Legal Culture in* Indonesia (Cambridge University Press, 2019) 31–58.
[509] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 84/PUU-X/2012, 15.

of the Blasphemy Law (and Article 156a of the Indonesian Criminal Code) to be unconstitutional and revoked.[510] The lack of legal certainty has consequences for the legal system. For example, Rifki Assegaf has argued that because the Supreme Court failed to deliver legal certainty, people have used other institutions instead, such as the Constitutional Court.[511]

The government and the legislature as respondents in the case argued that the Court has to declare the case inadmissible (NO/ *niet ontvankelijk verklaard*) for the reason of *nebis in idem/* double jeopardy (the same case could not be tried twice), since in the previous case (Case No 140/PUU-VII/2009) the Court rejected the claim that Article 4 of the Blasphemy Law contradicts Article 28 D(1) of the Constitution.[512] Further, the government, supported by its expert opinion delivered by Atho Mudzhar, a professor from Islamic State University Jakarta (UIN Jakarta) at the hearing dated 14 February 2013 argued that if the referred articles (Article 4 of the Blasphemy Law—Article 156a of the Criminal Code) were to be revoked, there would be vacuum of law which would contribute to a chaotic situation where horizontal conflict between religious groups will occur and disintegrate Indonesia.[513]

The Court found the case to be admissible and the applicants had legal standing and reasonable claim for loss and potential loss caused by the referred law. However, the Court ultimately rejected the substance of the application.[514] The Court in its decision cited its reasoning from the previous case, Case No 140/PUU-VII/2009 and in brief argued that the Indonesian Blasphemy Law is still necessary although it is not perfect.[515] The Court worried that horizontal conflict may occur if the referred law was found to be unconstitutional.[516]

4.2.3 Case 2017: Ahmadiyya

The third case to be examined in this chapter is Case No 56/PUU-XV/2017. Similar to the second case, this case was submitted by applicants claiming to be the victim of the Blasphemy Law. The applicants in this case (Asep Saepudin, Siti Masitoh, Faridz Mahmud Ahmad, Lidia

[510] Ibid 16.
[511] Assegaf (n 508) 48.
[512] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 84/PUU-X/2012, 114.
[513] Ibid 116; see also minutes of meeting on the Hearing of Judicial Review of the *Blasphemy Law* (webpage, 14 February 2013) 2 https://mkri.id/public/content/persidangan/risalah/risalah_sidang_PERKARA%20NOMOR%2084.PUU.X.2012%20tgl%2014%20Februari%202013.pdf.
[514] Ibid 136, 147.
[515] Ibid 143.
[516] Ibid.

Wati, Hapid, Iyep Saprudin, Anisa Dewi, Erna Rosalia, and Tazis) were all Ahmadis, member of Ahmadiyya, another religious minority in Indonesia.

Ahmadiyya is an international religious community. They claim themselves to be Muslim, but they share different teachings, such as the belief in Mirza Ghulam Ahmad as prophet after Muhammad when other Islamist groups believe in Muhammad as the last prophet. These differences have led to Sunni Muslim groups assaulting the Ahmadis, claiming the Ahmadis have blasphemed Islam. The conflict was originally a horizontal conflict within Indonesian society, with several radical Muslims who disagree with the teaching of the Ahmadis attacking the Ahmadis and burning down their houses and mosques[517].

The government sought to end the violence through a Joint Ministerial Decree[518] in 2008, commanding the Ahmadis to stop spreading the belief in Mirza Ghulam Ahmad as a prophet. Joint Ministerial Decrees are the legal procedure set by the Blasphemy Law for resolving cases involving religious conflict.[519] In this case, the government viewed the beliefs of Ahmadiyya as the reason for the assault. Thus, to prevent similar attacks, the Ahmadis were commanded to stop spreading their belief.

The applicants in this case referred to their status as Ahmadis and the existence of the Joint Ministerial Decree as prescribed by the Blasphemy Law that limits and violates their constitutional rights.[520] The applicants also argued that the case was not *nebis in idem* (that is, not heard twice) because they used different constitutional reasoning.[521] The main difference between this case and the previous cases (2009 and 2012) is that the applicant in this case asked the Constitutional Court not to annul the Blasphemy Law, but to declare it conditionally unconstitutional. In addition to the repeated constitutional articles used to test the constitutionality of Blasphemy Law (Articles 1(3), 28 D(1), 28 E(1), (2) and 29 (2)), the

[517] See Zainal Abidin Bagir, *Laporan Tahunan Kehidupan Beragama di Indonesia* (Center for Religious and Cross-Cultural Studies, 2013); Gadjah Mada and Crouch (n 254).
[518] Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republic Indonesia Nomor 3 Tahun 2008; Nomor KEP-033/JA/6/2008; Nomor 199 Tahun 2008 tentang Peringatan dan Perintah kepada Penganut, Anggota, dan/ atau anggota pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat [Joint Decree by Minister of Religious Affairs, Attorney General, and Minister of Home Affairs of the Republic of Indonesia on the matter of Warning and Order to the Followers, Members, and/or Leaders of the Indonesia Ahmadiyya Jama'at (JAI) and to the General Public] (Indonesia).
[519] Ibid art 2.
[520] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 56/PUU-XV/2017, 14.
[521] Ibid 15.

applicants in this case used several other constitutional articles: Articles 28 C par(2), 28 G(1), 28(1) and 28 I(2).

Article 28 C(2) provides:

> Each person has the right to develop themselves through the fulfilment of their basic needs, the right to education and to obtain benefit from science and technology, art and culture, in order to improve the quality of their life and the welfare of the human race.

Article 28 G (1) reads:

> Each person has the right to the protection of themselves, their family, their honour, their dignity, the property that is in their control, and the right to feel safe and to be protected from the threats of fear from doing or not doing something that is a basic right.

Stressing Article 28 C (2), the applicants in this case emphasised their group rights instead of individual rights. The applicants belong to the same group—the Ahmadiyya community[522]—and Article 28 C (2) provides a guarantee for them as a group to collectively struggle for improvement.[523] As the party accused of blaspheming Islam, the applicants also claim the framing of being 'deviant' will lead to religious group cleansing facilitated by the government.[524] By coercing the Ahmadis to stop believing (as ordered by the Joint Ministerial Decree), the government through Blasphemy Law violated the applicants' constitutional rights.[525]

The applicants also stressed the vagueness of the provisions, since the Blasphemy Law failed to recognise the intention of the Ahmadis when they worship. While claiming themselves to be Muslim, majority Muslim (Sunni) perceive the Ahmadis' belief and worship to be blasphemous as it different from the beliefs of the majority.[526] For this reason, the applicants asked the Constitutional Court to declare the Blasphemy Law to be conditionally unconstitutional as long as it was interpreted to be 'nullifying the right of people to adhere

[522] Mahkamah Konstitusi Republik Indonesia [The IndonesianIndonesia Constitutional Court],] No. 56/PUU-XV/2017., 22.
[523] Ibid.
[524] Ibid.
[525] Ibid 23.
[526] Ibid 22.

religious sects existed in Indonesia and to worship as part of the sect who actively perform their religious life.'[527]

The government as respondent in this case argued for the application to be *nebis in idem* and therefore should be inadmissible.[528] In responding to the substance of the case, the government argued that the Blasphemy Law does not limit the *forum internum* of religious freedom as guaranteed under article 28 (I) of the Constitution. It only limits the manifestation of religious freedom as also justified by Article 18 of the ICCPR.[529] The government also argued that the Blasphemy Law is an implementing regulation from Article 28 J (2) of the Constitution which justifies the limitation on human rights for the sake of protecting other people's rights, preserving morality, religious values, security and public order in a democratic society.[530] I argue, that such claim is weak and it is impossible to treat Blasphemy Law as an implementing regulation from Article 28 J(2) because the Blasphemy Law was made 35 years prior.

The legislature as joint respondent argued that the application should not be admitted by the Court for *nebis in idem*.[531] It also argued that freedom to manifest religion may be limited as prescribed by Article 28 J(2) of the Constitution.[532] The Parliament was also responding to the Ahmadis' claim of being the victim of persecution that it suggested should not be the point of interest in this case (the constitutionality of the Blasphemy Law) but instead should be a separate case on criminal law.[533] Conversely, Parliament said that the Joint Ministerial Decree aimed to protect the Ahmadis from persecution as it forbid people to attack them.[534] This is because the Decree is addressed to the two conflicting parties (the Ahmadis and the people who attack them) and makes the following orders: (1) - for the Ahmadis to stop manifesting

[527] Ibid 24.
[528] Ibid 94.
[529] Ibid 100.
[530] Ibid 101–102.
[531] Ibid 157.
[532] Ibid 158.
[533] Ibid 160.
[534] Ibid.

their belief in Mirza Ghulam Ahmad as a prophet;[535] and (2) – for the people to stop attacking the Ahmadis.[536]

However, there is an important issue left out from this Decree. The government ordered each conflicting party to refrain from certain conduct in respect of the other (the Ahmadis must stop publicly manifesting their belief, and the assaulters must stop attacking the Ahmadis). Here, the government seems to treat the two circumstances not as two separate legal issues (manifesting religion and attacking people), but as one continual circumstance: the attack is caused by the manifestation. Therefore, stopping the manifestation of religion is a condition needed to reduce the risk of conflict. On one hand, this could perhaps be classified under the limitation clause: *safety* (under ICCPR) or *security* (under Article 28 J (2) of the Constitution). However, in the perspective of criminal law, this view is incorrect. The two conditions (the manifestation and attack) should be treated as two separate legal situations. An attack should not be justified because it was triggered by the manifestation. This will result in abuse by the majority to the rights of minorities. I conclude the respondents' (government and legislature) arguments were not strong enough to support the constitutionality of the Blasphemy Law.

Aside from the direct parties (applicants and respondents) there were also *amicus curiae* or interveners in the case. Similar to the 2009 case, the 2017 case was a re-match of the concerned parties. Those who were the interveners in the 2009 case reappeared in 2017 case to affirm their interest and position in the case. Some of the interveners in this case were Dewan Da'wah Islamiyah Indonesia (DDII), YLBHI, *Komnas Perempuan* (National Commission for Women), and MUI.

The interveners may be classified into two groups: those who argue for the Blasphemy Law and those argue against the Blasphemy Law. Among those who argue for the Blasphemy Law are mostly Islamic organisation, such as DDII[537] and MUI. Those who argue against the

[535] Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republic Indonesia Nomor 3 Tahun 2008; Nomor KEP-033/JA/6/2008; Nomor 199 Tahun 2008 tentang Peringatan dan Perintah kepada Penganut, Anggota, dan/ atau anggota pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat [Joint Decree by Minister of Religious Affairs, Attorney General, and Minister of Home Affairs of the Republic of Indonesia on the matter of Warning and Order to the Followers, Members, and/or Leaders of the Indonesia Ahmadiyya Jama'at (JAI) and to the General Public] (Indonesia), points 1 and 2.
[536] Ibid point 4.
[537] Dewan Dakwah Islamiyah Indonesia (DDII) is a relatively radical Islamic movement. Crouch noted that the organisation was partly founded as a reaction to Christian proselytization and efforts to prevent apostasy. See Melissa Crouch, *Law and Religion in Indonesia: Conflict and the Courts in West Java* (Routledge, 2014) 27.

Blasphemy Law are mostly human rights-based organisations such as YLBHI and *Komnas Perempuan* (National Commission on Violence against Women).

On the group supporting the Blasphemy Law, DDII argued that Ahmadiyya has blasphemed Islam. A Fatwa No 11/MUNAS VII/MUI/15/2005 established by the Indonesian Ulama Council (MUI) declared that Ahmadiyya is a deviant sect and people who claim to be Ahmadis should not be considered Muslim.[538] In brief, DDII asked the Constitutional Court to reject the application.[539] Reaffirming its position to declare Ahmadiyya as a deviant sect,[540] MUI asked the Constitutional Court to reject the application on the grounds of *nebis in idem* because the Court had already made decisions in 2010 (case 2009) and 2013 (case 2012) both affirming the constitutionality of Blasphemy Law.[541]

On the other side of the interveners, YLBHI and Komnas Perempuan argued against the Blasphemy Law. YLBHI based its argument on the grounds that the Blasphemy Law tends to be misinterpreted in practice thus it may violate constitutional rights of the internal dimension of religious freedom in a discriminatory way.

The Court after a long proceeding decided to reject the application and affirm the constitutionality of the Blasphemy Law.[542] Maria Farida, the only judge who dissented in the 2009 decision changed her opinion in the 2012 (and later 2017) cases, making the decisions unanimous. There has been no change in the Constitutional Court's position regarding Blasphemy Law in Indonesia since then.

4.3 Commentary: The Blasphemy Law as an Unjustifiable Limitation on the Rights to Religious Freedom and Freedom of Speech

The commentary that follows is designed to address the above three judicial review cases. The three cases are related, and the Court often repeats its reasoning. Underpinning the Constitutional Court's decisions was an emphasis on the Indonesian state ideology, *Pancasila*. The Court stated that *Pancasila* is a state ideology that has to be accepted by all Indonesians.[543] It further stated that *Pancasila* is the philosophical foundation in framing religious freedom in

[538] Mahkamah Konstitusi Republik Indonesia [Indonesia Constitutional Court] No 56/PUU-XV/2017, 167.
[539] Ibid 168.
[540] Ibid 395.
[541] Ibid 387.
[542] Ibid 541.
[543] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 271.

Indonesia. Thus, there should be no excuses for any activity or practice that drives Indonesians away from *Pancasila*.[544] In the context of religious freedom, the Court's focus was on the first principle of *Pancasila*, 'belief in One and Only God'. In this regard, a person or group may not suppress the religiosity of the people, which the Court stated had been inherited as a value intertwined in many legal provisions in Indonesia.[545]

Closely linked with *Pancasila*, the Court also emphasised a principle of 'Indonesianness'.[546] This was the philosophical underpinning of the *Blasphemy Law*, and the Court used it to explain the accommodation of different religious practices in Indonesia compared with other countries.[547] In line with this, the Court emphasised the need to prevent religious conflict and discord—what we may call a preventive principle—in a heterogeneous society.[548] The Court explained: 'for the need of general protection and anticipating horizontal and vertical social conflicts, [the] Blasphemy Law is very important'.[549]

I accept that religious freedom in Indonesia must be conceived of within the distinctive legal history, constitutional ideology and multi-religious context of Indonesia. In this case, the Court's appeal to Indonesianness asserts a degree of relativism in human rights— how rights are understood, their existence and scope, is relative to local context and traditions.[550] This thesis is not against such a claim. Indeed, it accepts it as a fundamental commitment in the Indonesian context. However, this thesis argues that the Constitutional Court has inaccurately interpreted *Pancasila* and cast an overly narrow vision of 'Indonesianness' to justify the Blasphemy Law. The Court's narrow understanding of Pancasila has diminished the protection of religious freedom in Indonesia and therefore the Court's decision that justified and strengthened the Blasphemy Law contributes to serious problems for religious minorities.

The Constitutional Court in its decision on the Blasphemy Law focuses on the first principle of *Pancasila*, 'The One and Only God'.[551] This thesis argues that the first principle of Pancasila should not be read independently. It must be read alongside the other four principles in *Pancasila*: Just and Civilized Humanity (*Kemanusiaan Yang Adil dan Beradab*); The Unity of

[544] Ibid 273.
[545] Ibid 274.
[546] Ibid.
[547] Ibid.
[548] Ibid.
[549] Ibid 304.
[550] Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014) 4.
[551] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 11.

Indonesia (*Persatuan Indonesia*); government based on wisdom in representative democracy (*Kerakyatan Yang Dipimpin Oleh Hikmah Kebijaksanaan Dalam Permusyawaratan Perwakilan*); and social justice for all Indonesians (*Keadilan Sosial Bagi Seluruh Rakyat Indonesia*).

The Court states, 'someone or group may not suppress religiosity of the people which has been inherited as value in many legal provisions in Indonesia',[552] which shows that it examined the problem from the perspective of the majority. The Blasphemy Law suppresses the religiosity of minorities who have different beliefs from the majority, as it prohibits different interpretation of religions. It labels these interpretations, like those of the Ahmadis, deviant.[553] Here, I argue the Blasphemy Law should have been declared unconstitutional because while there can be limits on the manifestation of religious freedom, the law does not satisfy the proportional balance and non-discriminatory principle, by taking side to interest of majority.

The Blasphemy Law also does not satisfy *Pancasila* as the state ideology. The second principle of *Pancasila* stresses a just and civilised humanity. The Blasphemy Law does not conform to this principle as it renders justice differentially to different believers. A civilised humanity should give room for differences. Notonagoro, a prominent Indonesian philosopher on *Pancasila*, explains that the principle of just and civilized humanity reclaims the nature of humanism in Indonesia as *Bhineka Tunggal Ika* (Unity in Diversity), plural-unity, or *monopluralis.*[554] It justifies the heterogeneity of Indonesians. Therefore, according to this principle of Pancasila, all laws in Indonesia should facilitate the diversity of Indonesia.

The fifth principle of *Pancasila*, 'Social Justice for all Indonesian' also has been violated by the Blasphemy Law. Notonagoro explains that the fifth principle is the goal of all previous principles in *Pancasila* and that it is (social justice) the vision of Indonesia as a state.[555] He further explains that there must be a balance between the interests of the individual and the group.[556] The Blasphemy law does not give religious minorities a chance to practise their rights as provided by *Pancasila*. The Constitutional Court has failed to acknowledge this principle of justice in finding the Blasphemy Law to be a justifiable limit on the right to religious freedom.

[552] Ibid 12.
[553] Indonesian *Blasphemy Law* (*Law No 1 PNPS 1965*) art 1.
[554] Notonagoro, *Pancasila* (n 56) 94.
[555] Ibid 156.
[556] Ibid 160.

There is a need to interrogate the meaning of Indonesianness because it could have several meanings. This thesis argues that Indonesianness should not be defined in the way the Court did. The idea of Indonesianness should centre on the value of being Indonesian. We can return to Notonagoro's idea Unity in Diversity (*Bhinekka Tunggal ika*) [557] as an alternative way to describe Indonesianness, particularly regarding religious freedom. As a large archipelago, Indonesia naturally has many different peoples and beliefs. The national motto of 'Unity in Diversity' was declared long before the establishment of the state to unite all the differences among Indonesian. The goal is to create a peaceful and harmonious coexistence. If the Constitutional Court used this value instead of Asian values to define Indonesianness, this would better promote harmony and religious freedom in Indonesia.

4.3.1 Judicial Politics

Aside from the reasoning in the court cases, there are other contextual factors that influence how the court makes its decision. In this part, I want to examine the factors that influence judges in developing their reasoning. The idea of judicial politics explores 'institutional, structural and ideological variables for explaining key phenomena and processes of interest, such as judicial decision-making and other manifestations of judicial behaviour; appointments, promotions, and demotions; and judicial power and legitimacy.'[558] Following this idea, Section 4.3.1 will elaborate the judicial politics of the constitutional judges to explain the factors contributing to their reasoning. Some of the factors addressed here are the appointment of the judges and their religious background.

In deciding judicial review cases, all nine judges must sit on the Constitutional Court. According to the Constitution, three judges would be appointed by the president, three judges would be appointed by the Supreme Court, and three other judges would be appointed by the Parliament.[559] Most of the judges appointed by the Supreme Court were career judges who have been working as judges in Supreme Court or other courts below Supreme Court. The Parliament mostly proposes their own member of Parliament who have a law background, while the president usually promotes academics such as law professors to be constitutional judges.

[557] Notonagoro, *Pancasila* (n 56) 94.
[558] Björn Dressel, Raul Sanchez-Urribarri and Alezander Stroh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 *Annual Review of Law and Social Science* 413, 414.
[559] *Constitution of the Republic of Indonesia* (n 8) art. 24C(3).

In the 2009 case, the nine constitutional judges were Mahfud MD, Achmad Sodiki, Arsyad Sausi, Harjono, Maria Farida, Akil Mochtar, Muhammad Alim, Ahmad Fadlil and Hamdan Zoelva. Mahfud MD, who was then the Chief Justice of Constitutional Court during the 2009 case, was appointed by the Parliament to be constitutional judge. Prior to becoming a constitutional judge, Mahfud was the Minister of Defence (2000) and later the Minister of Justice (2001) during Abdurrahmah Wahid presidency; and a member of Parliament from the Islamic party, Partai Kebangkitan Bangsa (PKB) in 2004, until being appointed a constitutional judge in 2008. Aside from being active in Indonesian politics, Mahfud is also a constitutional law professor at the Indonesian Islamic University. Mahfud's views are shaped both by his expertise as a law professor as well as his time as a member of an Islamic political party.[560]

Achmad Sodiki, the then-Vice Chief Justice in the 2009 case was a law professor in at Brawijaya University prior to become constitutional judge.[561] He was raised by his grandfather who was a prominent figure in the Islamic movement during the independence war.[562] The third judge to adjudicate the 2009 case was Arsyad Sanusi.[563] He was appointed to be constitutional judge by the Supreme Court in 2008. Prior to becoming constitutional judge, Arsyad Sanusi was a career judge working in several courts in Indonesia. Sanusi resigned from his position as a constitutional judge in 2011 after he was allegedly involved in a bribery case investigated by the Constitutional Court's ethical committee.

The fourth judge in the case was Harjono. He was appointed constitutional judge by the Parliament in 2009. Prior to being a constitutional judge, Harjono was a member of Parliament—regional representative (non-partisan)—and a constitutional law lecturer at Universitas Airlangga. In the 2009 case, Harjono wrote a concurring opinion. Although he agreed that the case must be rejected, he provided a different reason. According to Harjono, Article 1 of the Indonesian Blasphemy Law gives no legal certainty (*lex certa*).[564] Therefore, it needs to be revised by the law maker.[565] However, if the Constitutional Court grants the case

[560] Mahfud official biography (in Indonesian) provided by the Constitutional Court is accessible through https://mkri.id/index.php?page=web.ProfilHakim2&id=7&menu=3.
[561] He was appointed to be constitutional judge by the president in 2008 and later became vice Chief Justice in 2010. Although all his career prior to being a constitutional judge was as an academic, Sodiki grew up in an Islamic family.
[562] As can be read in Achmad Sodiki's biography https://mkri.id/index.php?page=web.ProfilHakim2&id=9&menu=3
[563] See https://www.thejakartapost.com/news/2011/02/12/justice-quits-over-family-bribery-scandal.html
[564] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 311.
[565] Ibid 312.

resulting in the nullification of the referred law, there will be a legal vacuum.[566] He concluded that, for the time being, the Blasphemy Law is still necessary.[567]

The fifth judge in the 2009 case was Maria Farida Indrati. She was the only female judge, who also happens to be a Christian. Farida was a constitutional law professor at Universitas Indonesia prior to being appointed by the president as constitutional judge in 2008. Judge Farida was the most frequent dissenting judge in the Constitutional Court. During her tenure, Farida made at least 20 dissenting and concurring opinions.[568] In the 2009 Blasphemy Law case, Farida wrote the only dissenting opinion. She agreed with the applicants' argument that the Blasphemy Law should be revoked.[569]

According to Farida, the Blasphemy Law was a product of the old regime that was problematic since the amendment of the Constitution brought a new regime on human rights into the Constitution.[570] Thus, she argued that the claim made by the applicants should be granted.[571] The sixth judge in the 2009 case was Akil Mochtar.[572] The seventh judge was Muhammad Alim[573] and the eighth judge case was Ahmad Fadlil.[574] Finally, the ninth judge in the 2009 case was Hamdan Zoelva. He was appointed constitutional judge in 2010 by the president. Prior to becoming Constitutional judge, he was a member of Parliament from the Islamic party,

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[566] Ibid.
[567] Ibid.
[568] Pan Muhammad Faiz, 'Dari Concurring hingga Dissenting Opinions: Menelusuri Jejak Pemikiran Hakim Konstitusi Maria Farida Indrati.' (2018) in Pan Muhammad Faiz (ed), *Serviam: Pengabdian dan Pemikiran Hakim Konstitusi Maria Farida Indrati* (Aura, 2018) 3, 5.
[569] Constitutional Court of Indonesia, Court Decision No 140/PUU-VII/2009, 320.
[570] Ibid 321.
[571] Ibid 322.
[572] He was appointed constitutional judge by his colleagues in the Parliament. Akil Mochtar was the first constitutional judge to be dismissed during his tenure for committing a crime (corruption). He was sentenced to life in prison after being found guilty of manipulating a local electoral dispute case as the Chief Justice in Constitutional Court. This case was a shock for Indonesians, who since then have perceived the Constitutional Court to be as corrupt as other legal institutions in Indonesia. See Mahkamah Agung Republik Indonesia [Indonesian Supreme Court] No 336 K/Pid.Sus/2015. See also Stefanus Hendrianto, 'The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia' (2016) 25 *Pacific Rim Law & Policy Journal* 489, 562.
[573]He was a career judge before being assigned constitutional judge by the Supreme Court in 2008. It was interesting that Muhammad Alim mentioned in his official biography in the Constitutional Court website his response when he was assigned constitutional judge by the Supreme Court representative Arsyad Sanusi: 'Whatever task you give me, I will do it because you are my boss'. It might not seem problematic at first, but that statement to Sanusi may indicate a further relationship. In 2011, Sanusi resigned from his position as a constitutional judge because of a bribery case that involved his family and relatives. It was not a surprise that later in 2016, Alim was also investigated by the Corruption Eradication Commision (KPK) for a similar case. See <https://mkri.id/index.php?page=web.ProfilHakim2&id=12&menu=3>.
[574]He was also promoted to be constitutional judge by the Supreme Court. Ahmad Fadlil joined the Constitutional Court in 2010 and *Blasphemy Law* was one of his first cases. Prior to joining the Constitutional Court, he was a career judge who worked most at the Islamic (religious) courts throughout Indonesia. He has an Islamic education background. See <https://mkri.id/index.php?page=web.ProfilHakim2&id=617&menu=3>.

Partai Bulan Bintang. He was also one of the prominent promotors of the re-establishment of the *Jakarta Charter* in the Constitution during the amendment process in 2000.[575]

In the 2009 case, seven judges (Mahfud MD, Sodiki, Sanusi, Mochtar, Alim, Fadlil and Zoelva) unanimously agreed to uphold the Blasphemy Law. Harjono agreed to uphold the law, although he provided a concurring opinion that the law needs to be revised. Farida wrote a dissenting opinion, arguing for the applicant that the Blasphemy Law is unconstitutional. However, at the conclusion, the Constitutional Court rejected the 2009 application.

In 2012, most judges who heard the 2009 case were also adjudicating the 2012 Blasphemy Law case. Mochtar, Zoelva, Harjono, Farida, Fadlil and Alim were among the nine judges examining the Blasphemy Law 2012 case. The three new judges to join the Court were Anwar Usman, Arief Hidayat and Patrialis Akbar. All judges in the 2012 case agreed to reject the application, including Harjono and Farida, who argued differently in the 2009 case.

Usman, who is currently the Chief Justice of the Constitutional Court, started his tenure in 2011 after being promoted by the Supreme Court.[576] Hidayat was quite controversial.[577] He is currently serving his second period as a constitutional judge. Akbar was also controversial before being found guilty of corruption and sentenced to eight years' imprisonment.[578]

In the 2017 case, six new judges were involved in examining the case: Aswanto, Wahiduddin Adams, I Dewa Gede Palguna, Manahan MP Sitompul, Saldi Isra and Suhartoyo. The other three judges in the 2017 case were previously involved in the 2009 and/or 2012 case: Usman, Hidayat and Farida.

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[575] See Konstitusi (n 338) 269.

[576] Anwar Usman, on the Constitutional Court webpage, stated that as a career judge under the Supreme Court, he had known and worked with various constitutional judges before taking the position. See <https://mkri.id/index.php?page=web.ProfilHakim&id=668&menu=3>.

[577] He was appointed constitutional judge by Parliament in 2013 after Mahfud MD's retirement. He was twice convicted of violating the constitutional judges' code of ethics when he served as Chief Justice in 2016 and when he ran for the second period of candidacy in 2018. He was then just given a light sanction (verbal warning) and re-elected constitutional judge for the second time in 2018. See <https://www.thejakartapost.com/news/2018/01/16/mk-chief-justice-violates-code-of-ethics-receives-light-sanction.html>.

[578] He was appointed constitutional judge in 2013. As a politician, prior to his position as a constitutional judge, Patrialis Akbar served as a member of Parliament from Partai Amanat Nasional for two periods (1999–2004 and 2004–2009). He later became the Minister of Law and Human Rights under Susilo Bambang Yudoyono's presidency (2009–2011). Despite his sound record as a state official, Akbar was the second constitutional judge to be found guilty of corruption and sentenced to eight years imprisonment. See Pengadilan Negeri Jakarta Pusat [Central Jakarta Court/Magistrate] No 81/Pid.Sus-TPK/2017/PN.Jkt.Pst, 4 September 2017.

Aswanto was appointed as constitutional judge by Parliament in 2013, replacing Akil Mochtar after he was sentenced for corruption. Wahiduddin Adams was another constitutional judge appointed by Parliament in 2014.[579] I Dewa Gede Palguna was a new-old name in the Constitutional Court. He served as constitutional judge in the first term of Constitutional Court from 2003–2008.[580] Manahan MP Sitompul was appointed constitutional judge in 2015 by the Supreme Court.[581]

Saldi Isra was appointed constitutional judge in 2017 by the president.[582] Isra is considered a vocal and promising constitutional judge, given his history as an activist.[583] Suhartoyo was a career judge under the Supreme Court before being promoted to constitutional judge in 2015 by the Supreme Court.[584]

Nadirsyah Hosen has examined the religious background of the judges, concluding that 'the presence of Islamic judges at the MK enriches the legitimacy of the MK in the eyes of the public.'[585] This article is interesting because Hosen also claimed that judges' 'expertise in shari'a law can, in fact, make him or her a better advocate for maintaining the Constitution. This can be viewed as a clear indication of the compatibility of Islamic law and the Constitution of Indonesia.'[586] I agree with Hosen that there is a compatibility of Islamic law and the Constitution. This is the result of the constitutional debates in 1945, 1955–1959 and 1999–

[579]Prior to his position as a constitutional judge, Wahiduddin Adams served as a bureaucrat in the Ministry of Law and Human Rights. He also mentioned in his official biography on the Constitutional Court webpage that religious education (Islam) has been an important part of his life. See <https://mkri.id/index.php?page=web.ProfilHakim&id=671&menu=3>.

[580]After taking years off for his PhD, he returned to the Constitutional Court after being appointed by the president in 2015. However, his second tenure was not as smooth as his previous one. In 2017, he was investigated for a bribery scandal alongside Akbar. See <http://www.tribunnews.com/nasional/2017/02/14/hakim-mk-i-dewa-gede-paguna-mengaku-tidak-kenal-basuki-dan-kamaludin>.

[581]Prior to his current position, he was a career judge with strong religious values (Christian) attached to his family life. See <https://mkri.id/index.php?page=web.ProfilHakim&id=674&menu=3>. In 2017, Manahan MP Sitompul was investigated by the Corruption Eradication Commission (KPK) for a corruption case in which case fellow constitutional judge Akbar was sentenced to eight years imprisonment. See also <https://video.tempo.co/read/5931/hakim-manahan-sitompul-diperiksa-kpk-terkait-kasus-patrialis-akbar>.

[582]He was a constitutional law professor in Universitas Andalas and has been working with the anti-corruption movement in the recent years. See <https://mkri.id/index.php?page=web.ProfilHakim&id=677&menu=3

[583]https://nasional.kompas.com/read/2017/04/11/10510281/profil.saldi.isra.hakim.konstitusi.pilihan.jokowi.?page=all>.

[584]There was a controversy during his appointment in 2015. Harjono, who was a constitutional judge, commented on Suhartoyo's candidacy by the Supreme Court in the late 2014, voicing his disapproval of Suhartoyo as constitutional judge because Suhartoyo was investigated for breaching ethical codes as a judge. See <https://mkri.id/index.php?page=web.ProfilHakim&id=673&menu=3>. See also <https://news.detik.com/berita/d-2770153/suhartoyo-jadi-hakim-konstitusi-harjono-nanti-kasihan-mk-nya>.

[585] Nadirsyah Hosen, 'The Constitutional Court and Islamic Judges in Indonesia' 2016 (16)2 *Australian Journal of Asian Law* 1, 10.

[586] Ibid 1.

2002 negotiating the interest of Islam. The problem is, where is the accommodation of other religious or non-religious values? Hosen's statement that 'the presence of Islamic judges at MK enriches the legitimacy of the MK in the eyes of the public' is only true if we disregard minorities, something that we should not do in Indonesia with its "Unity in Diversity" motto.

The above cases of judicial review of the Blasphemy Law are a useful example. Most of the judges in the above case were Sunni Muslim. When a judge is an active member of an Islamic party or Islamic movement, they may be more likely to affirm the Blasphemy Law to protect Islam from blasphemy. This is the case with Hamdan Zoelva who adjudicated the 2009 and 2012 case, who was also a member of Parliament from Islamic party PBB during the constitutional amendment in 2000 who argued (on behalf of his party) for the mention of Islamic law (sharia) in the Constitution.[587]

Farida was the only constitutional judge to adjudicate all the three cases (2009, 2012 and 2017). In the 2009 case, she was the only judge to argue against the Blasphemy Law. Her dissenting opinion was much praised, especially for raising the interests of the minority in Indonesia.[588] Interestingly, she had no dissenting nor concurring opinion in the 2012 and 2017 cases, when she and the other eight judges unanimously rejected the applications.

In undertaking judicial review of a law in Indonesia, Constitutional Court would conduct two stages of examination. The first stage is the admissibility of the case. If a case is declared admissible[589], the judges will then examine the substance of the application.[590] The Blasphemy Law cases in 2009, 2012 and 2017 were all declared admissible by the Court because the applicants in the three cases successfully claimed their legal standing, including their claim on their constitutional rights. When a case is declared admissible, the applicant/s need to convince the judges that their (approved) constitutional right/s has been violated by the reviewed law (Blasphemy Law).

Farida, with the other judges, found in all three cases that the applicants had legal standing to pass the admissibility of the cases. This means that she approved the applicants' constitutional rights, which in these cases was the right to religious freedom. However, she had a different

[587] See Konstitusi (n 348) 581.
[588] <https://www.thejakartapost.com/news/2017/12/19/indonesialosing-only-female-top-justice-amid-rights-worries.html>.
[589] *Law No 24 2003 on Constitutional Court*, arts 51(1), (2) and 66(1).
[590] Ibid art 56.

view on whether the Blasphemy Law violates the applicants' constitutional rights. In the first case (2009), Farida found that the law violates the applicants' rights, thus concluding that the Blasphemy Law needs to be revoked. However, in the 2012 and 2017 cases, she did not find that the Blasphemy Law breached applicants' rights.

In fact, the applicants in both 2012 and 2017 cases were the direct victims of the law because they had been prosecuted under the Blasphemy Law. The 2012 case was submitted by the adherent of Shia, a minority Islamic sect and some of them were sentenced to jail for committing a crime classified under the Blasphemy Law. The 2017 case was submitted by the member of another religious minority group in Indonesia, Ahmadiyya. Although the member of Ahmadiyya was not prosecuted by the government, the government created a Joint Ministerial Decree to limit the Ahmadis's freedom to manifest religion. This Decree is said to derive from the Blasphemy Law. In addition, the Ahmadis were also being persecuted by their fellow Indonesians for sharing different ideas of being Muslim.[591] The applicants in 2009 case were organisations and individuals having concern on religious freedom. Abdurrahman Wahid was a prominent figure of Nahdlatul Ulama, the most influential Sunni organisation in Indonesia. None of the applicants in the 2009 case was prosecuted under the Blasphemy Law or was a victim of the law.

Considering the applicants' profile, it is obviously easier to recognise the loss of the applicants' constitutional rights (to religious freedom) in the 2012 and 2017 case, when compared with the 2009 case. Since judge Farida approved the applicant's claim in 2009, to be consistent in her position she should have approved the 2012 and 2017 applications, particularly because these applicants' in fact had stronger case due to the loss they had suffered as a result of the Blasphemy Law.

The establishment of the Constitutional Court in 2003 brought the idea of (constitutional) precedent into the Indonesian court system. Normatively, the Constitution gives the Constitutional Court the authority to review the constitutionality of a law (*Undang-Undang*).[592] In testing the constitutionality of a law, the Constitutional Court may declare a law (or article or any part of the law) unconstitutional and automatically revoke the law (or any part of it).[593]

[591] See Bagir (n 517); Universitas Gadjah Mada and Melissa Crouch, *Indonesia, Militant Islam and Ahmadiyah* (Centre for Islamic Law and Society University of Melbourne, 2009).
[592] See *Constitution of the Republic of Indonesia* (n 8) art 24 C(1).
[593] *Law No 24 2003 on Constitutional Court*, art 57.

This authority gives the Indonesia Constitutional Court the role of 'the negative legislator'.[594] As a negative legislator, the Indonesia Constitutional Court may revoke the (positive) legislation (*Undang-Undang*) created by Parliament. This is basically a 'checks and balances' mechanism within the three branches of government (executive, legislative and judiciary). In exercising its authority as a negative legislator, the Constitutional Court is often criticised for turning itself to become a 'positive legislator' when they find it difficult to decide whether a law is constitutional and then adding an interpretative phrase as a 'condition' for the law to be constitutional or unconstitutional.[595] Since its establishment in 2003, the Constitutional Court has made numerous 'conditionally constitutional' and 'conditionally unconstitutional' decisions.[596]

The Constitutional Court can use previous decisions to decide judicial review cases and ensure legal certainty. Although the constitutional judges still allowed to decide similar cases differently from the previous decision, this is not likely to be the case as it will create legal uncertainty. Judicial review in the Constitutional Court mixes the so-called 'abstract review' and 'concrete review'. This means, to submit a judicial review case before the Constitutional Court, an applicant needs to prove his/her (potential) loss caused by the tested law (concrete review). However, the decision made by the Court is applied and binding to all (abstract review). This will lead to more complexity as shown by the Marriage Law case that I will discuss further in the next chapter. The Constitutional Court justifies the use of constitutional jurisprudence to achieve legal certainty. This means, when a case has been decided by the Constitutional Court, it will most likely decide similar cases the same way.

In 2009 the Constitutional Court declared the Blasphemy Law constitutional, therefore the judges in 2012 and 2017 cases follow the 2009 decision. It was stated by the Constitutional Court itself in the 2012 and 2017 decision that the Court referred to the 2009 case. In the 2012 case, the Court stated 'the Constitutional Court in Case No 140/PUU-VII/2009, dated

[594] See eg, Aninditya Eka Bintari, 'Mahkamah Konstitusi sebagai Negative Legislator dalam Penegakan Hukum Tata Negara' (2013) 8(1) *Pandecta* 84–91.
[595] See eg, Martitah, 'Progresivitas Hakim Konstitutsi dalam Membuat Putusan (Analisis Terhadap Keberadaan Putusan Mahkamah Konstitusi yang bersifat Positive Legislature) (2012) 41(2) *Masalah-Masalah Hukum* 315–25; Muhammad Armia, 'Ultra Petita and the Treat to Constitutional Justice: Indonesian Experience' (2018) 26 (2) 903.
[596] See eg, Faiz Rahman and Dian Agung Wicaksono, 'Eksistensi dan Karakteristik Putusan Bersyarat Mahkamah Konstitusi' (2016) 13(2) *Jurnal Konstitusi* 349–78; Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito and Syukri Asy'ari, 'Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat serta Memuat Norma Baru' (2015) 12(3) *Jurnal Konstitusi* 632–62.

19 April 2010 has rejected the application to declare the Blasphemy Law unconstitutional.'[597] In the 2017 case, the court says, 'Since the Constitutional Court decision on the Case No 140/PUU-VII/2009, the Court affirms its position in arguing for the constitutionality of the Indonesian Blasphemy Law.'[598] The statements made by the Constitutional Court in 2012 and 2017 cases demonstrate the exercise of constitutional jurisprudence in the Constitutional Court.

The 2009 constitutional precedent may be one reason that Maria Farida was reluctant to dissent in 2012 and 2017 cases. Similar to practices in other countries, judges' dissenting opinion in Indonesia is not binding and could not change the majority decision made by the panel of judges.[599] Dissenting opinion is an act to express an idea beyond the judges' deliberation meeting. This happened in other courts as well.[600] As opposed to the Court hearing, judges' deliberation meeting in the Constitutional Court is not open to the public.[601] The public would not have access to any debate within the judges' deliberation meeting. They would only observe the wrap-up decision made by the panel judges that is often settled by voting. Thus, judges with different opinion would be given room to express their dissenting or concurring opinion in the decision.

4.3.2 Pressure from Islamic Movements

The second aspect of my commentary on the Constitutional Court decisions regarding the Blasphemy Law is the social pressure from Islamic movements. Normatively, judicial independence is required in the Indonesian legal system.[602] Such guarantee of judicial independence is expressed further under Article 3 of Law No 48 2009 on Judicial Power, which reads:

> 1. In carrying out their duties and functions, judges and constitutional judges must maintain judicial independence;

[597]The Indonesia Constitutional Court decision, Case No 84/PUU-X/ 2012, 146.
[598] The Indonesia Constitutional Court decision, Case No 56/PUU-XV/2017, 536.
[599] See eg, Ruth Bader Ginsburg, 'The Role of Dissenting Opinions' (2010) 95(1) *Minnesota Law Review* 1–8; James Spriggs, Forrest Maltzmann and Paul Wahlbeck, 'Bargaining on the US Supreme Court: Justices' Responses to Majority Opinion Drafts' (1999) 61(2) *Journal of Politics* 485–506.
[600] See Gustaf Reerink, Kevin Omar Sidharta, Aria Suyudi and Sophie Hewitt, 'The Commercial Courts: A Story of Unfinished Reforms' in Melissa Crouch (ed), *The Politics of Court Reform: Judicial Change and Legal Culture* (Cambridge University Press 2019) 174, 176.
[601] Constitutional Court Regulation No 6/PMK/2005, art 29(1): 'judges deliberation meeting is conducted in a closed and confidential manner and chaired by the Chief Justice of Constitutional Court'.
[602] See *Indonesian Constitution* art 24 and *Law No 48 2009 on Judicial Power* art 1.

2. Any interference in judicial matters by other parties outside the judicial authority is prohibited, except in matters as referred to in the Constitution;

3. Any person who deliberately violates provisions as referred to in (2) shall be punished in accordance with the law.[603]

However, in court proceedings, the related parties (applicant and the respondent) need to convince judges. This procedure is normal and acceptable within a court proceeding. What is interesting is the number of interveners in the Blasphemy Law cases. In the first case (2009 case), there were 24 interveners ranging from Islamic organisation to National Human Rights Committee, as discussed earlier. Some of these interveners also represent in the 2017 case such as DDII and MUI. There were two main sides this case, those who support the existence of the law, and those who prefer the law to be abolished. The first side mostly consists of Islamic organisations, while the other mostly consists of human rights organisations and religious minorities.

Legally speaking, the Constitutional Court allows anyone to intervene in a judicial review case as long as they have a direct or indirect interest in the application.[604] The interveners with direct interest in the case are those whose rights and/or authority are affected by the application.[605] They will be given the same rights as the applicant in the case.[606] Interveners with indirect interest are parties who need to be present before the court because of their authority.[607]

Among the various parties registering to be interveners in the Blasphemy Law cases, I would like to highlight MUI for its strong interest in supporting the Blasphemy Law. MUI is a non-governmental body consisting of representatives from Islamic organisations throughout Indonesia. With qualifications to create jurisprudence in Islamic law (fatwa), MUI was widely viewed as the only organisation in Indonesia to have the authority to give a national statement about Islamic law in term of jurisprudence used also by the government.[608]

[603] *Law No 48 2009 on Judicial Power* art 3.
[604] Constitutional Court Regulation No 6 2005 art 14(1).
[605] Ibid art 14(2).
[606] Ibid art 14(3).
[607] Ibid art 14(4).
[608] Although MUI is not a state body, it is often referred to by the Indonesian government for religious matter. See Syafiq Hasyim, 'Majelis Ulama Indonesia and Pluralism in Indonesia' 2015 (41)4–5 *Philosophy and Social Criticism* 487, 488.

MUI was established on 26 June 1975[609] as the result of a national conference attended by ulama (Muslim religious leader) across Indonesia as representatives from different Islamic organisations such as NU, Muhammadiyah, Syarikat Islam, Perti, Al Washliyah, Math'laul Anwar, GUPPI, PTDI, DMI and Al Ittihadiyyah. Although MUI gathers many Islamic organisations, it does not accommodate minority groups such as Shia and Ahmadiyya which were never able to register themselves to be the member of MUI.[610] Further, MUI established its fatwa (legal opinion) declaring Ahmadiyya and Shia as deviant sects.[611]

MUI was a key intervener in the Blasphemy Law case. With the additional interveners from various Islamic organisations which register themselves to be interveners (*amicus curiae*) to the case, sociopolitical pressure on the court regarding how to interpret the Blasphemy Law is inevitable. These organisations did not only show their interest and pressure within the court room but also outside the court, including demonstration and social media. The biggest demonstration in relation to the Blasphemy Law was the 'Aksi 212'. The group named Aksi 212, which reflects the date of the demonstration, 2 December (2016), was a radical Islamist group that led a mass protest in response to Basuki Tjahaya Purnama (Ahok)-the then governor of Indonesia's capital city Jakarta- who was accused of blaspheming Islam and was later prosecuted under the Blasphemy Law.[612] Millions of people marching in the main streets of the capital city, Jakarta during the demonstration.[613]

This demonstration was not directly linked to the judicial review of the law, but rather the march was to condemn Ahok who was prosecuted under the Blasphemy Law. Cahyo Pamungkas, researcher from the Indonesia Institute of Science (LIPI), explains in his study that Aksi 212 was supported by Islamic movements which previously promoted the establishment of an Islamic state in Indonesia.[614] They transformed the idea of an Islamic state to a 'sharia-compliant Republic of Indonesia' after realising that the labelling of an Islamic State cannot be

[609] Check MUI website for greater detail <https://mui.or.id/sejarah-mui/>.
[610] Syafiq Hasyim, 'Fatwa Aliran Sesat dan Politik Hukum Majelis Ulama Indonesia (MUI)' (2015) 25(2) *Al-Ahkam* 241, 247.
[611] Ibid.
[612] Arie Setyaningrum Pamungkas and Gita Octaviani, 'Aksi Bela Islam dan Ruang Publik Muslim: Dari Representasi Daring ke Komunitas Luring.' (2017) 4(2) *Jurnal Pemikiran Sosiologi* 65, 65.
[613] See eg, Ahmad Sholikin, 'Islamic Political Movement in Indonesia After "Aksi Bela Islam Jilid I, II, and III"' (2018) 10(1) *Madani Jurnal Politik dan Sosial Kemasyarakatan* 12, 16; Abidatu Lintang Pradipta et.al, 'Analisis Bingkai Pemberitaan Aksi Bela Islam 2 Desember 2016 (Aksi 212) di Media Massa BBC (Indonesia) & Republika' (2018) 48(1) *Informasi Kaian Ilmu Komunikasi* 109, 110.
[614] Cahyo Pamungkas, 'Gone but Not Forgotten: The Transformation of the Idea of Islamic State through Traditional Religious Authority' (2018) 23(2) *Masyarakat: Jurnal Sosiologi* 187.

imposed in Indonesia.[615] Radical Islamic movements in Indonesia need to compromise on their interest to establish an Islamic state or they will be considered to conflict with the state ideology, *Pancasila*.[616] This will lead to disbandment of the organisation by the government.[617]

Based on the Law on Civil Society Organisation, any civil society organisation may register to be a legal entity.[618] To have a legal standing as a legal entity provides more legal protection and benefits. To incorporate as a legal entity, a civil society organisation must register with the Indonesian Ministry of Law.[619] Under the 2013 Law on Civil Society, disbandment of a registered civil society organisation (from being a legal entity) must be done through court proceedings.[620] In 2017, the government revised the Law on Civil Society Organisation. Since then, the government may revoke the registration (as a legal entity) of a civil society organisation without court proceedings when the Ministry of Law perceives the organisation to not be in accordance with *Pancasila* and the Constitution.[621] One Islamic organisation banned by the government under this law was *Hizbut Tahrir Indonesia* (HTI).[622]

HTI was an Indonesian branch of *Hizbut Tahrir*, an international Islamic movement promoting the establishment of an Islamic state (Islamic Caliphate).[623] In Indonesia, HTI was registered as a legal entity under the Ministry of Law Decree No AHU-0028.60.10.2014. Following the revision of Civil Society Law in 2017, the Decree was withdrawn by the Ministry of Law based on the reason that HTI's promotion of Islamic state is against *Pancasila* and the unitarian concept of Republic Indonesia.[624] The revocation of HTI's legal status by the government in 2017 was seen by Kontras, a prominent human rights NGO in Indonesia, as a compromise after the Court decision in the Ahok blasphemy case.[625]

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[615] Ibid 188.
[616] Undang-Undang No 16 Tahun 2017 tentang Penetapan Perppu Ormas menjadi Undang-Undang [*Law No 16 2017 on The Legalisation of Interim Emergency Law on Civil Society Organisation*] (Indonesia) art 2.
[617] Ibid art 61.
[618] Ibid art 10.
[619] Ibid art12.
[620] *2013 Indonesian Law on Civil Society Organisation* art 70.
[621] *2017 Indonesian Law on Civil Society Organisation* art 61; (*Law No 16 2017 on the Legalization of the Revision of Law No 17 2013 on Civil Society Organisation*).
[622] Ahmad Najib Burhani, 'The Banning of Hizbut Tahrir and the Consolidation of Democracy in Indonesia' (2017) 71 *ISEAS Yusof Ishak, Perspective* 1, 1.
[623] Mohamed Nawab Mohamed Osman, 'The Transnational Network of Hizbut Tahrir Indonesia' (2010) 18(4) *South East Asia Research* 735, 763.
[624] See Ministry of Law Decree No AHU-30.AH.01.08 2017.
[625] <https://www.cnnindonesia.com/nasional/20170510154949-12-213860/kontras-sebut-pembubaran-hti-dan-vonis-ahok-hasil-kompromi>.

Within a relatively short period, the Ahok case occurred, followed by the demonstrations, the revision of the Civil Society Law, and the disbandment of HTI. Ahok delivered his allegedly blasphemous speech during a campaign on 27 September 2016. On 2 December 2016, massive demonstrations involving various Islamic groups occurred. HTI was one of the groups initiating the demonstration. On 9 May 2017, judges of the Jakarta District Court declared Ahok guilty and sentenced the defendant to two years imprisonment.

On 10 July 2017, the president revised the Civil Society Organisation Law to ease the mechanism to disband civil society organisation. This was quite unusual because normally the president has no authority to create or revise a law. The creation or revision of law must be conducted together by the president and the legislature.[626] However, the president may, in an emergency situation, create or revise a law,[627] although the proposed revision made by the president should be endorsed by the Parliament.[628]

The interim emergency Law on Civil Society Organisations was later affirmed by the Parliament. It is important to note the 'emergency situation' claimed by the president to justify his actions for revising the Civil Society Organisation Law.

Three days after the revision of the Civil Society Organisation Law which permitted the government to disband a civil society organisation without having to go to court, the Ministry of Law established Decree to disband HTI, dated 14 July 2017.[629] Since then, HTI is no longer allowed to exist in Indonesia. The sequence of events—the demonstration, followed by the prosecution of Ahok, the revision of the Civil Society Law, and then the cancellation of HTI registration - is related. Political scientist Adi Prayitno argued that this timeline explains that the government wants to balance the interests of both Islamic and secular groups.[630] Kontras's director Haris Azhar previously also mentioned that the government in this case plays a 'politics of balance' where the government on one hand accommodates the aspirations of Islamic groups to sentence Ahok under the Blasphemy Law, but on the other hand, the

[626] *Constitution of the Republic of Indonesia* (n 8) art 20(2).
[627] See Butt and Lindsey (n 5) 47.
[628] Ibid.
[629] The Ministry of Law revoked Decree No AHU-00282.60.10.2014 regarding Registration of HTI as a Civil Society Organisation.
[630] Tempo.co, 'Vonis Ahok dan Pembubaran HTI, Pengamat Politik: Seolah Skor 1:1' (webpage, 10 May 2017) <https://nasional.tempo.co/read/874075/vonis-ahok-dan-pembubaran-hti-pengamat-politik-seolah-skor-11/full&view=ok>.

government also restricts Islamist groups, that is by the banning of HTI.[631] However, it must also be noted that HTI is not just a regular Islamist organisation. This organisation has a specific aim to create an Islamic state which is considered subversive.

With so much pressure from Islamist movements in Indonesia, the government may not disregard them. However, when the demand from the Islamist movements is excessive, the government will try to balance or negotiate to reduce this pressure. Such efforts to balance competing interests is similar to the historical debate when the founding fathers drafted the Constitution in 1945, which was discussed in Chapter 3. Some of the aspirations from the Islamic parties were accommodated such as the 'One and Only God', but the explicit mention of Islam was rejected.

There are more cases of anti-blasphemy laws in 'Muslim-majority countries' than anywhere else. A study by Paul Marshall and Nina Shea shows wide-ranging restrictions on blasphemy alongside apostasy and insulting Islam in various Muslim countries, such as Saudi Arabia, Iran, Pakistan and Egypt.[632] Their study also finds that blasphemy-based repression and violence has grown rapidly in Indonesia.[633]

Marshall in his other study on Indonesia suggested that disagreements about religious freedom in Indonesia are sharper than in other countries.[634] Interestingly, the Indonesian government claims religious toleration in Indonesia is 'better than in other countries' and a model for other countries. However, Human Rights Watch described the claim as 'fantasy' and 'self-deception,' reflecting the government's wilful disregard of the corrosive influence of discriminatory laws that pose a clear threat to the country's religious minorities.[635] Human Rights Watch further describes the government's claim as 'a gross insult to religious minorities who are at risk from these discriminatory laws',[636] referring to the Blasphemy Law and its derivative laws in Indonesia.

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631 Tempo.co, 'Haris Azhar Soal Ahok dan HTI, Permainan Politik Keseimbangan' (webpage, 10 May 2017) <https://nasional.tempo.co/read/873978/haris-azhar-soal-ahok-dan-hti-permainan-politik-keseimbangan/full&view=ok>.

632 Paul Marshall and Nina Shea, *Silenced, How Apostasy & Blasphemy Codes Are Choking Freedom Worldwide* (Oxford University Press, 2011) 6.

633 Ibid 151.

634 Paul Marshall, 'The Ambiguities of Religious Freedom in Indonesia' (2018) *Review of Faith & International Affairs* 85, 85.

635 Ibid.

636 Ibid.

According to Marshall, two features in the Indonesian context explain these opposed claims about religious freedom: the rhetoric of harmonious religious relations and the systematic patterns of discrimination against certain minorities coupled with the threat of growing radicalisation.[637] Recalling my discussion in the previous chapter of this thesis on the historical development of religious freedom in the Indonesian Constitution, there is a need to appeal to *Pancasila* to respond this matter. *Pancasila* as the state's ideology frames the importance of unity within the Indonesian pluralism. In this regard, Notonagoro interpret the third *sila* of *Pancasila* 'Unity of Indonesia' as to reduce differences among Indonesians by focusing on the similarity to create harmony.[638] Thus, it is important to avoid friction, conflict and dispute.[639]

For arguments saying that we must focus on harmony instead of showing the nature of differences, leads the Constitutional Court to uphold the constitutionality of Blasphemy Law in Indonesia. The Court concludes in its decision by saying 'For the need of general protection and anticipating horizontal and vertical social conflicts, [the] Blasphemy Law is very important.'[640] This, relates to what the Court claims as 'Indonesianness', as previously discussed in Section 4.2.3. It was the philosophical underpinning of the Blasphemy Law, which the Court appealed to claim the relevance of differences of religious practices in Indonesia compared with other countries.[641]

Here, we need to examine whether the Blasphemy Law is an unjustifiable limitation on the rights to freedom of speech and freedom to manifest religion. Blasphemy Law is law prohibiting speech or conduct that shows you do not respect God or a religion.[642] By prohibiting someone to speak or act related to religion in a disrespectful way, the Blasphemy Law limit people's freedom to manifest religion (as one aspect of their religious freedom) and freedom of speech.[643]

Since freedom to manifest religion and freedom of speech are human rights, they may be limited only if there is a particularly strong justification for doing so. I would argue that blasphemy laws are not a justifiable limitation on the freedom to manifest religion or on

[637] Ibid.
[638] Notonagoro, *Pancasila* (n 56) 118.
[639] Ibid 119.
[640] Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia] No 140/PUU-VII/2009, 19 April 2010, 304.
[641] Ibid 274.
[642] <https://dictionary.cambridge.org/dictionary/english/blasphemy>.
[643] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

freedom of speech. My reasons for claiming that blasphemy laws are not a justifiable limitation on the right to freedom of religion and freedom of speech are: (1) blasphemy laws protect religion, not people; (2) blasphemy laws seek to prevent offence, not harm; and (3) blasphemy laws are not proportionate to the interest in not having one's religious feelings insulted.

First, the Blasphemy Law does not protect human rights, it protects religion. By contrast, religious freedom and freedom of speech protect individuals. Referring to Mill, infringements of individual freedoms may be justified if they cause harm to others. 'Others' in this regard refer to individuals,[644] therefore the Blasphemy Law which does not protect individuals are not justifiable limits on the freedom (to manifest) religion and/or freedom of speech.

Second, blasphemy laws seek to prevent offence to religion. In this sense, blasphemy laws may influence individuals (adherents of the blasphemed religions) in the form of offence. As explained above, an offence is not harm although it may irritate a person's thoughts or feelings. What is being justified to limit someone's freedom to manifest religion and freedom of speech is harm, not offence. In this regard, Barendt explained, 'The proscription of any type of speech on the ground of its offensiveness is, of course, very hard to reconcile with freedom of expression, for a right to express and receive only in offensive opinions would hardly be worth having.'[645] Barendt continued by referring to European Court of Human Rights case in the decision of Handyside, 'the Convention guarantee of freedom of expression extends to the dissemination of ideas which are shocking, offensive and disturbing, and that must include ideas on religion as well as political opinions and sexually explicit material.'[646]

Third, the benefits of blasphemy laws are not proportionate to the harms they cause by limiting the freedom to manifest religion and freedom of speech. The UN Special Rapporteur on freedom of religion or belief claims that blasphemy laws typically have intimidating effects on members of religious minorities as well as on critics or dissenters.[647] Because blasphemy laws limit people's freedom to manifest religion and freedom of speech, they cause substantial damage to people whose rights are limited. Meanwhile the blasphemy laws give no tangible

[644] In his explanation, Mill even specifically referred to 'other' in this regard as 'adult': 'it is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human being in the maturity of their faculties.' See Mill, *On Liberty* (n 166) 14.
[645] Eric Barendt, 'Religious Hatred Laws: Protecting Groups or Belief?' (2011) 17 *Res Publica* 41, 44.
[646] Ibid.
[647] András Koltay and Jeroen Temperman, 'Introduction' in András Koltay and Jeroen Temperman (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflection after the Charlie Hebdo Massacre* (Cambridge University Press, 2017) 7; Marshall and Shea (n 632) 3.

benefit for individuals as these laws do not protect individuals. Therefore, Blasphemy Law is not proportional to balance the costs and benefits of the conflicting rights and interests.

4.4 Conclusion

In the Indonesian case, politics is a determining factor in the making of laws concerning religion. Not just a high-level politics by political parties, but also low-level politics played by Islamic organisations in the social discourse, including social media. The low-level politics works by creating a hegemonic paradigm of Islamic interpretation. In a utilitarian way, Sunni Muslim as the majority seeks to determine how Islam should be interpreted. Any disagreement with the majority's perception may be viewed as deviancy which threatens public order. Judges may be indirectly influenced by knowledge of the views of the majority Muslims. The judges (and the government) may find it hard to resist the pressure from Islamic groups inside and outside the court room. The combination of various groups registering themselves as interveners to the case and the demands of many people marching in the street to defend Blasphemy Law is the broader context in which the court had to decide this case.

In this chapter I have shown that the decisions of the Constitutional Court upholding the validity of the Blasphemy Law in fact fail to protect the right to religious freedom. The explanation I have offered shows that the judges created the concept of 'Indonesianness' to justify the Blasphemy Law as a permissible limitation based on the 'religious values' of Muslims as the majority. But beyond the legal reasoning, I have suggested that the public demonstrations and protest by radical Islamic groups created a broader atmosphere that made it difficult for government officials to oppose the Blasphemy Law. The Constitutional Court is not immune from such wide social perspectives and public pressure.

Chapter 5: The Marriage Law: An Endorsement for Islamic Law

This chapter will discuss the development of the Marriage Law and the Constitutional Court decisions on the constitutionality of the law through several of its judicial review cases. I argue that Islamic interests, in the sense of incorporating Islamic law in the Indonesian legal system, were considered in the making of the Marriage Law. The incorporation of Islamic law values within the Marriage Law gives rise to various issues regarding religious freedom and related rights such as women and children rights as can be seen in the discussion during the judicial review of the Law.

To have a more comprehensive understanding of the construction of the Marriage Law in Indonesia, discussion in this chapter will be heavily focused on sociopolitical discourse surrounding the Marriage Law, both in the lawmaking process and judicial review of the law before the Constitutional Court where the Islamist movements play an influential role in this regard.

I will start the chapter by discussing the historical legal framework of marriage in Indonesia since the Dutch colonisation era, and then consider the making of the 1974 Marriage Law and the Islamic Law Compilation in 1991. We will observe how the state and Muslims negotiated the existence of Islamic law resulting in legal pluralism in Indonesia. In Section 5.2, I will examine the Constitutional Court decisions on the Marriage Law.

Among the cases lodged before the Court, I have chosen to examine three important cases: Case No 12/ PUU-V/2007 on Polygamy (2007 case); Case No 46/ PUU-VIII/2010 on Child Born Out of Wedlock (2010 case); and Case No 68/PUU-XII/2014 on Interfaith marriage (2014 case). These three cases have the most in-depth discussion on the issue of religion compared with other cases such as Case No 69/PUU-XIII/2015 on Prenuptial agreement and Case No 22/PUU-XV/2017 on the minimum age of marriage, where the court does not offer sustained reasoning on matters of religion.

The 2007 polygamy case at first seems to be a progressive response by the state to affirm its authority to control the application of Islamic law in Indonesia. However, the fact that the Court affirmed the constitutionality of polygamy shows that Islamic law is still being accommodated by the state. The 2010 case on child born out of wedlock was a complicated case that was partially granted by the court under the so-called ‘conditionally unconstitutional’ doctrine.

Although this case should be appreciated for progressively disregarding the Islamic law doctrine of the civil relationship between biological father and his child by emphasising the interests of the child (Article 43 (1)), the Court's reasoning to uphold the constitutionality of Article 2 (2) shows the state's endorsement of religion (including Islam) to validate a marriage. Meanwhile the 2014 case of interfaith marriage was rejected by the Court, affirming the requirement for couple to have the same religion to marry. Interestingly, the Court in the 2014 case stresses the importance of religion in the Indonesian society in upholding the law which prevents interfaith marriage.[648] These three cases show how the Constitutional Court has decided cases in ways that, perhaps implicitly, take Islamic values as consideration in deciding cases related to Islam, similar to the way that law makers had this as a consideration when they made the Marriage Law in Indonesia.

5.1 The Debate over the Marriage Law

There are four aspects that I will explain in the development of Marriage Law in Indonesia: the marriage laws under the Dutch colonial era (see Section 5.1.1); the Marriage Law during the newly established independent state (see Section 5.1.2); the 1974 Marriage Law (see Section 5.1.3); and the implementing regulation of the 1974 Marriage Law (Government Regulation on Marriage and the Islamic Law Compilation) (see Section 5.1.4).

5.1.1 Under the Dutch Colonial Government

Marriage has been regulated in Indonesia long before the independence of the state in 1945. In this part, I will explain the development of Marriage Law during the Dutch colonial government. This discussion is important to give context to the states' acknowledgement of religious values in the Marriage Law in Indonesia, a fact that still relevant today. During the Dutch colonisation era, there were different marriage laws that applied in the area known today as Indonesia, each applied to a different group or religion such as for Christian or Chinese, or Muslims.[649] For Muslims, the Dutch colonial government established an Islamic Law Compilation made by D.W. Freijer. The compilation was later called *Compendium Freijer* and officially in force since 24 May 1760.[650] Alongside Compendium Freijer, the Dutch colonial

[648] Putusan Mahkamah Konstitusi No 68/PUU-XII/2014 [Constitutional Court Decision, Case No 68/PUU-XII/2014) 153.
[649] See Nani Soewondo, 1977, 'The Indonesian *Marriage Law* and its Implementing Regulation' (1977) 13 *Archipel* 283, 283.
[650] Moh. Hatta, 'Perkembangan Legislasi Hukum Islam di Indonesia' (2008) 11(1) *Jurnal Al-Qanun* 142, 152.

government also established other Islamic legal codes for Muslims in Indonesia such as the Dutch *Mogharaer* which was applicable in Central Java at that time.[651] These Islamic law compilations were being used as valid law for Muslims, including for the matters related to marriage.[652]

In 1855, under the Dutch colonisation government, Indonesia was known as the 'Dutch East Indies'. Although the colonial government was still recognising the existence of legal pluralism in the Dutch East Indies, the state law would always prevail over other types of law including Islamic law. As a non-state law, Islamic law would only be used under certain conditions set by the state's law. This condition was arranged under the Dutch East Indies Constitution, called the *Regering Reglement*.

Article 75 (1) of Dutch East Indies Constitution stipulates that Islamic law was to be adopted as long as it complies to *adat* (community) law and does not contradiction Dutch East Indies law.[653] Under this stipulation, the Dutch East Indies recognised legal pluralism within its jurisdiction, although the state's law must prevail whenever contradictions occur. This stipulation was later re-acknowledged under the new Constitution, *Indische Staatsregeling* 1925 (*Staatsblaad* 1925 No 416) – which was later revised under *Staatsblaa*d 1929 No 221. Under this law, Islamic law is applicable as long as it fulfils two requirements: the (Islamic) law has been accepted by the society as part of their culture; and the society-accepted (Islamic) law should not contravene Dutch East Indies law.[654]

Beside the Islamic law that was applicable to Muslims, there were also different systems of marriage laws that existed to accommodate non-Muslims in Indonesia during the Dutch colonisation era. The Indonesian Christians were using the *Huwelijks Ordonantie Christen Indonesia* (*HOCI*) – *Staatsblad* 1933 No 4,[655] while the Civil Code was being used by the Europeans and the Chinese living in Dutch East Indies.[656] Religion was put aside for those people using the Civil Code as their marriage law. This is because Article 26 of the Civil Code

[651] Mahmood Kooria, 'The Dutch Mogharaer, Arabic Muharrar, and Javanese Law Books: A VOC Experiment with Muslim Law in Java, 1747–1767' (2018) 42(2) *Itinerario* 202, 206.
[652] Ibid.
[653] Moh. Hatta, 'Perkembangan Legislasi Hukum Islam di Indonesia.' (2008) 11(1) *Jurnal Al-Qanun* 142, 153.
[654] Nafi' Mubarok, 'Sejarah Hukum Perkawinan Islam di Indonesia.' (2012) 21(2) *Indonesian Journal of Islamic Family Law* 139, 145.
[655] Ahmad Rifai, Ibnu Sodiq and Abdul Muntholib, 'Sejarah Undang-Undang Perkawinan Atas Pendapat Hingga Pertentangan dari Masyarakat dan Dewan Perwakilan Rakyat Tahun 1973–1974' (2015) 4(1) *Journal of Indonesian History* 1, 4.
[656] Ibid.

stated that the marriage being regulated under the Civil Code was only concerning civil relationship.[657] This means that their marriage would not need to be in compliance with any religious matter so that mixed marriage between European and Chinese people from different religious beliefs was possible. Thus, such a mixed marriage would not be possible for Muslims because the state has approved Islamic law to be used as the source of law for them.

For other people living in Indonesia such as people from East Asia who were not Chinese, their own traditional (*adat*) law was acknowledged as their marriage law.[658] There was also a law regulating interfaith marriage, for example between Muslim and Chinese. For this matter, marriage should be conducted under the man's (husband's) law, as stated in the *Staatsblad* 1898 No 158. This means that the Dutch colonial government allowed interfaith marriage, although there would be restriction in the practice.

The legal pluralism under colonial law for interfaith marriage can be practically explained using this illustration: an Indonesian Muslim woman could not marry a non-Muslim man because the Marriage Law applied to Muslims was Islamic law, which prohibits Muslim women from marrying non-Muslim men.[659] An Indonesian Muslim man could marry a non-Muslim woman under Islamic law because the interfaith marriage would be conducted under the man (husband)'s law. Interfaith marriage for European and Chinese citizens was possible since their marriage would only be considered a civil relationship, not religious. People with other background such as non-Chinese east Asian could conduct interfaith marriage if their *adat* (traditional) laws permitted it.

5.1.2 After Independence 1945

While different law applied for different people under the Dutch colonial government, the newly established independent state of Indonesia regulated marriage in a different way. Soon after the declaration of independence in 1945, Indonesia established a unified law concerning marriage registration in 1946. This law applied for everyone under the Indonesian jurisdiction regardless of their religious or ethnic background. However, the 1946 law only regulated the registration of marriage and divorce. The more substantial matter of marriage such as the rights and obligations of the couple were still regulated under *adat* (community) or Islamic law, the

[657] Undang-Undang Nomor 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Perdata [*Law No 1 1946 on Civil Code*]. See art 26.
[658] Rifai, Sodiq and Muntholib (n 655).
[659] David Pearl and Werner Menski, *Muslim Family Law* (Thomson Reuters, 3rd ed, 1998) 146.

former Dutch colonial law or the newly established Civil Code (Law No 1 1946). For Indonesian Muslims, Islamic and *Adat* (community), law was used as their Marriage Law.[660]

In the 1950s, the Indonesian government began to draft a more substantial Marriage Law. The Ministry of Religious Affair established a dedicated task force to create the draft of the Marriage Law.[661] Two drafts were produced by the task force in 1952 and 1954.[662] The first draft was meant to be a unified law on marriage for all of the different groups in Indonesia.[663] However, the idea of creating the same law to be applied to different groups of people was not a popular idea. This draft of a unified marriage law was then rejected by the government.[664] Two years later, the task force proposed the second draft. This time, the proposal of the task force was to apply different laws accommodating various religious beliefs.[665]

The idea of regulating marriage, whether under the same or different legal system invited controversy. Several women's movements demonstrated to urge the government to enact the Marriage Law.[666] The draft was then brought to be discussed before the Parliament during 1958–1959 but the Parliament failed to agree on the draft.[667] Similar attempts to discuss the Marriage Law were proposed in 1967 and 1968.[668] Consecutively, the first draft was designed for Islamic marriage while the second one was designed as a general principle of marriage applicable for everyone in Indonesia regardless their religion.[669] The Parliament again failed to reach agreement on these drafts.[670]

It was suggested that the failure of the Parliament to adopt Marriage Law was because of no agreement on the proposal for a unified Marriage Law.[671] The Islamic movements did not want to adopt any clause in the draft that was not in line with the Islamic law.[672] This makes heated

[660] Rifai, Sodiq and Muntholib (n 655).
[661] See Soewondo (n 649) 284.
[662] Ibid.
[663] Ibid.
[664] Ibid.
[665] Ibid.
[666] Ibid.
[667] Ibid.
[668] Ibid.
[669] Ibid.
[670] Ibid.
[671] Ibid.
[672] Ibid.

debate in the Parliament while outside the Parliament, women organisations were demonstrating to urge the government to enact the law.[673]

5.1.3 The 1974 Marriage Law

The Indonesian Marriage Law was enacted in 1974 after series of heated debate inside and outside the Parliament. Regulating matters related to religion, Islamist movements were involved in the debate, alongside women movements who struggle for women's rights to be accommodated in the law. There were three key issues in the debate on Marriage Law at that time: (1) whether marriages could be required to be registered with the state; (2) whether interreligious marriage was permissible; and most importantly, (3) whether the Marriage Law will be set as a unified law (one law applied to all) or not.

Throughout the law-making process, the draft of Marriage Law was revised several times to accommodate different interests. In 1973, the Indonesian government proposed another new draft of Marriage Law to the Parliament. This time, the making of the law was an attempt to unify the diverse legal system regulating marriage in Indonesia.[674] Some parts of the draft were taken from the Civil Code and HOCI which were designed for non-Muslims.[675]

The 1973 draft of Marriage Law proposed by the government was controversial for the Muslim community because it was viewed as an attack on Islamic doctrine.[676] For example, in regard to the government proposal saying that a marriage needs to be registered to the state institution for it to be called 'valid'. Meanwhile, according to Islam, marriage does not have to be registered to the state to be valid. If the marriage fulfils the requirement set by Islamic law (Islamic ceremony), the marriage should be valid. In this regard, a valid marriage according to Islam could be viewed as an invalid marriage by the state when the marriage is not registered to the state. Thus, such proposal can be viewed as delegitimising Islamic law.

During the making of the law in 1973–1974, various Islamist movements reacted to the proposed law, including Islamist movements who support the establishment of Islamic state and/or Islamic law in Indonesia.[677] They claimed that the Muslims had been pushed aside in

[673] Ibid 285.
[674] June S Katz and Ronald S Katz, 'The New Indonesian *Marriage Law*: A Mirror of Indonesia's Political, Cultural, and Legal System' (1975) 23(4) *American Journal of Comparative Law* 653, 653.
[675] The laws were Dutch domestic law adopted by the Dutch colonial government.
[676]Mark Cammack, Lawrence A Young and Tim Heaton, 'Legislating Social Change in an Islamic Society-Indonesia's *Marriage Law*' (1996) 44(1) *American Journal of Comparative Law* 45, 61.
[677] Rifai, Sodiq and Muntholib (n 655) 2.

the formulation of the Marriage Law draft and that the Ministry of Religion and Muslim leaders were not given a role in drafting the proposal.[678] Some Islamist movements fiercely objected to the draft as they perceived the proposed law to be in contradiction to their religion such as in the case of marriage registration and restriction on polygamous marriage.[679] As a result, heated debate was risen again inside and outside the Parliament during the deliberation of the Marriage Law proposal.[680]

During the 1970s, the Indonesian political system was re-ordered by the then-President, Soeharto. The so-called 'party fusion' was introduced to group political parties in the Parliament into two groups: the nationalist and the Islamist.[681] By Islamist political party, I mean that the political party specified Islam as the ideological basis of the political party, in contrast to nationalist parties that specified *Pancasila* as the ideological basis. The two groups later became two political parties: Indonesian Democratic Party/ *Partai Demokrasi Indonesia* (PDI) and Unity Development Party/ *Partai Persatuan Pembangunan* (PPP). PDI was composed by nationalist and Christian parties: PNI, MURBA, PARKINDO, KATHOLIK and IPKI.[682] PPP was composed by Islamist parties: NU, PARMUSI, PSII and PERTI.[683] The two parties (PDI and PPP) were officially established respectively in 10 January 1973 (PDI) and 13 February 1973 (PPP).[684]

In 1973, the Islamist groups were already using their new political vehicle to channel their aspirations for the new proposed draft of Marriage Law. NU (*Nahdlatul Ulama*), a prominent and largest Islamic mass organisation which was known to hold a more traditional and moderate view of Islam, was one of the most vocal Islamist groups to respond the draft. The first draft of the Indonesian Marriage Law was proposed to the Parliament by the Ministry of Law in July 1973. It consisted of 15 chapters and 73 articles.

[678] Katz and Katz (n 674) 660.
[679] Ibid.
[680] Ibid.
[681] Riswandha Imawan, 'The Evolution of Political Party System in Indonesia: 1900 to 1987' (PhD Thesis, Northern Illinois University, 1989) 198. I use the term 'Islamist' instead of 'religious' to name one of the groups because the Christian parties did not belong to the group, although some existed during the era. Somehow, the Christian parties were merged into the nationalist group.
[682] Ibid 198.
[683] Ibid.
[684] Ibid. The Indonesian government officially declared PDI and PPP as the 'only two' Indonesian political parties besides *Golongan Karya* (GOLKAR) to exist in 1975. See Undang-Undang No 3 Tahun 1975 tentang Partai Politik dan Golongan Karya [*Law No 3 1975 on Political Party and Golongan Karya*] (Indonesia).

Article 2(1) of the draft was the most debated article.[685] This draft article required registration with state authorities for the marriage to be valid. Under the previous law and under the Islamic law, registration is not necessary for marriage to be considered valid. Although the previous law (Law No 22 1946) required marriage to be registered by state officials, the registration itself was never mentioned as a condition for marriage validity. Some Muslims were concerned that this stipulation (registration) would make marriage more of an administrative matter instead of religious affair.[686] For the same reason (that the Marriage Law would make marriage more administrative and less 'religious based'), the Muslims also rejected the draft of Articles 3 and 40, which require permission from civil court for a man to enter into a polygamous marriage or seek a divorce.[687]

A more serious controversy arose regarding the discussion of interfaith marriage related to Article 11(2). The initial draft stipulated that religious differences are not obstacles to marriage.[688] Although such mixed marriage was possible under the previous Dutch colonial law, the Muslims always objected on this matter.[689] This was because they were afraid a mixed marriage would help Christian missionaries to convert Muslims to Christianity if they married a Christian.[690]

Soeharto's secular New Order government initially proposed a Marriage Law that would have effectively abolished the Islamic courts as well as to prevent arbitrary divorce and polygamy.[691] This proposal was brought to the House of Representative and the parties started to negotiate the proposal. As a result of the negotiations, the draft law was amended to retain a role for Islamic courts regarding Muslim marriage.[692]

This agreement shows that despite the urge to soften the Islamists' interests, the Marriage Law still accommodates Islamic values. For instance, Article 4 of the Marriage Law allowing polygamous marriage which was taken from Islamic law. Here, although Islamist party (PPP) was not the majority in the Parliament, it seems that the Islamist movement demonstration also played significant role to give pressure to the Parliament.

[685] Katz and Katz (n 674) 661.
[686] Ibid.
[687] Ibid.
[688] Ibid.
[689] Ibid 662.
[690] Ibid.
[691] Ibid.
[692] Ibid.

After the president agreed to delete all of the provisions that contradicted Islamic law from the draft,[693] the draft of Marriage Law was finally agreed by the Parliament on 22 December 1973 and was enacted as the Marriage Law on 2 January 1974, formally named the Law No 1 1974 on Marriage. The Marriage Law consists of 67 articles within 14 chapters (Principle of Marriage; Marital Condition; Marriage Prevention; Marriage Cancellation; Rights and Obligations of Husband and Wife; Property in Marriage; The End of Marriage; Children; Rights and Obligations of Parents and Children; (Child) Custody; Other Provision (Proof of the Origin of Child, Marriage Outside Indonesia and Intermarriage—between Indonesian and foreigner); (Court) Jurisdiction; Transitional Provision; and Closing).

Some of the controversial articles in the 1974 Marriage Law are:

> Article 2(1), 'A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned.'[694]
>
> Article 2(2), 'A marriage shall be registered according to the regulation.'[695]
>
> Article 3(1), 'In principle, man may only have one wife. Woman may only have one husband.'[696]
>
> Article 3(2), 'The Court may grant permission to a husband to have more than one wife, if all the parties concerned so wish.'[697]
>
> Article 42, 'A child is legitimate if born in or as a result of a legitimate marriage.'[698]
>
> Article 43(1), 'A child born out of wedlock has only civil relationship to his/her mother and her relatives.'[699]

The above articles give rise to problems arising from marriage registration, polygamy, children born out of wedlock and interfaith marriage.

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[693] Ibid.
[694] Undang-Undang Nomor 1 Tahun 1974 tentang Perwakinan [*Law No 1 1974 on Marriage*] (Indonesia) art 2(1).
[695] Ibid art 2(2).
[696] Ibid art 3(1).
[697] Ibid art 3(2).
[698] Ibid art 42.
[699] Ibid art 43(1).

On the issue of marriage registration, the provisions under the Marriage Law are controversial for some people arguing that their second marriage is already considered valid, according to Article 2 (1), if it is performed in accordance with the laws of the respective religion and belief of the parties concerned. Therefore, registering a marriage should not be an issue. Article 2(2)'s statement that marriage should be registered creates legal uncertainty of a valid marriage that has not been registered. For example, Islamic polygamous marriage of '*siri*' (secret marriage performed under Islamic law) which performed in accordance to Islamic law but will not be registered because the marriage does not satisfy the polygamous clause under Article 4 of the Marriage Law which require permit from district court. Here, although all of the provisions (directly) contradict to Islamic law were erased, the Marriage Law, particularly in the polygamy clause adjusts the adoption of Islamic law by giving additional clause such as the permit of the wife and court that the Islamic law does not set. The permit from court is not known under the Islamic law, therefore the polygamous marriage of 'siri' without the court's permit is still valid under Islamic law. However, the Civil Registrar Office will not accept the marriage to be registered because it does not satisfy Article 4 of the Marriage Law.

Articles 3(1) and 3(2) are also controversial in the sense of breaching gender equality as a man (husband) may have more than one wife, but women may not have more than one husband. Further, to be recognised by the (state) law, a marriage in Indonesia need to be registered.[700] According to religious authorities, a marriage performed under a religious law is valid. However, such a valid religious marriage may violate the state's Marriage Law, so the civil registrar may refuse to register the marriage. This can be observed for example, in the case of polygamous secret marriage or *nikah siri* which is acknowledged under Islamic law. Under Islamic law, a marriage is valid if it fulfils these aspects: the offer from the man (*ijab*), the acceptance from the woman through the woman's father/ male relative (*qobul*), payment of dowry (*mahar*), and two witnesses.[701] There is no requirement for the husband to ask for the wife's permission for him to enter into a second marriage. Therefore, if the husband marries the second wife fulfilling all the required aspects (*ijab, qobul, mahar*, and witnesses) without the permission of the first wife, the second marriage is still considered valid under Islamic law.

However, the Marriage Law requires the husband to ask permission from the first wife, as well as the court to allow him to do polygamy. Without the permits, the second marriage cannot be

[700] Ibid art 2(2).
[701] Majid Khadduri, 'Marriage in Islamic Law: The Modernist Viewpoints' (1978) 26(2) *American Journal of Comparative Law* 213, 213.

registered under the state's law. In this case, such unregistered valid marriage will give no legal protection for the couple and the child. This is because, as relate to Article 2(2) of the Marriage Law, the unregistered marriage will have no marriage certificate that is needed to claim other civil registration benefit such as family card. In most cases, the second wife and the children in unregistered marriage are those having most disadvantages.

On the issue of children born out of wedlock, Article 42 of the Marriage Law is problematic because the term 'legitimate child' gives lack protection for children's rights, especially for those children considered to illegitimate. The parents may derogate their obligation to take care of the children under this clause. Similar to Article 42, Article 43 is also problematic because it gives a lack of protection for children rights, especially for those children born out of wedlock (eg, their right to access inheritance from the biological father). If a child cannot be proven legitimate, the father can deny responsibility to pay maintenance to the mother.

On the issue of interfaith marriage, it may be argued that in general, the *Marriage Law* closes the door for interfaith marriage with its Article 2(1) requiring the marriage to be performed in accordance with the parties' religion to be considered valid. Although the article does not explicitly state the parties need to have the same religion, in effect, it makes it impossible for adherents of different religions to marry because the marriage ceremony needs to be performed in accordance with the religion's ceremony. Unless the religious ceremony for marriage allows person with different religion to perform its ceremony. For example, a church welcomes a Muslim woman and a Christian man to marry under the church's system. Although it is possible, any religious institution in Indonesia will most likely deny this. Further, Article 2(2) presumed that the couple share the same religion. If couples are of a different religion and these religions do not allow interfaith marriage, then this means they would not be allowed to marry.

5.1.4 Government Regulation of Marriage

Although the Marriage Law regulates marriage, it still needs implementing regulations because the law (*undang-undang*) only regulates general principles. For this, the Marriage Law has two 'implementing regulations': Government Regulation No 9 1975 and the Islamic Law Compilation formally named Presidential Instruction No 1 1991.

The government regulation on Marriage consists of 10 chapters and 49 articles. It further regulates matters concerning marriage registration; marriage procedures; divorce procedures;

divorce lawsuit; 'waiting time' for woman after divorce or death of her husband[702]; marriage cancellation; and polygamy procedures. Such procedural law privileges Islamic law compared with other religions, for example, by recognising *talak* or Islamic divorce by husband. In the elucidation (general explanation) of Article 14 of the Government Regulation on Marriage, it is stated that Article 14 along with Article 15, 16, 17, and 18 on divorce was meant to regulate Islamic divorce by husband (*talak*) procedure. There is a debate about whether the position on the issue of divorce under the Government Regulation of Marriage departs from the requirements of Islamic law according to the *Syafi* school of law. Van Huis in his research on women's divorce rights in Indonesia concludes that talak under the Marriage Law, even with reform compared with traditional Islamic teaching, remained within the limits of Islamic family law because the husband still holds the position to divorce the wife.[703]

However, the Government Regulation also accommodates different models of divorce that was not acknowledged under Islamic law: divorce suit by the wife. (In Islam, only the wife may file for divorce/ *gugat cerai*). This stipulation is designed to be used as a general law for Muslims and Non-Muslims in Indonesia). However, apart from this stipulation, the remaining stipulations under the Government Regulation as well as the Marriage Law may still be discriminatory. This is because most of the provisions in the Marriage Law and Government Regulation on Marriage refer to Islam and establish two different offices to manage marriage: one for Islamic marriage and one for marriage for other religions.[704] In addition to the use of the Islamic Court, a dedicated state-owned court addresses Islamic law, including marriage and divorce cases.

The 'Islamic registration' is a registration for those performing marriage under Islamic law. The registration will be done by the Religious Affairs Office or *Kantor Urusan Agama (KUA),*[705] an institution under the Ministry of Religious Affairs. Meanwhile, the registration of marriage conducted not using Islamic law will be done by the Civil Registry Office,[706] an

[702] This was adopted from Islamic law, which states that a woman must wait several months after divorce or the death of her husband before she can remarry. It was meant to secure the status of pregnancy (if any) of the woman.
[703] Stijn Cornelis van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba' (PhD Thesis, Universieit Leiden, 2015) 112.
[704] Peraturan Pemerintah No 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan [*Government Regulation No 9 1975 on Implementation of Law No 1 1974 on Marriage*] (Indonesia) art 2.
[705] See Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan [*Government Regulation No 9 1975 on Implementing Regulation of the Marriage Law*] (Indonesia) art 2(1).
[706] Ibid art 2(2).

institution under the Ministry of Home Affairs. In fact, the Ministry of Religious Affairs is not only designed to take care of Islamic matters. It has divisions to take care of other religions such as Christianity, Catholicism, Hinduism and Buddhism. If the marriage is viewed as a religious matter, the marriage registration of other religions should also be done by the Ministry of Religious Affairs. It is potentially unequal if the marriages of other religions be registered by different a ministry (Ministry of Home Affairs) as it indicates that Islamic marriage is a religious matter, but marriage under other religions is not considered to be a religious matter, but only a civil matter.

Interestingly, although the government has established the requirement to register a marriage some Indonesians, particularly Muslims, still choose not to register their marriage.[707] This is mainly because the Marriage Law (the higher regulation) only says that a valid marriage is a marriage done in accordance to the parties' religion. It does not mention registration as a condition for a valid marriage. Thus, unregistered marriage is still considered valid if the marriage is done in accordance with the parties' religion.

The importance of marriage registration is merely for administrative matters. Once a marriage is registered by the state, the husband, wife, and children will be given rights under the state's administrative law such as family card that being used as a basis to establish identity card. An identity card is important in Indonesia to access various social and political benefits such as registering for school and work. Since 2007, a child may have identity card addressed to his or her biological mother without having to mention the name of the biological father.[708]

However, a child born within an unregistered marriage is administratively classified as a child born out of wedlock, even if the marriage is considered valid according to the parties' religion because the state will not recognise (register) the marriage.[709] Without valid administrative status of an heir, the child may not claim inheritance from his or her biological father. However, since the Constitutional Court decision in 2010,[710] which I will discuss in Section 5.2.2, the child may now claim the inheritance from his or her biological father after legally and medically proven as the biological child of the father. The expensive and complex nature of

[707] Muchimah, 'Pelaksanaan Peraturan Pemerintah No 9 Tahun 1975 dalam Perspektif Sosiologi dan Antropologi Hukum Islam' (2018) 1(2) *Volskgeist* 157,157.
[708] The establishment of *Presidential Regulation No 37 2007* accommodated a birth certificate for child born out of wedlock. See *Presidential Regulation No 37 2007 on Implementation of Law No 23 2006 on Civil Administration* art 55(2).
[709] See Constitutional Court Decision, Case No 46/PUU-VIII/2010, 33.
[710] Ibid.

the process to verify the biological father in court makes it difficult for the poor to claim such a thing so that in practice, many people choose to not use this legal mechanism.

In practice, one condition that deters people from registering their marriage is polygamy. Although the Marriage Law permits polygamous marriage, the husband needs to fulfil strict criteria, such as permission from the first wife; confirmation that the first wife has an illness that may not be cured; or infertility of the wife.[711] The government regulation on marriage as the implementing regulation of the Marriage Law makes it even more difficult and complex to obtain the permit for polygamy. Under this regulation, the permit for polygamy from the wife needs to be in a written form accompanied with other additional documents such as the proof of wealth (income) of the husband.[712] Because the Marriage Law and the government regulation do not make it easy for people to enter polygamous marriage, most who want to enter polygamy choose to do it unregistered.[713] The Marriage Law only requires the marriage to be done in accordance with the parties' religion to make the marriage valid, so some people choose to do 'Islamic marriage' without registering their marriage in the state official.

5.1.5 The Compilation of Islamic Law

The second implementing regulation from the Indonesian Marriage Law is the Compilation of Islamic Law formally named Presidential Instruction No 1 1991. According to the current Indonesian legal drafting structure, Presidential Instruction is not a form of regulation.[714] However, under Soekarno and Soeharto eras, the form of regulations was not as structured as today. There were some Presidential instructions that was meant to be internal instructions for the ministry but became a wider regulation. The Presidential Instruction No 1 Year 1991 is one of these laws which some academics call '*beleidsregel*'.[715]

Two years prior to the establishment of the Compilation of Islamic Law in 1991, a new law on

[711] See Undang-Undang Nomor 1 tahun 1974 tentang Perkawinan [*Law No 1 1974 on Marriage*] (Indonesia) art 4.
[712] See Peraturan Pemerintah No 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan [*Government Regulation No 9 1975 on Implementation of Law No 1 1974 on Marriage*] (Indonesia) art 41.
[713] See eg, Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, Laporan Telaah Perkawinan Sirri dan Dampaknya di Provinsi Jawa Barat (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2016) 60.
[714] The types and hierarchy of laws in Indonesia are classified under art 7 of *Law No 12 2011 on Legal Drafting*.
[715] Derived from the Dutch term, which means 'decree that regulates'. In the civil continental legal system, there is a difference between decree and regulation. Decrees are supposed to address concrete subjects while regulations will be applied to everyone. Many *beleidsregel* were made by the Indonesian government before the establishment of the *Indonesian Legal Drafting Law*. For legal certainty, art 100 of the *Indonesian Legal Drafting Law* (Law No 12 2011 further regulates that any *beleidsregel* made before Law No 12 2011 should be read as a regulation).

Islamic Court was established (Law No 7 1989 on Islamic Court). Before this law, Islamic court in Indonesia was regulated under various Government Regulations made in 1957 such as Government Regulation No 45 1957 on the Establishment of Islamic Court Outside Java and Madura Islands. The main difference between the older Government Regulation and the newer law is that the Law No 7 1989 did not regulate the establishment of the court, but it specifically regulates the procedural law and the general template structure for the (Islamic) courts.

The existence of the Islamic court in Indonesia is subject to controversy because Indonesia is not an Islamic state. It may be explained that such acknowledgement and privilege for Muslims given by the state reflecting the government's closeness to Islamic interest.[716] Such closeness could also be seen in the Parliament during the making of the law (Law No 7 1989 on Islamic Court) when they agreed on competence the Islamic Court Law to settle cases on Islamic marriage, inheritance, endowment (*Waqf*) and alms (*Zakat and Shadaqah*).[717] However the competence of the court remain in the private law cases; it does manage with public matters such as criminal law.

With the new law on the Islamic Court being established, the task force established to create the Compilation of Islamic Law urged to finish their work and they managed to do it two years afterwards. The Compilation of Islamic Law was designed be used as the source of material law by the judges in Islamic courts. Therefore, the compilation came up with chapters on marriage, inheritance and endowment.

As the name suggested, the Compilation of Islamic Law consists of Islamic laws taken from various Islamic teaching. Islamic law can be classified in two hierarchical levels: sharia and *fiqh*. Sharia is the immutable and transcendent law of God,[718] The sources of sharia are *Quran* and *sunnah* (the practice of Prophet Muhammad). It is the eternal and universal law to be applied anywhere and anytime for every Muslims.[719] The second level of Islamic law is *fiqh* which is the derivative and/or interpretation of *Quran* and *Sunnah.*[720] Using legal term, *fiqh* is seen as an Islamic jurisprudence because it was made by Islamic jurists considering local

[716] On this matter, please see Daniel S Lev, *Islamic Court in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press, 1972).
[717] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Court,* (Amsterdam University Press, 2011) 74.
[718] Howard Federspiel, 'Islamic Values, Law and Expectation in Contemporary Indonesia' (1998) 5(1) *Islamic Law and Society* 90, 91.
[719] See Abdullah Saeed, *Islamic Thought: An Introduction* (Routledge, 2006) 43.
[720] See Mohammad Hashim Kamali, *Principle of Islamic Jurisprudence* (Islamic Texts Society, 1991) 22.

context.[721] However, it should be noted that this concept of Islamic jurisprudence is different to the concept of jurisprudence in Western legal thought. In the Islamic law perspective, *fiqh* is a law, in the sense that it is a knowledge of the practical rules of sharia acquired from the detailed evidence in the sources.[722] In the other words, *fiqh* is the interpretation of sharia for contextual matters.

However, the Middle Eastern oriented *fiqh* are sometime not suitable for the Indonesian context. So, an idea to develop Indonesia's own *fiqh* was initiated. There was a project to create Indonesia's Compilation of Islamic Law as an attempt to design an Islamic jurisprudence (particularly on the issue of marriage, inheritance and endowment) compatible with *Sunni* standards but contextualised to Indonesia. The idea to create a distinct Indonesian Islamic jurisprudence was initially proposed by Hazairin, a prominent Islam and Adat law scholar from Universitas Indonesia in the 1950s.[723] This idea was later developed by Hasbi Ash-Shiddiqie, a professor in Yogyakarta's State Institute for Islamic Studies (today's State's Islamic University) during the 1960s.[724] Munawir Sjazali, the then Minister of Religion (in office 1982–1992) argued on the previous mentioned scholars to contend that the standard *fiqh* from the Middle East should not be used in Indonesia because of the cultural and geographical differences.[725] In 1985, when the Ministry of Religious Affairs and the Supreme Court agreed to create the Islamic Law Compilation under their joint project, Bustanul Arifin, an expert on Islamic law, was appointed to be the leader of the task force.[726]

Backed up by various Muslim judges and Islamic courts' officials, the team was fully aware of the possible tension between Islamic law and the state's fundamental principle, *Pancasila*.[727] While Islamic law is a legal system by itself, Indonesia is not an Islamic state. It adopts its own ideology called *Pancasila*. This means, although Islamic law has its own source of law, to be implemented in Indonesia, Islamic law need to be positioned under the *Pancasila*. As requested by president Soeharto, the team ensured position of *Pancasila* during the drafting of the compilation to ensure it is in line with the Indonesian legal context.[728]

[721] See Saeed (n 719) 61.
[722] See Kamali *Principle of Islamic Jurisprudence* (n 712) 12.
[723] Nurlaelawati (n 717) 76.
[724] Ibid 77.
[725] Federspiel (n 718) 99.
[726] Nurlaelawati (n 717) 82.
[727] Ibid.
[728] Ibid.

The emerging issue was regarding the name 'Compilation of Islamic Law'. The word 'compilation' (or *kompilasi* in Indonesian) was chosen to differentiate it from 'codification' (*kodifikasi*)[729], although the term 'codification' or *kodifikasi* is widely used in the Indonesian legal system such as the Criminal Code and Civil Code.[730] Both the Indonesian Criminal Code and Civil Code were adopted from the Dutch Criminal and Civil codes. The two codes were incorporated under the Indonesian legal system as legislation (law/ *Undang-Undang*) so that one may argue that Indonesia is incorporating Dutch law in its legal system. This is a normal practice to be done in a post-colonial state that a newly established state adopting the former colonial law. However, adopting Islamic law in a non-Islamic state is a different matter. Although Indonesia is predominantly Muslim, the founding fathers had agreed to not establish Islamic state to accommodate different religious groups in the state. Remembering the threat from the eastern Indonesian to separate from Indonesia in 1945 if 'Islam' is to be written in the Constitution,[731] the team who was given task to create the Islamic Law Compilation in 1985 has to be very careful to not trigger another controversy.

The team suggested that the use of the word 'compilation' in the name of their Islamic jurisprudence means that they would not systematise the (Islamic) law but only to collect and arrange various sources of Islamic law.[732] According to them, the word 'compilation' will not be treated as a binding source of law, while if they use the word 'codification', it will be a binding source of law such as the Indonesian Criminal Code and Indonesian Civil Code. This reasoning is not convincing because in practice, the differentiation between 'compilation' and 'codification' does not make any difference. Judges in Islamic courts still use the Compilation of Islamic Law as a source of law.

From the choice of word made by the team, it can be observed that they were trying to play a 'safe political game' in dealing with Islam and the state. While trying to accommodate Islamic values, the team did not want to be perceived as 'hijacking' the state's law with an explicit use of Islamic law in the state's legal system.

[729] Ibid.
[730] See Nurlaelawati (n 717) 82–3; see also Nurjihad, 'Pembaharuan Hukum Islam di Indonesia Studi Kasus CLD Kompilasi Hukum Islam' (2004) 27(11) *Jurnal Hukum* 106, 108.
[731] For more on this matter, see Chapter 3 on historical development of religious freedom under the Indonesian Constitution.
[732] Nurlaelawati (n 717) 83.

The use of Islamic law as source of law in the Indonesian (state) legal system is one source of legal pluralism in Indonesia. Although the state has its own legal system, it approves the use of other system of law, including religious law, particularly Islam in this regard. Because the Marriage Law gives religion (including Islam) authority to validate marriage, Islamic law in relate to marriage is being acknowledged as part of the state's law. Nevertheless, the Compilation of Islamic Law remains one of the ultimate sources of Islamic law to be used in Indonesia for matter concerning Marriage beside the Marriage Law and the Government Regulation on Marriage. In this regard, the Marriage Law gives a general legal basis to allow the use of Islamic law in the matter of marriage; the Government Regulation on Marriage gives legal basis for administrative matter regarding marriage; meanwhile, the Compilation of Islamic Law is being used as the substantial source of law regarding Islamic marriage in Indonesia. In practice, judges in the Islamic courts will use the Compilation of Islamic Law as material source of law to settle dispute regarding marriage, inheritance and endowment because the Marriage Law and government regulation do not provide elaborated substantial matter in this regard.

The making of the Compilation of Islamic Law was started by an agreement (joint Decree) between Ministry of Religious Affairs and The Supreme Court in 1985 to create project on Islamic law development through jurisprudence.[733] The initial idea of this project was to focus on the role of Islamic (religious) court (*Pengadilan Agama*) that was given task to settle legal dispute between Muslims on family matters.[734] Although Indonesia is not an Islamic state, but there is a need to embrace Islamic law in the Islamic Court to give proper justice for the parties.

Under the Compilation of Islamic Law (*Kompilasi Hukum Islam* – Under the Presidential Instruction No 1 Year 1991) which was designed specifically for Muslims, divorce suit (*gugat cerai*) may only be applied by the wife.[735] In this regard, the compilation differentiates the procedure of divorce suit and *talak* according to Islamic law tradition. Under Islamic law tradition, it is the husband who has the right to divorce the wife (*talak*).[736] The word *talak* or

[733] Keputusan Bersama Ketua Mahkamah Agung dan Menteri Agama Tanggal 1 Maret 1985 No 07/KMA/1985 dan No 25 Tahun 1985 tentang Penunjukan Pelaksanaan Proyek Pembangungan Hukum Islam melalui Yurisprudensi [*Joint Decree Between Chief of Supreme Court and Minister of Religious Affairs, 1 March 1985 No 07/KMA/1985* and *No 25 1985 on Appointment of Islamic Law Development Project Through Jurisprudence*] (Indonesia).
[734] Ibid see consideration.
[735] Instruksi Presiden No 1 Tahun 1991 tentang Kompilasi Hukum Islam [*Presidential Instruction No 1 1991 on Islamic Law Compilation*] (Indonesia) art 132.
[736] See Furqan Ahmad, 'Understanding the Islamic Law of Divorce' (2003) 45(3/4) *Journal of the Indian Law Institute, Family law Special Issue* 484, 486.

talaq means to release the wife from the bondage of marriage.[737] Under this procedure for divorce, the husband only needs to indicate a clear and unambiguous intention to dissolve the marriage.[738] No Court or other people need to be involved. Such divorce mechanism may be resulted in abuse for woman because the husband may arbitrarily divorce the wife. The later development of Islamic law acknowledges the right of the wife to divorce her husband.[739] The right of the wife to file for divorce (*gugat cerai*) in the Islamic Court is affirmed in the compilation.[740] To prevent arbitrary divorce by the husband, the Compilation of Islamic Law also requires the husband, in the case of pronouncing *talak,* to deliver it before the Court.[741] In this regard, the Compilation of Islamic Law is a significant legal development for Islamic divorce and the protection of women's rights.

5.2 Case Law

Having examined how Islamic law has been incorporated into state law through the making of Marriage Law and its implementing regulations, the next part of this chapter will discuss the continuing debate on Islamic law in the matter of marriage through judicial review cases in the Constitutional Court. Law No 1 1974 on Marriage has been repeatedly reviewed seven times before the Constitutional Court.[742] From the seven cases, four cases were rejected, and three other cases were partially granted. Some of the controversial issues brought before the Court are the legal status of a child born out of wedlock; polygamy; and interfaith marriage.

I will examine these three issues in the second part of this chapter, started with Case No 12/PUU-V/2007 regarding polygamy that was rejected by the court; followed by Case No 46/PUU-VIII/2010 regarding children born out of wedlock that remain the most discussed case of Marriage Law until today; and then the last case on interfaith marriage (Case No 68/ PUU-XII/2014). These three cases were chosen because they have the most substantive discussion in relate to religion, compared with other cases that the Constitutional Court has heard across the seven cases.

[737] Ibid 488.
[738] Ibid.
[739] Ibid 495.
[740] Instruksi Presiden No 1 Tahun 1991 tentang Kompilasi Hukum Islam [*Presidential Instruction No 1 1991 on Islamic Law Compilation*] (Indonesia) art 146.
[741] Ibid art 117.
[742] Case No 12/PUU-V/2007; Case No 46/PUU-VIII/2010; Case No 38/PUU-IX/2011; Case No 30-74/PUU-XII/2014; Case No 68/PUU-XII/2014; Case No 69/PUU-XIII/2015; and Case No 22/PUU-XV/2017.

5.2.1 Polygamy Case

The polygamy case involved the constitutional review of Articles 3 (1), (2), 4(1), (2), 5(1), 9, 15 and 24 of the Marriage Law. Mohammad Insa, as the applicant in the case, suggested that the reviewed articles breached his constitutional right to religious freedom because the articles limited his right to enter into polygamy.[743] The applicant claimed the articles made it difficult for him to exercise his religious freedom because polygamy is allowed and viewed as an observance in Islam. He contrasted the reviewed articles to Articles 29(1) and (2) of the Constitution guaranteeing his religious freedom.

According to the applicant, all of the requirements for polygamy mentioned in the reviewed article of Marriage Law were not adopted from Islamic law.[744] He claimed that Articles 29(1) and (2) of the Constitution gave him and other Muslims the right to perform their religion based on Islamic law instead of strictly following the state's law.[745] The applicant further explains in his circumstance, that his constitutional right to worship (he claimed polygamy as the practice of religious observance) was limited by the state because the Marriage Law afforded his wife the authority to approve or not his polygamous marriage.[746] For being limited to enter into polygamy, the applicant also claimed that his right to establish family and to procreate was breached by the Marriage Law. Therefore, the applicant also claims that the reviewed articles of Marriage Law also contradicts Articles 28 B(1), 28 E(1), 28 I(1) and (2) of the Constitution.

The Constitutional Court in examining the case did examine the provision of Islamic law on polygamy. Not because the Court recognises the existence of Islamic law in Indonesia, but solely to understand the application because the applicant uses Islamic law reasoning in the application.[747] According to the Court, the existence of polygamous marriage clauses in the Marriage Law is a form of accommodation for Islamic law.[748] The Court held that the requirement for polygamy set under the Marriage Law is necessary to protect the rights of the wife and future wife.[749]

[743] Putusan Mahkamah Konstitusi Nomor 12/ PUU-V/2007 [Constitutional Court Decision, Case No 12/PUU-V/2007] 3.
[744] Ibid.
[745] Ibid.
[746] Ibid.
[747] Ibid 91.
[748] Ibid 97.
[749] Ibid.

The Court argued that the reviewed articles do not breach the constitutional articles because: (1) the requirements under the law to gain permission to take a second (or more) wives do not limit the right of person to establish family and to procreate as they still can enter into monogamous marriage;[750] and (2) the requirements to enter into a polygamous marriage do not prohibit the practice of polygamy.[751] The mention of polygamy in the Marriage Law is an acknowledgement of Islamic law Thus, the Court believes that the Marriage Law is accommodating Islamic law and does not contradict the religious freedom clauses in the Constitution.[752] Based on their reasoning, the Constitutional Court rejected the application and declared the polygamy clauses in the Indonesian Marriage Law constitutional.[753]

According to Simon Butt, the decision of the Court in the polygamy case resembles a more progressive interpretation to Islamic law[754] as it rejected the argument of the applicant that limiting polygamy violates his religious freedom.[755] Butt argued that the Court decision to uphold the government's limitation to polygamy shows that the state has the absolute control to the use of Islamic law in Indonesia.[756] Moreover, it can also be viewed as an attempt 'to restrict the state's recognition of Islamic law to limited areas of law and to deny Islam independent legal authority'.[757] Although I agree with the argument that the state in the polygamy case did show its authority to limit Islamic law, it did not fully consider a more comprehensive approach such as the issue of gender equality.

Addressing the Marriage Law's articles on polygamy, Nur Kholis et al in their study argued that while the Marriage Law set requirements to complicate the permit for polygamy, the articles still reflects gender inequality because it emphasises the vulnerability of the first wife (woman) to allow her husband to take a second wife.[758] It can be seen, for example, in Article 4(2) of the Marriage Law, there are three conditions that can be used as a reason for polygamy: (1) If the wife cannot fulfil her obligations as wife; (2) If the wife has disability or incurable disease; and (3) If the wife is infertile. Here, the law does not protect the interest of the first

[750] Ibid 98.
[751] Ibid.
[752] Ibid.
[753] Ibid 99.
[754] Simon Butt, 'Islam, the State and the Constitutional Court in Indonesia' (2010) 19(2) *Pacific Rim Law & Policy Journal* 279, 282.
[755] Ibid 281.
[756] Ibid 5.
[757] Ibid.
[758] Nur Kholis, Jumaiyah, Wahidullah, 'Poligami dan Ketidakadilan Gender dalam Undang-Undang Perkawinan di Indonesia' 2017 (27)2 *Al-Ahkam* 195, 204.

wife, and even make her situation worse. Moreover, the law only focuses on the interest and advantage of the husband on one hand, without prescribing the right of the wife to equally claim something if the husband could not fulfil his obligation as husband or has disability or incurable disease or infertile.

There are two factors that contribute to the lack of attention to gender equality in the clause under the Marriage Law that regulate polygamy: political configuration during the making of the law and the method used to interpret Islamic law during the making of the law. [759] Nur Kholis et al argued that during the making of the Marriage Law, Islamic law (sharia) was literally interpreted without considering a more comprehensive context.[760] Because of this, they asserted that Article 4 of the Marriage Law concerning polygamy should have been removed from the draft.[761] By deleting polygamous clause in the Marriage Law, only monogamous marriage will be allowed in Indonesia. However, it will also directly clash with Islamic law, which allows polygamy. If this is the case, there would be significant disagreement from the Islamist movements. The decision of the Constitutional Court to preserve polygamous clauses in the Marriage Law shows its attempt to minimise potential conflict by balancing the accommodation of Islam and human rights interests, such as gender equality. In the end, the decision of the Court to affirm the constitutionality of polygamy shows that the Court agrees with this accommodation, despite the lack of gender equality. If the Court emphasise human rights, especially women's rights, it would have declared the articles to be unconstitutional.

To conclude my analysis on the polygamy case, I would argue the Constitutional Court decision in the polygamy case shows that Indonesia does acknowledge Islamic law in its legal system, particularly on *Marriage Law*. However, the state's law regulates or modifies Islamic law as appropriate in Indonesia. The Court recognises and considers the rights of others (eg, women and children rights) to be balanced in this regard, although the balance seems to be less equal in the issue of gender equality. The decision made by the Court to uphold the requirement for polygamy means that polygamy is still allowed, and anyone may still enter into polygamy, thus the polygamy clause in the Marriage Law is accommodating and acknowledging Islamic law.

[759] Ibid 210.
[760] Ibid 209.
[761] Ibid.

5.2.2 The Child Born Out of Wedlock Case

On 18 February 2012, the Constitutional Court published its decision on the constitutional review of article 2 (2) of the Indonesian Marriage Law. The judicial review were submitted by Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim (Machica Mochtar) and Muhammad Iqbal Ramadhan bin Moerdiono.[762] Machica Mochtar as the mother of Muhammad Iqbal Ramadhan bin Moerdiono claimed her legal standing in the referred case because article 2 (2) and Article 43(1) has led to legal uncertainty and her son experienced discrimination because of his status as an illegitimate child who was born within an Islamic marriage that was not considered a legal marriage because the marriage was not registered.[763] Therefore, the applicants were requesting the Constitutional Court to declare article 2 (2) and article 43 (1) unconstitutional because those two articles contradict article 28 B p (1) and (2) and article 28 D (1) of the Constitution regarding the right to establish family and child rights.[764]

The constitutional judges took more than one year to decide the case.[765] In a unanimous decision with one concurring opinion (different reasoning), the Court decided Article 2(2) of the Marriage Law to be constitutional, and Article 43(1) to be conditionally unconstitutional.[766] The Court argued that registration does not determine the validity of marriage.[767] The Court perceived marriage registration as an administrative duty set by the law.[768] This being said, the Court argued that the applicant's marriage was still valid. Thus, her claim that Article 2(2) made her marriage invalid was not accepted.[769] For Article 43 (1) of the Marriage Law, the Court decided the article to be conditionally unconstitutional if the article interpreted as to not recognise civil relationship between the child and the man who can be proven based on science and technology and/or other evidence according to law as the biological father of the child.[770]

Article 43 (1) states, 'Child born out of wedlock only has civil relation with its mother and the mother's family.' The problem is the word 'only'. The Court declared the article to be

[762] Putusan Mahkamah Konstitusi Nomor 46/ PUU-VIII/2010 [Constitutional Court Decision, Case No 46/PUU-VIII/2010] (Indonesia) 1.
[763] Ibid 4
[764] Ibid 11
[765] Mariana Amiruddin, 'Maria Farida Indrati "UU Perkawinan Perlu Diuji Secara Konstitusional"' (2012) 73 *Jurnal Perkawinan* 137, 139.
[766] Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 [Constitutional Court Decision, Case No 46/PUU-VIII/2010] (Indonesia) 37.
[767] Ibid 33.
[768] Ibid.
[769] Ibid 36–7.
[770] Ibid 37.

unconstitutional if it eliminates civil relation between the child and a man who can be proven medically or legally as the child's biological father. In its decision, the Court erased the word 'only' from the original article and decided that article 43 (1) has to be read, 'a child born out of [valid] marriage has a civil relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child.'[771]

In general, the Constitutional Court decision in the case of child born out of wedlock should be appreciated for its breakthrough in the state's control over Islamic law. Similar to the polygamy case, the Court affirms the authority of the state to depart from Islamic law, because under Islamic law there is no relationship between children born out of wedlock and their biological father. The fact that the Court affirms children's rights is a progressive statement for human rights. However, the fact that the Court affirmed the constitutionality of Article 2(2) reflects a different direction: that the Court affirmed the importance of religious institutions (including Islamic law) to validate a marriage. In its *ratio decidendi*, the Court argued that marriage registration does not determine the validation of a marriage because it is just an administrative matter.[772] Although Judge Maria Farida made a concurring opinion in this regard by questioning the consequence of registration under Article 2 (2) as whether it will clash Article 2 (1) on the determinant factor for validating marriage,[773] the judges further emphasises Article 2 (1) saying that the determinant factors for validity of a marriage are the conditions set by religion of the couple.[774] This indicates the Court (and the state)'s endorsement of religion (including Islamic law) to control marriage validation.

The remaining issue is on the effect of such reasoning in one case decision: that the Court on one hand affirms the role of religious authorities to validate marriage, but on the other hand the Court disregards Islamic law when dealing with child issues. There are two points of comments I want to make as response to the Constitutional Court decision in this case: (1) of the issue of legal uncertainty for the applicant; and (2) judicial activism in the sense of making conditional judgment.

[771] Putusan Mahkamah Konstitusi Nomor 46/ PUU-VIII/2010 [Constitutional Court Decision, Case No 46/PUU-VIII/2010] 35.
[772] Ibid 33.
[773] Ibid 39.
[774] Ibid 33

For the first issue on legal uncertainty, there is a complication in the court's decision because the applicants requested for both article 2 (2) and article 43 (1) to be declared unconstitutional due to violating her and her child's constitutional rights. However, the Court mixed the logic of concrete review and abstract review in this case. The case was brought by the applicants who must satisfy a preliminary assessment on the legal standing. In this stage, the applicants must prove that they have loss or potential loss caused by the law (concrete review). However, the decision of the court will be binding not only for the applicant, but for everyone (abstract review), as the decision of the court will change the law and the law is binding for everyone under the Indonesian jurisdiction.

The applicant did ask the court to annul article 2 (2) and article 43 (1) because her marriage was conducted in accordance to Islamic law and not being registered as requested by article 2 (2) therefore she believed her marriage was not valid and her child was considered born out of wedlock. The court said, in relate to article 2 (2), that registration is not a condition set to validate a marriage.[775] A marriage is valid if it is conducted in accordance to the parties' religion. [776] Therefore the court rejected the application for article 2.[777] It could be argued based on this decision that the court recognised the applicant's marriage, thus her child should not be considered a child born out of wedlock.

However, the Court seems to have inconsistent logic in dealing with Article 43 (compared with the decision for article 2 (2)). This is because the court, in examining Article 43 referred to (the applicant and) her child as a child born out of wedlock. This means, the court simply disregarded the applicant's condition examined under Article 2 (2) and examined Article 43 (1) in a more general (abstract) review for any child born out of wedlock. If the court declared the applicant's marriage to be valid, the applicant simply does not have legal standing to review Article 43 (1) and the case should no longer be continued. In the end, the Court decided that Article 43 (1) is conditionally unconstitutional.

As a result of this decision, any child born out of wedlock has civil relations with its biological father provided that paternity can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child. Interestingly and sadly, Machicha Mochtar as the applicant in this case was unable to prove her child's claim

[775] Putusan Mahkamah Konstitusi Nomor 46/ PUU-VIII/2010 [Constitutional Court Decision, Case No 46/PUU-VIII/2010] 33.
[776] Ibid 36–7.
[777] Ibid.

to inheritance from the deceased father because they could not take the DNA test to prove the biological linkage between the son and the father. The family of the deceased father refused to do DNA test, arguing that this is a civil case, and they could not be forced to do a DNA test.[778] However, as negative legislation[779], the decision of Constitutional Court is equivalent to the legislation (*Undang-Undang*) and it is binding not only for the applicant, but also for all other Indonesian citizens. This means, any child born out of wedlock who can prove its biological paternity with the father has civil relations with the father. This includes those children whose parents had never married.[780]This decision was protested by MUI, the most influential Islamic movement in Indonesia.[781] Soon after the Constitutional Court decision, MUI issued its fatwa on children born out of wedlock.[782] It is explicitly stated in MUI's fatwa that the establishment of the fatwa is a response to (against) the Constitutional Court decision. Using purely Islamic legal considerations, MUI substantially rejected the Constitutional Court decision by declaring that the child born out of wedlock should not have civil relation with the biological father.[783] As it claims to be an authoritative Islamic council in Indonesia[784], MUI's fatwa is influential to Muslims across Indonesia. The contradiction between Constitutional Court decision and MUI's fatwa raises the issue of legal pluralism in Indonesia.

The Constitutional Court decision involved state (positive) law intertwined with Islamic law regarding the status of a child born out of wedlock. As state law, the Constitutional Court decision is binding for everyone under the Indonesian jurisdiction. This means that every Muslim is bound by the Constitutional Court decision saying that a child born out of wedlock must have civil relationship with the child's biological father if the biological relationship can be proved. In contrast, Islamic law regulates the matter of a child born out of wedlock in a different way. According to the Islamic law, a child born out of wedlock only has a civil relation with his/her biological mother.

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[778] Yazir Farouk, 'Alasan Keluarga Moerdiono Tolak Tes DNA' *Tempo.co* (13 March 2013) <https://seleb.tempo.co/read/466769/alasan-keluarga-moerdiono-tolak-tes-dna>.

[779] The Constitutional Court is said to be a negative legislator (thus, its decision on judicial review is called negative legislation) because it may annul (positive) legislation made by the Parliament (*Undang-Undang*). On this matter, see Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu* (Rajawali Press, 2009) 280.

[780] See also Simon Butt, '"Illegitimate" children and Inheritance in Indonesia' (2012) 12(63) *Legal Studies Research Paper* 1, 2.

[781] <https://news.detik.com/berita/d-1866192/mui-nilai-keputusan-mk-soal-status-anak-di-luar-nikah-overdosis>.

[782] MUI Fatwa (Islamic Legal Opinion) No 11 2012 on Child Born Out of Wedlock.

[783] See ibid.

[784] Further elaboration on MUI can be read in Chapter 4.

The second issue I want to highlight in this case is the judicial activism of the Court regarding the 'conditionally unconstitutional' doctrine. In deciding the constitutionality of Article 43 (1), the court created the 'condition' for the article to be unconstitutional. Before we examine this further, there is a need to differentiate 'conditionally constitutional' and 'conditionally unconstitutional' doctrine. Conditionally constitutional means the court declares the article to be constitutional if it fulfils the condition set by the court. Therefore, we can say that in the baseline condition, the article is unconstitutional because the court's condition is not exist. In the other hand, conditionally unconstitutional means the article is unconstitutional if it meets the condition set by the court. This means, the baseline condition for the article is constitutional.

For article 43 (1), the court decided the article to be conditionally unconstitutional if it eliminates the civil relation between the child and a man who can be proven medically and/or legally as the biological father of the child. The court also erased the word 'only' in the article.[785] Thus, after the decision, the article should read, 'a child born out of [valid] marriage has a civil relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child.'

Looking at the Court reasoning in relation to article 43 (1)[786], I would argue that the Court was examining the article for a wider group of stakeholders (abstract review) and not just considering the applicant's situation. The court considered child's rights as can be seen in this *ratio decidendi*, 'aside from the administrative matter of the marriage, a child must have legal protection. If not, a child born out of wedlock will lose his/her rights. Law must provide fair legal protection and legal certainty for the status of a child, although his/her parents' marriage is still disputed'.[787]

The question is, why the court did not directly declare article 43 to be unconstitutional? The decision to declare the article to be conditionally unconstitutional means the court argued there is a condition (possibility) that the article will not eliminate the civil relation between the child and its biological father, and another condition that the article will eliminate such relationship. Yes, there is a condition where Article 43 (1) will not eliminate the civil relation between the child and the biological father, that is, if the biological father later marry the child's mother,

[785] Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 [Constitutional Court Decision, Case No 46/PUU-VIII/2010] 37.
[786] Ibid 34–5.
[787] Ibid.

thus he becomes the family (relative) of the mother. In that case, the article does not eliminate the civil relation between the child and its biological father although the child was born before the marriage of its parents.

The condition that will eliminate the civil relation between the child and its biological father is when the biological father does not marry the mother thus, he does not count as the family of the mother. The Court decision seems to emphasise the second condition, in which the biological father does not marry the mother of the child. Hence, the court states that if it becomes the condition, Article 43 (1) will be unconstitutional.

From a legal perspective, the Constitutional Court's decision on the constitutionality of Article 43(1) can be described as judicial activism. The judicial activism happened because the Court decision is not in accordance with what the Court should do. The Constitutional Court in this case was asked to review the constitutionality of Article 43(1) in light of the constitutional articles (Articles 28 B(1) and (2) on children's rights and Article 28 D(1) on equality before the law. If the Constitutional Court finds the wording of Article 43, 'a child born out of [valid] marriage only has a civil relationship with its mother and her family', violates Articles 28 B(1), (2) or 28 D(1) of the Constitution, it simply just have to declare Article 43(1) of the Marriage Law unconstitutional.

The Court decision has added a new legal norm on Article 43(1), although it states, 'if it is interpreted'. The Court was asked to review the constitutionality of Article 43(1), which regulates the civil relation between the child and his or her biological mother. The article does not regulate the civil relation between the child and his or her biological father. Meanwhile, the applicant concern was on the civil relation between the child and his father. Because Article 43(1) does not explicitly deprive civil relation between the child and his or her biological father, the Court chose to not directly declare Article 43(1) unconstitutional. The Court chose to give condition for interpretation in declaring whether Article 43(1) is constitutional. This means, Article 43(1) may still be constitutional if the condition set by the Constitutional Court in this decision is met. The condition set by the Court is: that the article would not eliminate civil relation between the child and the man who can be proven by science and technology and/or other evidence according to law as the biological father of the child. In practice, the Court was adding provision in Article 43(1). This provision (civil relation between the child and the biological father), although claimed by the court as a 'condition for interpretation', has to be

read as a legal norm because it has equivalent position as the civil relation of the child and its biological mother written in the original Article 43 (1).

In conclusion, for the case of a child born out of wedlock, there are two important things to be noted: (1) In regard to Article 2 (2), the Court affirms the importance of religious institutions in validating marriage. This indicates the state's endorsement of Islamic law in this regard. (2) In regard to Article 43 (1), the Court bravely prioritised the rights of the child over Islamic law. This is a progressive movement by the Court. However, it should be noted that the Court was conducting judicial activism (making decision out of its authority) in its decision of Article 43(1) by making a conditionally unconstitutional judgment that give rise to a new legal norm in the article (establishing civil relationship between the child and its biological father). It is not the authority of the Constitutional Court to make a legal norm (positive legislation).[788] Instead, it is the task and authority of the legislature to revise or make a new Marriage Law. If the Court thinks that Article 43 (1) needs to be revised, it should recommend the legislature the revise it, instead of giving a new interpretation that leads to an establishment of a new legal norm.

Beyond the legal debate, the Constitutional Court decision on the issue of a child born out of wedlock is controversial for Muslims and triggered MUI to establish a fatwa opposing the Constitutional Court decision. The protest from MUI can be viewed as a sign that the Islamist movement in Indonesia still play a significant role as an interest party in the law-making in Indonesia. The Islamist movements do not mind making 'their own law' such as fatwa that contradict to the state law if they find the state law to be in contradiction to their Islamic law.

5.2.3 The Interfaith Marriage Case

The third case to be examined in this chapter is the interfaith marriage case, registered as Case No 68/ PUU-XII/2014. The case was submitted by four applicants: Damian Agata Yuvens, Rangga Sujud Widigda, Anbar Jayadi and Luthfi Sahputra. The applicant asked the Constitutional Court to constitutionally review Article 2(1) of the Marriage Law which stipulates, 'A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned'. Looking for the recognition of

[788] See Mahfud (n 779) 280.

interfaith marriage, the applicants claim the reviewed article to be in contradiction with article 28 E(1) and (2); 28 I(1); 29(2); 28 B (1); 28 D(1); and 27(1) of the Constitution.

According to the applicants, Article 2(1) of the Marriage Law breaches their constitutional rights because it uses a single interpretation of religious law to define a valid marriage.[789] This article, claimed the applicants, limit their right to marriage.[790] The applicants further explain that because the Marriage Law authorises religion to determine the validity of marriage, it gives no legal certainty for Indonesians, especially those who are looking for interfaith marriage.[791]

The article gives no legal certainty for interfaith marriage because it does not explicitly regulate interfaith marriage, nor does it prohibit interfaith marriage. Although it may be interpreted that the law allows interfaith marriage, this may not be the case, because according to the law, 'a marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned.'[792] This means, the law gives authority to religion to determine whether interfaith marriage may be done or not. Because there are two parties at the marriage (husband and wife), there are two different religions that need to be considered for interfaith marriage. If both religions do not permit interfaith marriage, the couple will not be able to marry. If one of the religions does not allow interfaith religion, while the other one allow interfaith religion, will the marriage be considered valid for the party whose religion does not allow interfaith marriage? If the two religions allow interfaith marriage, which religion will be used in the ceremony? Under the previous Marriage Law (under the Dutch colonisation era), the man (husband's) religion will be used in the case of interfaith marriage.[793] However, such a condition is not set under the 1974 Marriage Law. Therefore, the applicants argued that the 1974 Marriage Law provides no legal certainty for interfaith marriage and asked the Constitutional Court to declare Article 2(1) of the Marriage Law unconstitutional.

The Constitutional Court rejected the application, stressing that religion is the very foundation of Indonesian society.[794] Although the Constitution recognises the right of everyone to marry, the Constitutional Court stated that this right may be limited under Article 28 J (2) of the

[789] Putusan Mahkamah Konstitusi No 68/PUU-XII/2014 [Constitutional Court Decision, Case No 68/PUU-XII/2014) 10.
[790] Ibid.
[791] Ibid 11.
[792] Undang-Undang Nomor 1 Tahun 1974 tentang Perwakinan [*Law No 1 1974 on Marriage*] (Indonesia) art 2(2).
[793] See *Staatsblad* 1898 No 158.
[794] Putusan Mahkamah Konstitusi No 68/PUU-XII/2014 [Constitutional Court Decision, Case No 68/PUU-XII/2014) 153.

Constitution for the sake of other people's rights, public morality, religious values, public security and public order.[795] The Court further stated that the limitation of Marriage set under the Marriage Law is necessary to implement the principle of *Pancasila* and the Constitution as well as accommodating the social aspect of the society.[796] This means that the Court acknowledges the role of religion, particularly Islam, in Indonesia. The Court also further justifies the authority given to religion to validate marriage.

Article 28 B (1) of the Indonesia Constitution reads, 'Every person shall have the right to establish family and to procreate based upon lawful marriage.' This means the Constitution requires condition to be fulfilled before getting the right to establish family and to procreate. The condition required is a lawful marriage. Thus, the court argues that anyone may claim their rights to establish family and to procreate only if they satisfy the lawful marriage. Further, the Court affirms that the lawfulness of marriage is determined by the parties' religion, not the state.[797] Therefore, if the parties' religions do not permit interfaith marriage, the interfaith marriage will be unlawful. In a situation where at least one person to a marriage is Muslim, the Compilation of Islamic Law is considered. The Compilation provides in its Article 40(C) that a Muslim man may not marry non-Muslim woman, and Article 44 asserts that Muslim woman may not marry non-Muslim man. Therefore, when the Indonesian Marriage Law (Law No 1 1974) states that a valid marriage is a marriage conducted in accordance to the parties' religion, there is no possibility for Muslims in Indonesia, both Muslim man and woman, to conduct interfaith marriage.[798]

There are 29 countries throughout the world that prohibit interfaith marriage: Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Burma (Myanmar), Djibouti, Egypt, India, Indonesia, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, West Bank and Gaza and Yemen.[799] Most of these countries prohibiting interfaith marriage are Islamic states (state using Islamic law) or Muslim-majority countries including Indonesia. This data show that religion is an important factor in the making of law in religious countries, particularly in regard religion-related law such as marriage. Interestingly, as a self-declared

[795] Ibid.
[796] Ibid 152
[797] Ibid 153.
[798] Islamiyati, 'Analisis Putusan Mahkamah Konstitusi No 68/PUU-XII/2014 Kaitannya dengan Nikah Beda Agama Menurut Hukum Islam di Indonesia' (2017) 27(2) *Al-Ahkam* 157, 165.
[799] Law Library of Congress, 'Prohibition of Interfaith Marriage' (September 2015) 1.

secular state, India is among the countries in the list to prohibit interfaith marriage. Thus, the title of secular state does not a guarantee separation between religion and the state. Indonesia, which does not classify itself as secular state, seems to have stronger reason to not exclude religion from its law-making in the name of existing legal pluralism in its society.

In practice, there are many interfaith marriages in Indonesia.[800] One of the ways to achieve this for couples from different religions is for one of the parties to convert to the religion of the other, so the couple share the same religion. After the religious-based marriage ceremony, the converted party then returns to his/her original religion.[801] Another way to achieve interfaith marriage is by performing the ceremony twice, each according to the party's religion. For example, a Muslim man and a Christian woman will conduct two marriage ceremonies: one Islamic ceremony and one Christian ceremony. The couple will then ask the civil registry officer to register their marriage. In their interview with civil register officer in Yogyakarta, Indonesia, Ermi Suhasti et al discovered that the civil registry officer will still register interfaith marriage without examining the validity of the marriage because the issue (of marriage validity) is left to the parties' religions. If the religious authorities give them certificate of marriage, the civil registry officers should not refuse to register their marriage.[802]

However, there are also some cases where the interfaith-married couples denied being registered by the civil registry officers.[803] The officers mostly base their rejections on the fact that the couple shares different religions. If the civil registry officer refuse to register interfaith marriage, the couple may file a lawsuit to civil court to acknowledge their marriage.[804] Due to the absence of precedent in the Indonesian court system, the result of such a lawsuit may vary. In one of the cases, a civil court reject such interfaith marriage lawsuit simply because the Marriage Law does not explicitly regulate interfaith marriage.[805] Using the same reasoning (that Marriage Law does not explicitly regulate interfaith marriage), the general courts will not accept a case concerning interfaith marriage.[806] This is because the judges in the later court

[800] See Ermi Suhasti, Siti Djazimah and Hartini, 'Polemics on Interfaith Marriage in Indonesia Between Rules and Practice' (2018) 56(2) *Al-Jamiah Journal of Islamic Studies* 367, 377; Fathol Hedi, Abdul Ghofur and Anshori Harun, 'Legal Policy of Interfaith Marriage in Indonesia' (2017) 3(3) *Hasanuddin Law Review* 263, 264.
[801] Suhasti, Djazimah and Hartini (n 800).
[802] Ibid.
[803] Hedi, Ghofur and Harun (n 800) 271.
[804] Ibid.
[805] Ibid.
[806] Ibid.

believe when the law does not regulate interfaith marriage, it means the law does not prohibit interfaith marriage.[807]

In conclusion, the different treatment for interfaith marriage shows legal uncertainty for interfaith marriage in Indonesia. There is a need to amend the Marriage Law to give a clear legal stipulation for interfaith marriage in Indonesia, whether Indonesia allow interfaith marriage or not. The Constitutional Court as a negative legislator[808] does not have the authority to create or to add new stipulation to the law. Thus, amendment of Indonesian Marriage Law may only be done by the Parliament and president in a collaborative work.

5.3 Conclusion

The Marriage Law is an arena in which to observe religion-making in Indonesia. Under the Constitution, the right to marriage is regulated under Article 28 B(1), which states, 'Every person shall have the right to establish family and to procreate based upon lawful marriage.' The term to be emphasised here is 'based upon lawful marriage'. This means, the right to marriage is not an absolute right. It must satisfy the Marriage Law (lawful marriage) clauses, one of which requires marriage to be performed in accordance with the parties' religion. Furthermore, the right to marriage (establish family and to procreate) does not fall under the classification for absolute rights set under Article 28 I(1) of the Constitution. This means, the right to marriage is subject to limitations under Article 28 J(2) of the Constitution.

Article 28 J(2) explicitly mentions religious values as one potential source of permissible limitations on rights permitted by the Constitution. Under international human rights regime, the use of religion to limit the right to marriage is contradict to Article 16(1) of the Universal Declaration of Human Rights (UDHR) stating, 'Men and women of full age, without any limitation because of race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.' However, because the UDHR is a soft law document, it does not provide enforcement mechanism.

From the Dutch colonisation era until the most recent case of Marriage Law before the Constitutional Court, it can be observed that Indonesia recognises the importance of Islam.

[807] Ibid 272.
[808] As a judicial body, the Indonesia Constitutional Court may only erase the article or law proven to be in contradiction to the Constitution. The Court may not add new stipulation to the law.

Islamist movements attempt to influence the making of law, particularly on the matter associated with Islamic law. The result is when the state accommodates Islamic law to be used in the family matter (particularly marriage). The state's endorsement of Islamic law is even further developed with the establishment of Islamic (religious) court to settle disputes over private family matters. The Indonesian government even sponsored the Compilation of Islamic Law to be used as a source of law before the Islamic Court.

When it comes to the Constitutional Court decisions, it can be seen from the three examined cases above that the Court is still giving Islam an endorsement although the Court also emphasises the importance of human rights. In this sense, the Court accepted the accommodation and balance struck between Islamic law and state law (including human rights) in most cases.

In the 2007 polygamy case, the state still endorses the existence of Islamic law doctrine in the sense of allowing polygamy under the Marriage Law. However, the Court also fiercely affirms its authority to control the use of Islamic law in Indonesia by saying that it has an authority to determine the conditions that must be met by its citizen to perform polygamous marriage for the sake of public interest. This means, although polygamy is allowed under Islamic law, the state taking into account the interest of human right and disregarding certain aspects of Islamic law in limiting polygamous marriage in Indonesia. However, it should also be noted that the balance the Court reached in the polygamy case seems to have lack consideration in the issue of gender equality by still upholding the weak condition of the wife as the requirement to do polygamy.

The 2010 case of a child born out of wedlock can be viewed as the most remarkable case in the Constitutional Court. In this decision, the Court affirmed Islamic law by justifying the constitutionality of Article 2(2) of the Marriage Law but departed from Islamic law in deciding the constitutionality of Article 43(1) of the Marriage Law. The Court decision for accommodating children rights in examining Article 43 (1) of the Marriage Law must be appreciated although it triggers protest from Islamic movements.

In the 2014 interfaith marriage case, the Court emphasises the importance of religion as the foundation of the state, in order to reject the application for interfaith marriage. The Court also emphasised that human rights in Indonesia, including the right to marry, may be limited for the

sake of accommodating the social aspect of the Indonesian society. The Court in this regard recognised the interests of Islam which does not allow interfaith marriage.

Chapter 6: The Civil Administrative Law and the Religion Column in the National Identity Card

The final case that I will analyse to understand the practice of religion-making in Indonesia is the dispute over the religion column in the national identity card (ID card). The ID card has an important role in Indonesian administrative law as it must be used to access certain basic rights such as health care, education and other social welfare benefits. Without an ID card a person would not be able to exercise their constitutional rights. Although there is no dedicated law on ID card, this matter is regulated under the Civil Administrative Law (*Undang-Undang Administrasi Kependudukan*).[809]

Similar to the Blasphemy Law and the Marriage Law, the Civil Administrative Law, particularly Articles 61(1), (2) and 64(1), (5) on the religion column in the ID card, has also been constitutionally reviewed before the Constitutional Court. The applicants brought the case in 2016 arguing that the policy of not filling out the name of religions which are not being recognised by the state is discrimination.[810] The issue of mentioning religion in the ID card has been a controversy throughout the world. In 2004 the United Nation Special Rapporteur on Freedom of Religion or Belief, Abdelfattah Amor commented that:

> 'The mention of religion on an identity card is a controversial issue and appears to be somewhat at variance with the freedom of religion or belief that is internationally recognised and protected. Moreover, even supposing that it was acceptable to mention religion on an identity card, it could only be claimed that the practice had any legitimacy whatsoever if it was non-discriminatory: to exclude any mention of religion other than Islam, Christianity or Judaism would appear to be a violation of international law.'[811]

Although in 2013 the Indonesian government revised the Civil Administrative Law to make it possible for people to leave the religion column in the ID card blank, some people claimed that they are still discriminated against by this policy because their religion column was marked

[809] Undang-Undang No 23 Tahun 2006 tentang Administrasi Kependudukan sebagaimana diubah dengan Undang-Undang No 24 Tahun 2013 [*Law No 23 2006 on Civil Administrative as amended by Law No 24 2013*] (Indonesia).
[810] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] (Indonesia) 27.
[811] Report submitted by Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, to the Commission on Human Rights, 60th sess, 16 January 2004, UN Doc E/CN.4/2004/63 [42].

with a dash (that looks like this -) and the society perceives them as communist or infidel.[812] Because of that, they sought judicial review of the Civil Administrative Law before the Constitutional Court in 2016. Deliberated in 2017, the Constitutional Court decision in this case was highly praised for protecting religious freedom in Indonesia, unlike in the Blasphemy Law and Marriage Law cases, in which claims for religious freedom were rejected and only partially or conditionally accepted. However, the case left unsolved problems of discrimination because people who are not members of the six recognised religions can only mention 'belief in One and Only God' in their ID card, instead of writing the name of the religion.

With the Indonesian government's policy of identifying religion column in the ID card, it is necessary to examine if the policy has violated religious freedom; and if the Court has interpreted the concept of 'belief' narrowly by limiting it to monotheistic belief and excluding other types of belief, such as polytheism and atheism. This chapter will address two issues: the idea of monotheistic belief, and the idea of official religions in Indonesia. There will be three parts to this chapter: Section 6.1 will discuss the attempt to define official religions, Section 6.2 will examine the Constitutional Court case for the ID card issue and Section 6.3 will explore the unresolved issues: monotheistic belief and official religions.

Section 6.1 will explain the attempt to construct the recognition of official religions under Indonesian law. It includes discussion on the recognition of local belief (see Section 6.1.1) and the Confucianism (see Section 6.1.2). Throughout this section, we will observe the religion-making process conducted by the government as well as political elites during the making of law in relation to political identity of religion in Indonesia.

Part 6.2. will elaborate the case law on this issue, that is Constitutional Court Case No 97/PUU-XIV/2016 on Judicial Review of Articles 61(1), (2) and 64(1), (5) of the Civil Administrative Law. Articles 61(1) and 64(5) regulate the items to be mentioned in the family card and electronic ID card. One of the items is religion. Anyone whose religion is not yet being recognised by the state, according to the religion column both in the family card under Article 61(2) and in the electronic ID card under Article 64(5), is not required to be filled and may be left blank. Although Articles 61(2) and 64(5) accommodate the interest of religious minorities, the applicants in this case still face discrimination caused by the articles. The Constitutional

[812] See Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] (Indonesia) 7–10.

Court in its decision grant the application. I will elaborate the reasoning in this case, both by the applicants, respondent and the Court to understand the context behind the court decision.

Part Two will also analyse the court reasoning, particularly regarding the concept of belief (6.2.1) and official religions (6.2.2). These issues are two important concepts in the Indonesian legal framework of religious freedom. For instance, the claim of monotheistic state limits religious freedom of people who have different type of belief such as atheism or polytheism. The claim of official religions may result in discrimination against religions other than those recognised as official ones. Although the discrimination is conducted by the government (executive), the Court's absence in addressing these two issues contributes to justify government's discriminatory policy. This leads to my conclusion in this chapter that there is a lack understanding of the concept of religious freedom in Indonesia. Both the government's (law maker) and the Constitutional Court's construction of religion-making has contributed to discrimination against religious minorities.

Finally, in Section 6.3, I will conclude the discussion of this chapter by arguing that despite making progress for religious freedom in Indonesia by acknowledging the right of local belief to exist and being accommodated in the ID card, the Constitutional Court decision does not resolve the problem of discrimination concerning monotheistic beliefs and official religions in Indonesia.

6.1 An Attempt to Define Religion

In Indonesia, there has long been tension and debate over how to define a 'religion', and whether the concept of 'local beliefs' is included or excluded from the recognition and protection that religions also receive. I start the discussion in this part by considering the issuance of the Ministry of Religion and BAKORPAKEM. The establishment of the Ministry of Religion in Indonesia can be viewed as an acknowledgement of the importance of religion by the state. Furthermore, it can also be the sign that the state uses its administrative power to regulate religion in Indonesia despite the claim that Indonesia is neither a secular nor an Islamic country.[813]

[813] See Butt and Lindsey (n 5) 11.

The Ministry of Religion was established in 1946, one year after the declaration of independence.[814] In 1953, PAKEM (*Pengawas Aliran Kepercayaan),* a dedicated team to monitor local beliefs in society was initially established under the Ministry of Religion.[815] This is because at that time, the government perceived local belief as sect of religion.[816] Therefore, local belief should attach to certain religion instead of claiming itself as religion. PAKEM was given initial task to prevent local belief from declaring itself as religion.[817] Later in 1960, PAKEM was taken over by the Attorney General. Under the Attorney General, PAKEM was given task to authorise whether one belief or religious sect should be considered deviant to religion or not. If a local belief found to be a deviant to religion, it may be prosecuted under the law for harming public order.[818] The transfer of authority of PAKEM from the Ministry of Religion to the Attorney General occurred because its task is to prosecute crime, while the Ministry of Religion does not have the authority to prosecute a crime.

The work of PAKEM to control local beliefs received strong legal basis to criminalise deviant teaching in 1965 with the establishment of Blasphemy Law. Under the Blasphemy Law, the state is justified to criminalise any religious teaching considered deviant. According to Article 1 of the Blasphemy Law, everyone is prohibited to undertake religious-based activities and/or interpretation that considered deviant.[819] Further, the law punishes such crime up to five years imprisonment.[820]

To enforce the Blasphemy Law, the Attorney General later in 1984 reaffirmed the authority of PAKEM by establishing it as coordinating team to monitor local beliefs. The new role was given under the Decision of the Attorney General No Kep-108/J.A/5/1984. As the coordinating unit, the new PAKEM team consists of representatives from other related institutions: the Ministry of Religion, the Police, the Ministry if Home Affairs, the National Intelligence Agency (*Badan Intelijen Negara*), the National Armed Force (*Tentara Nasional Indonesia*/

[814] Putusan Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 73.
[815] Ibid.
[816] Ibid.
[817] Ibid.
[818] Ibid.
[819] Undang-Undang No 1/PNPS/1965 tentang Pencegahan dan Penyalahgunaan dan/atau Penodaan Agama [*Law No 1/PNPS/1965 on Blasphemy Law*] (Indonesia) art 1. See also Undang-Undang No 15 Tahun 1961 tentang Ketentuan Pokok Kejaksaan Republik Indonesia, Pasal 2 ayat (3) [*Law No 15 1961 on Attorney General*] art 2(3) (Indonesia).
[820] Undang-Undang No 1/PNPS/1965 tentang Pencegahan dan Penyalahgunaan dan/atau Penodaan Agama [*Law No 1/PNPS/1965 on Blasphemy Law*] (Indonesia) art 3.

TNI), the Ministry of Education and Culture, and the Ministry of Law and Human Rights.[821] The involvement of various state institutions to monitor local beliefs shows the government's serious attempt to restrain local beliefs. Most recently in 2015, there was a change made to the responsibilities of PAKEM to include religious sects under its surveillance.[822] Representatives of the 'Religious Harmony Forum' or FKUB *(Forum Kerukunan Umat Beragama*) also being invited to join PAKEM. FKUB is a state sponsored community forum consist of various religious leaders in the provincial and city/municipality level.[823] Since then, PAKEM enforces the Blasphemy Law by investigating religious sects all over the country and if the team finds activities or teaching of the alleged sect to be deviant, prosecution will take place.

In relation to the discussion of defining religion, I want to emphasise the state's authority, in particular the role of PAKEM in defining whether one's religious activity or teaching should be considered deviant. The problem with the state's authority to claim one religious teaching or activity to be deviant is that it may lead to a form of violation of religious freedom. This is because religious freedom in its internal dimension is a civil right that should be viewed as a negative right, which means the holder of the right should be free in holding the right without any state interference. This means, all kind of beliefs should freely exist and consequently state should not claim any of beliefs to be deviant. This right has been clearly stated in the Constitution. Articles 29 and 28 of the Constitution explicitly rule that the state guarantees all persons the freedom to adopt religion and to worship according to his religion and belief[824] and that the freedom to hold a religion in Indonesia is an absolute right.[825] By these two constitutional articles, it is clear that everyone should be free to hold a religion or belief. Further, because everyone has the right to exercise their religious freedom based on their belief, the interpretation of one religion may vary. Multiple religious sects may contradict each other in this regard and each of these different interpretations or teachings of religion has the same (or equal) guarantee to exist.

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[821] Melissa Crouch, 'Indonesia, Militant Islam and Ahmadiyah: Origins and Implications' (2009) 4 ARC Federation Fellowship Islam, Syariah and Governance, Background Paper Series (University of Melbourne) 9.
[822] Keputusan Jaksa Agung Republik Indonesia No KEP-146/A/JA/09/2015 [*Decree of Attorney General of The Republic of Indonesia* No KEP-146/A/JA/09/2015] (Indonesia) 25 September 2015.
[823] See Peraturan Bersama Menteri Agama dan Menteri Dalam Negeri No 9 Tahun 2006, No 8 Tahun 2006 tentang Pedoman Pelaksanaan Tugas Kepala Daerah/Wakil Kepala Daerah dalam Pemeliharaan Kerukuran Umat Beragama, Pemberdayaan Forum Kerukunan Umat Beragama, dan Pendirian Rumah Ibadat [*Joint Ministerial Decree of Ministry of Religion and Ministry of Home Affairs No 9 2006* and *No 8 2006 on Guideline for Implementing Duties of Governor/Mayor in Maintenance of Religious Community, Empowering Religious Harmony Forum, and House of Worship Establishment*] (Indonesia) 21 March 2006.
[824] *Constitution of the Republic of Indonesia* (n 8) art 29(2).
[825] See ibid art 28 I(1).

The same concern arises with the FKUB. Although FKUB is designed as a civil society's forum, it is controlled by the government. If the religious leaders want to congregate by themselves, the establishment of such forum should not be sponsored by the government. In fact, the FKUB was established by Joint Ministerial Decree and the government takes a role as the steering committee in the forum.[826] Further, the Decree authorises the governor to create regulations for administering FKUB.[827] If the state were based upon the liberal conception of liberty, this would provide a justification to prevent the state from intervening in the private domain. If we use the liberal conception of liberty, the right to hold religion or belief belongs to the private domain, not in the public life[828] where state may intervene. When the state claims one religious interpretation or activity to be deviant, the state has intervened religious freedom of the people practicing the accused interpretation/ activity.

6.1.1 On Local Beliefs

In the late 1960s, local beliefs received political support from political and military elites who adhered to local beliefs (such as *kejawen*).[829] Later, these political elites invited local belief organisations to join GOLKAR, a newly established political party formed by President Soeharto's regime.[830] They supported GOLKAR because GOLKAR inherited political tradition of *abangan,*[831] a subvariant within general Javanese religious system based on extensive and intricate complex of spirit belief, sorcery and magic.[832] The incorporation of the association of local belief into a state sponsored organisation (GOKAR) would require the government to have duty to protect local beliefs.

The aspiration came into reality when in 1973, the government through a Parliament's Decree (TAP MPR) on The Outline of State's Policy (GBHN) started to acknowledge local belief and

[826] See Peraturan Bersama Menteri Agama dan Menteri Dalam Negeri No 9 Tahun 2006, No 8 Tahun 2006 tentang Pedoman Pelaksanaan Tugas Kepala Daerah/Wakil Kepala Daerah dalam Pemeliharaan Kerukuran Umat Beragama, Pemberdayaan Forum Kerukunan Umat Beragama, dan Pendirian Rumah Ibadat [*Joint Ministerial Decree of Ministry of Religion and Ministry of Home Affairs No 9 2006* and *No 8 2006 on Guideline for Implementing Duties of Governor/Mayor in Maintenance of Religious Community, Empowering Religious Harmony Forum, and House of Worship Establishment*] (Indonesia) 21 March 2006, art 11.
[827] Ibid art 12.
[828] George Crowder, 'Negative and Positive Liberty' (1988) 40(2) *Political Science* 57, 57.
[829] See Samsul Maarif, *Pasang Surut Rekogisi Agama Leluhur dalam Politik Agama di Indonesia* (Center for Religion and Cross-Cultural Studies, 2017) 41. The word '*kejawen*' is taken from 'java'. The name explains the belief system rooted in Javanese culture.
[830] Ibid 41.
[831] Ryaas Rasyid, 'State Formation, Party System, and the Prospect for Democracy in Indonesia: The Case of Golongan Karya (1967–1993)' (PhD Thesis, University of Hawaii, 1994) 13.
[832] See Clifford Geertz, *The Religion of Java* (University of Chicago Press, 1960) 5.

positioning it as equivalent to religion[833] although some Islamist movements protested the state's policy.[834] Because MPR was the highest state institution at that time, its Decree was also set to be above the regular law.[835] As a result, The Outline of State's Policy became the source of law (legislation) in Indonesia.

However, five years afterwards in 1978 the politics of religion-making changed. There was a heated debate in MPR (Parliament) to rediscuss the position of religion and belief. Some Islamist parties resisted to acknowledge local belief as they perceived it to be a threat to Islam.[836] The parliamentary debate was followed by mass demonstration by Islamist movements outside the Parliament building to reject the state's acknowledgement of local belief.[837] The proposal was to revise the previous acknowledgement of local belief under the 1983 Parliamentary Decree. At this moment, the Parliament wanted to reduce political tension which was mostly set by the Islamist.[838] However, to erase local belief from Indonesian law and the Parliamentary Decree in particular would be unconstitutional because Article 29 (2) of the Constitution already affirmed its existence. Eventually, the Parliament agreed to revise the Parliamentary Decree (TAP MPR) on The Outline of State's Policy, where it still mention local belief, but explicitly declare it not as a religion by stating, '(local) belief is not a religion'.[839] Further, the Decree also stated that 'the supervision to (local) belief in One and Only God is carried out to prevent the formation of new religion'.[840] The new formulation of religion and belief in the 1978 can be seen as a political compromise in religion-making. On the one hand, the Parliament still wanted to acknowledge the existence of (local) belief because the Constitution already mention it. Conversely, the Parliament cannot ignore the Islamist parties' aspiration that heated up alongside the demonstration.

Interestingly, the government in further regulating local belief classifies it as a culture instead of religion.[841] Thereafter, local belief is set to be managed under the Ministry of Education and

[833] See the explanation of TAP MPR No IV/MPR/1973 tentang GBHN [MPR (People's Consultative Assembly/ Parliament) Decree No IV/MPR/1973on The Outline of State's Policy] (Indonesia) 448.
[834] See Maarif (n 829) 44.
[835] Asshiddiqie (n 281) 36.
[836] See Maarif (n 829) 51.
[837] Ibid.
[838] Ibid 53.
[839] See the explanation of TAP MPR No IV/MPR/1978 tentang GBHN [MPR (People's Consultative Assembly/ Parliament) Decree No IV/MPR/1978 on The Outline of State's Policy] (Indonesia) 615.
[840] Ibid.
[841] See Keputusan Presiden Republik Indonesia No 40 Tahun 1978 tentang Perubahan Pasal 9 Lampiran 12 Keputusan Presiden Nomor 45 Tahun 1974 jo Pasal 1 Angka 5 Huruf E Keputusan Presiden Nomor 27 Tahun 1978 tentang Susunan Organisasi Departemen [*Presidential Decree No 40 1978 on the Revision of Article 9 point*

Culture.[842] This last development is currently in effect. By positioning local belief as a part of culture instead of religion is, in itself, discrimination. This is because adherents of local belief may not declare their belief as religion under the law, although they would perceive it so. Further, there would be problem for these people when it comes to processing the ID card with religion column. It was stated in the 1978 Ministry of Home Affair letter that the national ID card applicant had to choose one of the five official religions to be mentioned in the ID card.[843] This means, the adherents of local belief, alongside the Confucians, as well as the adherents of religions and beliefs out of the five recognised religions (Islam, Catholicism, Christianity, Buddhism, and Hinduism) might not have their religions mentioned in the ID card. They had to choose one of the five available options, and if they did not want to, they would not be given ID card. As stated in the introduction of this chapter, opting for not having an ID card will result in the lack of recognition and protection of citizens' rights because they are not registered in the national database. However, to choose one of the available religions is also a violation of their religious freedom because they do not wish to do so.

6.1.2 On Confucianism

Similar conditions are also faced by the Confucians. Although Confucianism was originally included in the group of official religions under the elucidation of the 1965 Blasphemy Law, it was taken out two years afterwards. In 1965, a few months after the establishment of the Blasphemy Law, Islamic groups and the military targeted and killed alleged communists.[844] Although many observers argue that such violence is a product of spontaneous horizontal conflict with the involvement of local figures and groups, it is odd that the victims were not targeted because of their religion. Responding to this, Geoffrey Robinson argued the untrained people would not be able to commit such violence.[845] This means a bigger political interest, particularly the military, played a significant role in the 1965 violence. However, the military

12 of Presidential Decree No 45 1974] and [*Presidential Decree No 27 1978 on Ministerial Organisational Structure*] (Indonesia) art 1(5)E.

[842] See Keputusan Presiden Republik Indonesia No 40 Tahun 1978 tentang Perubahan Pasal 9 Lampiran 12 Keputusan Presiden Nomor 45 Tahun 1974 jo Pasal 1 Angka 5 Huruf E Keputusan Presiden Nomor 27 Tahun 1978 tentang Susunan Organisasi Departemen [*Presidential Decree No 40 1978 on the Revision of Article 9 point 12 of Presidential Decree No 45 Year*] and [*Presidential Decree No 27 1978 on Ministerial Organisational Structure*] (Indonesia) art 1(5)E. See also <http://kebudayaan.kemdikbud.go.id/ditkma/sejarah-direktorat-pembinaan-kepercayaan-terhadap-tuhan-yme-dan-tradisi/>.

[843] See Surat Edaran Menteri Dalam Negeri No 477/74054 Tanggal 18 November 1978 [Circular Letter from Ministry of Home Affair No 477/74054, 18 November 1978] (Indonesia).

[844] See Ricklefs (n 285), especially Chapter 4 and Hefner (n 414), especially Chapter 4.

[845] Geoffrey B Robinson, *The Killing Season: A History of the Indonesian Massacres, 1965–1966*, (Princeton University Press, 2018) 7.

disguised its own central role behind the killings.[846] Jess Melvin explained further that the military never justified the killings in religious terms[847], nor did it view the killings as a holy war.[848] With small occasional exceptions, the victims were selected for arrest and killed mainly for their alleged political affiliations.[849]

The following regime change in 1966 after the failed *Coup D'etat*, in which the Communist Party was accused to run the *Coup* strengthen the claim that such political interest has resulted in the cease of recognition and protection for Confucianism. Soeharto's New-Order regime took over the power from Soekarno, the first Indonesian president who was allegedly supported by the Indonesian Communist Party (PKI).[850] With the Communist Party accused of conducting the *Coup* (even though this was not the case), the new regime under Soeharto presidency later banned all communist-related matters and dissolved the Indonesian Communist Party in 1966.[851] Interestingly, because communism was associated with atheism, many people holding beliefs other than 'recognised' religions mentioned in the Blasphemy Law converted to a 'recognised' religion to avoid being accused of being a communist.[852] After the banning of the Indonesian Communist Party in 1966, Soeharto's regime established Presidential Instruction No 14 1967 banning Confucianism. In the Presidential Instruction, it is said that the manifestation of 'Chinese religious belief and culture which centred in its ancestor's country (China), may cause unsuitable psychological, mental and moral influence to the Indonesian citizens.'[853] The instruction continues saying, 'such influence becomes obstacle to the process of assimilation, so that it needs to be regulated in a reasonable proportion.'[854]

To recall, the elucidation (general explanation) of the Blasphemy Law mentions Confucianism as one of the six major religions in Indonesia[855], in which the stipulation broadly used to justify the existence of 'official religions' in Indonesia. However, the 1967 Presidential Instruction

[846] Jess Melvin, *The Army and the Indonesian Genocide: Mechanics of Mass Murder* (Routledge, 2018) 49.
[847] Ibid 49.
[848] Ibid 49.
[849] Robinson (n 845) 7.
[850] See Martin Ebon, 'Indonesian Communism: From Failure to Success.' (1963) 25(1) *Review of Politics* 91, 91.
[851] See TAP MPRS No 25 Tahun 1966 tentang Pembubaran Partai Komunis Indonesia [*Parliament Decree No 25 1966 on the Dissolution of the Indonesian Communist Party*] (Indonesia).
[852] Ricklefs (n 295) 133.
[853] See the preamble (consideration) of Instruksi Presiden No 14 Tahun 1967 tentang Agama Kepercayaan dan Adat Istiadat Cina [*Presidential Instruction No 14 1967 on Chinese Religious Belief and Culture*] (Indonesia).
[854] Ibid.
[855] See the elucidation of Penetapan Presiden Republik Indonesia Nomor 1/PNPS Tahun 1965 tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama [*Presidential Decree No 1/PNPS 1965 on Blasphemy Law*] (Indonesia).

prohibited public manifestation of Confucianism.[856] Under the Presidential Instruction, the adherents of Confucianism may still hold their belief and practise it in their private space, individually or with their family.[857] However, any public activity related to Confucianism will be monitored and 'secured' by BAKORPAKEM (PAKEM).[858] Although the Presidential Instruction did not explicitly ban Confucianism in Indonesia, it was broadly perceived so.[859]

There are several legal issues worth attention regarding the Presidential Instruction. First issue is on the formal legal drafting contradiction. If the government claimed to recognise six religions (Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism) under the the Blasphemy Law, how can a Presidential Instruction annul Confucianism as one of the 'official religions'? As explained in Section 3.1., according to the hierarchy of law,[860] a Presidential Instruction may not overrule a law (*Undang-Undang*). Although the Blasphemy Law was originally enacted as Presidential Decree and later affirmed to be Law (*Undang-Undang*) in 1969,[861] the same logic still applied. Presidential Instruction may not overrule Presidential Decree. If the president wanted to change any stipulation in the Decree, the Decree should have been revised by the same type of law (Decree), instead of instruction. With the new Presidential Instruction banning Confucianism while other law (Presidential Decree) acknowledges Confucianism, it created legal uncertainty for Confucianism under the Indonesian legal system.

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[856] Instruksi Presiden No 14 Tahun 1967 tentang Agama Kepercayaan dan Adat Istiadat Cina [*Presidential Instruction No 14 1967 on Chinese Religious Belief and Culture*] (Indonesia) art 1.
[857] Ibid.
[858] Article 4 of Instruksi Presiden No 14 Tahun 1967 tentang Agama Kepercayaan dan Adat Istiadat Cina [*Presidential Instruction No 14 1967 on Chinese Religious Belief and Culture*] (Indonesia).
[859] See eg, Santi Aprilia, Murtiningsih, 'Eksistensi Agama Khonghucu di Indonesia' (2017) 1(1) *JSA* 15; Sulaiman, 'Agama Khonghucu. Sejarah, Ajaran, dan Keorganisasiannya di Pontianak Kalimantan Barat' (2009) 16, 50; Evi Sutrisno, 'Confucious is Our Prophet: The Discourse of Prophecy and Religious Agency in Indonesian Confucianism' (2017) 32(3), *Humaniora* 669; Sugiato Lim, 'Analysis of Indonesia Confucians Understanding Towards Religious Doctrines and Ordinances in Confucianism' (2013) 4(2) *SOJOURN: Journal of Social Issues in Southeast Asia* 1297; Christine Chan, '"Assimilationism" versus "Integrationalism" Revisited: The Free School of the Khong Kaw Hwee Semarang' (2013) 28(2), *SOJOURN: Journal of Social Issues in Southeast Asia* 329.
[860] Theoretically, the idea of hierarchy of law in Indonesia was taken from Hans Kelsen's *stuffenbau* theory. Further reading includes Kelsen, *General Theory of Law* (n 281) and Kelsen, *Pure Theory of Law*(n 281); Jimly Asshiddiqie, *Teori Hans Kelsen tentang Hukum* (Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006), especially Chapter IV, 169; Asshiddiqie, (n 281) 241; Hamid Attamimi Peranan, 'Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun wakti Pelita I–Pelita IV' (PhD Thesis, Universitas Indonesia, 1990); Indarti (n 280).
[861] Through Undang-Undang No 5 Tahun 1969 tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Presiden Sebagai Undang-Undang [*Law No 5 1969 on the Repositioning Several Presidential Decrees and Presidential Regulation as Law*] (Indonesia).

The second issue is on the political context beyond the Presidential Instruction. The Indonesian Communist Party (PKI) was one of the main supporters of Soekarno, the first Indonesian president. Soeharto took over Soekarno's regime and was declared to be the second president of Indonesia in 1966 after the 1965 tragedy. It can be understood that Soeharto wanted to ensure all Soekarno's people were removed from his government, including the members of the Indonesian Communist Party and its associate organisations.[862]

Soekarno, albeit promoting the 'Non-Block' or 'Non-Aligned' movement during the Cold War through the 1955 Bandung Conference[863], had more interest in communism. It can be seen by his idea of NASAKOM (*Nasionalisme, Agama, Komunisme*) which combines the values of nationalism, religion and communism used in Indonesia.[864] Although Confucianism and communism are not directly related, Soeharto saw it as a threat alongside the Communist Party which he also banned right after he took over the regime.

Eventually, adherents of Confucianism were affected by the 1967 Presidential Instruction on Confucianism. Their religion was 'downgraded' from one of the 'official religions' into the so-called 'belief' and thus subjected to the control by BAKORPAKEM. The discriminatory Presidential Instruction on Confucianism was finally revoked in 2000. However, from 1967 to 2000, the adherent of Confucianism faced difficulties and discrimination regarding their religious freedom, particularly in manifesting their belief. Included in the list of the difficulties is the absent of mentioning Confucianism in the religion column of the ID card which resulted in difficulties in accessing various administrative rights. Because of this, there was mass conversion from Confucianism to other recognise religions, mostly Christianity, Catholicism

[862] On this topic, please see eg, Richard Robinson and Vedi Hadiz, *Reorganising Power in Indonesia: The Politics of Oligarchy in an Age of Markets* (Routledge, 2004); Vedi Hadiz, 'The Left and Indonesia's 1960s: The Politics of Remembering and Forgetting' (2006) 7(4) *Inter-Asia Cultural Studies* 554; Edward Aspinall and Greg Fealy (eds), *Soeharto's New Order and Its Legacy: Essays in Honour of Harold Crouch* (ANU Press, 2010), especially Chapter I, 1; Benedict Anderson, 'Old State, New Society: Indonesia's New Order in Comparative Historical Perspective' (1983) 42(3) *Journal of Asian Studies* 447, 487.

[863] For further reading, see eg, Naoko Shimazu, 'Diplomacy as Theatre: Staging the Bandung Conference of 1955' (2014) 48(1) *Modern Asian Studies* 225; Ahmad Rizky Mardhatillah Umar, 'Rethinking the Legacies of Bandung Conference: Global Decolonization and the Making of Modern International Order' (2019) 11(3) *Asian Politics & Policy* 461; Amitav Acharya, 'Studying the Bandung Conference from a Global IR Perspective' (2016) 70(4) *Australian Journal of International Affairs* 342.

[864] See Huub de Jong, 'Patriotism and Religion: Pilgrimages to Soekarno's Grave' in Peter Jan Margry (ed), *Shrines and Pilgrimage in The Modern World: New Itineraries into the Sacred* (Amsterdam University Press, 2008) 95, 97; Nyoman Darma Putra, 'Getting Organized. Culture and Nationalism in Bali, 1959–1965' in Jennifer Lindsay and Maya HT Liem (eds), *Heirs to World Culture. Being Indonesian 1950–1965* (KITLV Press, 2012) 315, 325; Etel Solingen, 'ASEAN, Quo Vadis? Domestic Coalitions and Regional Co-Operation' (1999) 21(1) *Contemporary Southeast Asia* 30; Steven Farram, 'The PKI in West Timor and Nusa Tenggara Timur 1965 and Beyond' (2010) 166(4) *Bijdragen tot de Taal-, Land- en Volkenkunde* 381.

and Buddhism.[865] Similar to the argument made by the applicants on the judicial review case that will be explained further in Section 6.2, this conversion was merely administrative: they declare themselves as Christian, or Buddhist to be able to have an ID card. Even though these people (Confucians) may still observe their own belief (Confucian) and the government would not monitor if they comply to the religion mentioned in their ID card, this policy is still discriminatory in the sense of recognising their religious identity.

6.1.3 Religion Column in the ID Card

As explained above, it is important to acknowledge that the claim of official religions has caused discrimination for people having beliefs or religions outside the 'official religions' because at one stage they had to choose from the 'available' religions to obtain the ID card.[866] Interestingly, the Indonesian national ID card was not originally designed to include religion in its column. As a post-colonial country, Indonesia inherits the administration system from the Dutch. Under the Dutch colonial government, the people were grouped by racial differences: European; East Asian; and Indonesian.[867] Although race was the main concern, religion was not mentioned in the ID card during that era. After the independence, Indonesia started to create its own system of population registration. Religion was still not mentioned in the ID card although the state did create the Ministry of Religion in Indonesia showing the concern over religious matter in the country.

Although there is no valid academic source to explain the first mention of religion column in the ID card, it can be understood that in 1978, religion column was already mentioned in the Indonesian ID Card. The mention of religion in the ID card in 1978 was consistent with the report of the Indonesian ID Card by the local Civil Registry Officer in Batanghari as explained by Samsul Maarif, an expert on local belief during the Constitutional Court hearing on the Case of ID Card.[868]

During the hearing, Samsul Maarif after examining the data from the Civil Registry Office in Batanghari, found that the Indonesian ID Card has been reconceptualised 10 times.[869] The first

[865] Sutrisno, 'Negotiating the Confucian Religion in Indonesia' (n 852) 236–7.
[866] See eg, Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] (Indonesia), 9, in which one applicant in the case claimed that he decided to lie about his religion to obtain an ID card because his religion was not recognised by the state.
[867] See *Indische Staatregeling* (the *Constitution of The Dutch East Indies*) art 163.
[868] See Putusan Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016], 75; Maarif (n 829) 56.
[869] Maarif (n 829) 56.

time was under the Dutch colonial government when the ID card was in the form of population certificate.[870] The second one was under the Japanese Colonial government which mention the devotion of the people to the Japanese government.[871] The third one was during the early years after the declaration of independence of the newly established state, 'Indonesian'.[872] The fourth model of ID card was designed in 1967 and being used until 1970.[873] The fifth model was being used during 1970–1977.[874] The sixth model, known as 'KTP Kuning' (Yellow ID card) was being used during 1977–2002.[875] The seventh model was being used during 2002–2004. The eight model being used only in Aceh during emergency in 2003–2004.[876] The ninth model, known as KTP Nasional (national ID Card) during 2004–2010.[877] The tenth and current model of identity card (known as KTP) has been used since 2011 is the electronic ID card (E-KTP).[878]

It was reported that until the fourth model (ended in 1970), there was no religion column mentioned in the ID card, but a 'race' column was there.[879] In the fifth period, during 1970–1977, the 'race' column was revoked and there was no religion column.[880] Recalling the policy set by the Ministry of Home Affairs in 1978 on the technicality on filling religion column in the ID card, it can be said that the mention of religion column in the ID card was started in the sixth model of ID card (Yellow ID card/ KTP Kuning), started in 1977.

The next issue is the reason of the government for including a religion column in the ID card from 1977. The government, during the Constitutional Court hearing in 2017 argued that the importance of mentioning religion in the ID card is for the sake of legal certainty for the holder of the ID card, particularly in relate to administrative procedures such as marriage registration.[881] The concept of legal certainty in Indonesia can be understood as the 'consistent application of laws'.[882] The government argued that written evidence is important to validate

[870] Ibid.
[871] Ibid.
[872] Ibid.
[873] Ibid.
[874] Ibid.
[875] Ibid.
[876] Ibid.
[877] Ibid.
[878] Ibid.
[879] Ibid.
[880] Ibid.
[881] See Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 108.
[882] See Rifki Assegaf, 'The Supreme Court: Reformasi, Independence and the Failure to Ensure Legal Certainty' in Melissa Crouch (ed), *The Politics of Court Reform* (Cambridge University Press, 2019) 31.

legal subject.[883] In the example of marriage registration, the government explained that religion being filled in the religion column in the ID card will be regarded as authentic evidence in claiming religious ceremony needed to validate the marriage. The same logic applied in the case of adoption where the religion of the adopting parents and the adopted child need to be the same.[884]

Beyond the stated reason of the government during the trial, the mention of religion in the ID card in 1977 was also related to the anti-communist policy set by Soeharto's regime. As explained before, the 1965 tragedy was involving the clash between the communist and the Islamist leaving a large negative perception of communist as anti-religion.[885] It is logical for people to mention their religion in the ID card to ensure they are not communist. This argument is supported by the testimony of the applicants during the ID card case before the Constitutional Court who claimed that they were being accused as communist for leaving their religion column blank.[886]

However, this policy of mentioning religion might have been conducted earlier in 1970 when the government changed the form of ID card and revoking the 'race' column. The race column was inherited from the Dutch colonial government policy to label and treat people differently based on their race. It can be understood that the new regime wanted to revoke the race column for the sake of national unity. Interestingly, albeit revoking the race column in the ID card, the government did not add religion column although it was the perfect moment to gather the support from the Islamist if the government chose to incorporate religion column in the ID card. The newly established Soeharto regime during that time (1970) was aware of the religious conflict after the 1965 tragedy. The regime even banned the communist and Confucianism in 1966 and 1967, respectively. If the regime wanted to incorporate the religion column to limit the recognition of religion, 1970 was the perfect timing. However, the regime chose to not do so in the early 1970s. The development of religion-making during the early 1970s was relatively peaceful. Even with the involvement of local belief to GOLKAR (See 6.1.1.), the

[883] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 108.
[884] Ibid 108.
[885] Fealy and McGregor (n 427).
[886] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 8.

Parliament Decree 1973 on the Outline of State Policy was also accommodating a more tolerant construction of religion by accommodating local belief within it.

It was not until 1978 when the Parliament agreed to reconceptualise the relationship between religion and belief under TAP MPR *tentang* GBHN (Parliamentary Decree on The Outline of State Policy) by explicitly stating that belief is not religion and it should not be developed to be a new religion.[887] Although it does not directly answer the reason why the government started to mention religion in the ID card in 1977, the issue of religion in the ID card became major subject to be debated during the Parliament meeting in 1978. It may be suggested that with the policy of mentioning religion in the ID card since 1977, some people started to realise the diversity of religion in Indonesia, that there are more religions than just the 'mentioned' six religions under the 1965 Blasphemy Law. As mentioned in the previous discussion (6.1.1), during the 1978 parliamentary meeting, the Islamist parties resisted to acknowledge some of these beliefs, particularly the traditional ones, as they perceived it to be a threat to Islam.[888]

The Ministry of Home Affairs, in implementing the 1978 Parliamentary Decree, and considering the Presidential Instruction 1967 on the banning of Confucianism, further established its technical policy regarding religion column in the ID card to only allow five religions to be mentioned: Islam, Christianity, Catholicism, Hinduism and Buddhism.[889] Such policy of the government to allow only certain religions to be mentioned in the ID card was problematic. To not have a national identity card is a crucial problem. Without a National Identity, one may not be able to register to any social-benefit programs such as health care, voter list, education, marriage and so forth. They will not be able to receive such constitutional rights simply because they are not listed in the national database. While some people choose to conceal their real belief/religion and register themselves under one of the five religions, some other choose to not have ID card because they did not want to give up their belief. Because of this, many people refused to obtain the ID card because the civil administrative officer asked them to choose one of six religions to be mentioned in their national identity card application form: Islam, Christian, Catholics, Hindu, Buddhism or Confucianism. Problem arises when their religions or beliefs are not among the six 'recognised' religions. This is mainly the case

[887] See attachment of TAP MPR No IV/MPR/1978 tentang GBHN *[MPR (People's Consultative Assembly/Parliament) Decree No IV/MPR/1978 on The Outline of State's Policy*] (Indonesia) 615.
[888] Maarif (n 829) 51.
[889] Surat Edaran Menteri Dalam Negeri No 477/74054 Tanggal 18 November 1978 [Circular Letter from Ministry of Home Affair, No 477/74054, 18 November 1978] (Indonesia).

with local belief such as *Samin, Badui* or *Dayak*. Some of them were forced to choose one of the five religions or they will not be given national identity card.[890]

In 2000 under Abdurrahman Wahid (Gus Dur) Presidency, the Presidential Instruction restricting Confucianism was revoked. Since then, Confucianism has been included again in the group of six 'official religions' in Indonesia.[891] Later in 2006 the government created the Civil Administrative Law to reorganise and restructuring civil administrative matter, including ID card. The 2006 law affirmed the mention of religion in the ID card. In 2013, the government revised the Civil Administrative Law to for anyone to leave the religion column blank (strip signed) in the identity card form if the applicant so wishes. It is said under the revised law, information regarding religion in the ID card for residents whose religions have not been recognised by the law or for residents with local beliefs may now, 'not filled out but is still served and recorded in the population database.'[892]

This marks an improvement for the people with no affiliation to one of the five religions. One of the adherents of local belief, *Sedulur Singkep*, said he was able to have a new identity card with the religion column left blank.[893] However, this was not always the case for most other traditional believers. CRCS Universitas Gadjah Mada in their 2017 report still found numerous cases of traditional believers being intimidated to choose one of the offered religions in the identity card form.[894] Further, although the wording of the law's revision seems to accommodate the interest of people who do not adhere to one of 'recognised' religions, it does not eliminate the discriminatory nature of the law. People who have chosen to leave their religion column blank claim to have been discriminated in various aspects of their life, from difficulties in accessing work to financial loan.[895] In 2016, an application for judicial review of the Civil Administrative Law, particularly in regard to the articles mentioning religion column in the ID card was brought before the Constitutional Court. The case, registered as Case No

[890] Elza Peldi taher (ed), *Merayakan Kebebasan Beragama: Bunga Rampai Menyambut 70 Tahun Djohan Effendy* (Digital version, 2011) Democracy Project Yayasan Abad Democracy 373.
[891] See Sutrisno, 'Negotiating the Confucian Religion in Indonesia' (n 859) 253.
[892] Undang-Undang No 24 Tahun 2013 tentang Perubahan Atas Undang-Undang No 23 Tahun 2006 tentang Administrasi Kependudukan, Pasal 61 ayat (2) [*Law No 24 2013 on the Revision of Law No 23 2006 on Civil Administration*] art 61(2).
[893] Lembaga Studi Sosial dan Agama (eLSA) Semarang, Laporan Tahunan Kebebasan Beragama dan Berkeyakinan di Jawa Tengah Tahun 2012, Lembaga Studi Sosial dan Agama, 70.
[894] Zainal Abidin Bagir, *Kerukunan dan Pendoaan Agama; Alternatif Penanganan Masalah* (Center for Religious and Cross-Cultural Study, 2017) 5.
[895] See Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] (Indonesia) 7, 9.

97/PUU-XIV/2016 will be elaborated in the following part of the chapter, emphasising the issue of local belief and official religions.

6.2 Case Law

The Constitutional Court decision, Case No 97/PUU-XIV/2016 was praised as an achievement for inclusive citizenship. The Court based its reasoning on the importance of the right of the applicant to access social welfare and other rights accessible by using ID card. To begin the analysis of this case, I provide the summary of the case:

Case No 97/PUU-XIV/2016 before the Constitutional Court was submitted by four applicants: Nggay Mehang Tana; Pagar Demanra Sirait; Arnol Purba; and Carlim on 28 September 2016. The applicants who hold local beliefs[896] claimed that Articles 61(1), (2) and 64(1), (5) of Law No 23 2006 as amended by Law No 24 2013 on civil administrative contradict the Constitution, particularly Articles 1(3), 28 D(1), 27(1) and 28 I(2).

The reviewed articles are:

> Law No. 23 Year 2006 as being amended by Law No. 24 Year 2013 on Civil Administration
>
> Article 61 (1): 'A family card contains the following column of information: Family Card number; full name of the patriarch and the members of the family; Civil Registration Number; sex; address; place of birth; date of birth; religion; education; occupation; marital status; relationship status within the family; citizenship; immigration document; and parents' name.' [author's trans]
>
> Article 61 (2): 'Information regarding religion as referred to in (1), for residents whose religions have not been recognised by the law or for residents with local beliefs; is not required to be filled in but is still served and recorded in the population database.' [author's trans]

[896] The first applicant (Nggay Mehang Tana) is one of around 21.000 members of the 'Marapu' community in East Sumba. See Constitutional Court Decision, Case No 97/PUU-XIV/2016, 5; the second applicant (Pagar Demanra Sirait) is the adherent of 'Permalim' in North Sumatra. See Constitutional Court Decision, Case No 97/PUU-XIV/2016, 7; The third applicant (Arnol Purba) is an adherent of 'Ugamo Bangso Batak' in Medan, North Sumatra. See Constitutional Court Decision, Case No 97/PUU-XIV/2016, 8; the fourth applicant (Carlim) is an adherent of 'Sapto Darmo' from Central Java. See Constitutional Court Decision, Case No 97/PUU-XIV/2016, 9.

> Article 64 (1): 'Electronic Identity Card with a picture of Garuda *Pancasila* and the map of Indonesian territory; contains these elements of civil administrative data: Civil Registration Number; name; place and date of birth; sex; religion; marital status; blood type; address; occupation; citizenship; passport photo; validity period; place and date of issuing the Electronic Identity Card; and the signature of the owner of the Electronic Identity Card.' [author's trans]
>
> Article 64 (5): 'Element of civil administrative data regarding religion as referred to in (1) for residents whose religions have not been recognised by the law or for residents with local beliefs; is not required to be filled in, but is still served and recorded in the population database.' [author's trans]

The constitutional articles claimed to contradict the above stipulations are:

> Article 1(3): The State of Indonesia is a state based on law.[897]
>
> Article 27(1): All citizens shall be equal before the law and in government and shall uphold the law and government without exception.[898]
>
> Article 28 D(1) of the Constitution: Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.[899]
>
> Article 28 I(2): Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.[900]

The first applicant claimed that the mention of religion in the ID card column and the dash used for adherents of beliefs other than the 'recognised religions' caused him and his fellow members of *Marapu* community to be regarded as primitive, infidel, and perverted by the other members of the society because they chose to left the religion column blank in their ID card

[897] *Constitution of the Republic of Indonesia* (n 8).
[898] Ibid.
[899] International Labor Organization (United Nations) trans, *The 1945 Constitution of the Republic of Indonesia* (2015).
[900] Ibid.

and family card.[901] Further, it affects the violation of their constitutional rights as well as their rights for civil administrative services.[902] The second applicant claimed that the reviewed articles cause discrimination for him in the form of difficulties in accessing employment; no access for social security right; difficulties in accessing civil administrative documents such as electronic ID card, family card, marriage certificate and birth certificate.[903]

The third applicant claimed direct and indirect discriminations caused by the articles because the right to access employment for his daughter with the same belief as him (*Ugamo Bangso Batak*) has been violated.[904] His daughter's application for employment was rejected although her resume was good.[905] The rejection was because her religion column in her ID card was left blank (or marked with a dash).[906] The prospective employer assumed that the dash in her religion column in the ID card implicitly indicates atheism or infidelity.[907] The applicant himself also failed to access financial loans from banking and other financial institution because of the dash in his religion column in the ID card.[908] To provide a better future for his children, the applicant changed his religion into Christianity in his ID card and family card.[909] The fourth applicant claimed that the society labels him and his fellow members of the *Sapto Darmo* community as perverted.[910] Because of the strip in their religion column in the ID card, his family member was denied to be buried in the public cemetery in his residency.[911] The applicant's child was also restricted to access education because he was forced to study Islam in the mandatory religion class in his elementary school[912] even though the teaching of Islam is contrary to their belief in *Sapto Darmo*.[913]

Claiming their loss was caused by the articles of the law, the applicants further argued that the dash in their religion column in the ID card contradicts to Article 1 (3) of the Constitution stating that Indonesia is a state based on law. This is because according to the applicants, a

[901] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 7.
[902] Ibid.
[903] Ibid 8.
[904] Ibid.
[905] Ibid.
[906] Ibid.
[907] Ibid.
[908] Ibid 9.
[909] Ibid.
[910] Ibid 10.
[911] Ibid.
[912] Ibid.
[913] Ibid.

state based on law should guarantee human rights, non-discriminatory action and fairness for all of its citizens.[914] In practice, there has been discrimination caused by the dash in their religion column in the ID card including difficulties in accessing employment, social security, and civil administrative rights.[915]

The applicants also claim that the reviewed articles contradict the principle of legal certainty and equality before the law guaranteed under Article 28 D (1) of the Constitution.[916] The absence of legal certainty, claimed by the applicants, is because the articles say ID card contains information regarding religion, but their religion column has a dash.[917] With their religion column left blank while other people with majority religions written in the ID card, the applicants also claim to be given no equality before the law because of the different treatment they received compared with other people with majority religions.[918] The same argument is being used by the applicant to claim that the reviewed articles breach Article 27(1) of the Constitution guaranteeing equality before the law for all citizens.[919]

Finally, the applicants argued the reviewed articles contradict Article 28 I (2) of the Constitution highlight the obligation of the state to protect human right to non-discrimination.[920] The state officials (local government) discriminate against the applicants by treating them differently compared with other people.[921] The applicants argue that Article 28 I (2) of the Constitution requires the government to prevent discriminatory action towards its citizens. Therefore, the government should record the name of the citizens' religion/ belief instead of leaving it blank.[922]

Based on their argument, the applicants asked the Constitutional Court to declare Article 61 (1) and article 64 (1) conditionally constitutional for the phrase 'religion' mentioned in the articles.[923] The condition asked by the applicants to set the articles to be constitutional is that

[914] Ibid 12.
[915] Ibid 14.
[916] Ibid 16.
[917] Ibid 17.
[918] Ibid 19.
[919] Ibid 21.
[920] Ibid 27.
[921] Ibid 30.
[922] Ibid.
[923] Ibid 31.

the phrase 'religion' includes 'belief'.[924] For Article 61 (2) and Article 64 (5), the applicants asked the Court to declare the articles unconstitutional.[925]

The government in responding to the case, asserted that it there are six official religions in Indonesia: Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism, despite the existence of other belief systems known as local beliefs.[926] To accommodate these unofficial religions/ beliefs, the government allows the religion column in the ID card to be left blank/ marked with a dash.[927] For the importance of having religion column in the ID card, the government argues that it is necessary for administrative practices such as marriage, inheritance, ownership and adoption.[928] The mentioned religion (in the ID card) corelate to administrative action by the state officials for the sake of legal certainty.[929] For example in the case of marriage, the state official will see the mentioned religion in the ID card as a proof to process the marriage according to the parties' religion.[930] However, realising the complexity of the issue, the government did not directly ask the Constitutional Court to reject the application. The government let the Constitutional Court to decide how best to regulate religion column in the ID card.[931] The government continue its non-confrontational position in the case by offering further dialogue with the society in this regard.[932]

The Parliament (DPR) was also present during the trial as the co-respondent. In its response, the Parliament argues that the dash in the religion column for the adherents of beliefs other than the 'recognised' religions does not harm the applicants' constitutional rights.[933] Therefore, the Parliament asked the Court to reject the application.[934]

There was one amicus curiae (*pihak terkait*) in the case, Majelis Luhur Kepercayaan Terhadap Tuhan Yang Maha Esa Indonesia (MLKI). MLKI was a civil society organisation established on 13 October 2014 by number of local belief communities.[935] The amicus argued that the

[924] Ibid.
[925] Ibid.
[926] Ibid 106.
[927] Ibid 108.
[928] Ibid.
[929] Ibid.
[930] Ibid.
[931] Ibid 109.
[932] Ibid.
[933] Ibid 114.
[934] Ibid 118.
[935] See <https://www.mlki.or.id/sejarah-mlki/> for reference.

members of the organisation have long been discriminated by the state due to their beliefs.[936] The dash in their religion column in the ID card also causes negative effects such as the stigma in the society that they are infidel or communist which led to historical trauma.[937]

It was not further explained in the application what the historical trauma was. But it can be understood that the historical trauma is related to the 1965 tragedy of communism in Indonesia. With the negative perception of communism as anti-religion during the genocide, people who do not have a religion will easily be considered communist.[938] This, resulted in discrimination for the amicus in the same way as the applicants.[939] Therefore, the amicus asked the Constitutional Court to declare Articles 61(1) and 64(1) of the concerned law (Civil Administrative Law) to be conditionally constitutional as long as the phrase 'religion' be interpreted as to include any kind of belief and religion.[940] Supporting the position of the applicants, the amicus also asked the Constitutional Court to declare Articles 61(2) and 64(5) unconstitutional.[941]

The case, albeit mentioning religion and belief, concerned matters of administration. This is mainly because the reviewed law is the Civil Administrative Law. Although the Constitutional articles being used to review the law are those related to religious freedom, the outcome of the case is administrative, in the sense of mentioning belief in the religion column of the ID card.

The Court did touch upon the issue of religious freedom in examining Articles 28 E(1) and 29 of the Constitution. However, the Court's reasoning seemed unfinished and left important questions about the concepts of belief and religion and the concept of the recognised religions unanswered. I will explain this further in Sections 6.2.1 and 6.2.2.

In discussing religious freedom, the Court argued that Article 28 E guarantees the right to have religion and belief.[942] Such stipulation causes a consequence to the state, as being stated in Article 29, that the state must guarantee the freedom of the people in relate to religious

[936] Putusan Mahkamah Konstitusi Nomor 97/ PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 118.
[937] Ibid 120-121.
[938] See Fealy and McGregor (n 427) 37, 39.
[939] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 121.
[940] Ibid 129.
[941] Ibid.
[942] Ibid 139.

freedom.[943] Therefore, the two articles jointly affirm religious freedom in Indonesia.[944] The Court further argued that Article 28 I (1) affirms the right to hold religion as an absolute right.[945] Because the right of religious freedom is stated in the Constitution, argued the Court, it establishes the obligation of the state to respect, protect and fulfil the right.[946]

The constitutional judges who examined this case in 2017 strongly affirmed the right to adhere to a religion, along with other rights stated under Article 28 I, to be absolute. It is contrary to the controversial Constitutional Court decision, Case No 2-3/PUU-V/2007 on Death Penalty, nearly 10 years prior to the 2016 case. In the 2007 Death Penalty case, the Court argued that all rights stated in the chapter of 'Human Rights' in the Constitution may be limited as set under Article 28 J (2).[947] The 2007 case affirms that there are no absolute rights in Indonesia, therefore the Court justifies death penalty in Indonesia although the right to life is listed as absolute right along with the right to adhere to a religion under Article 28 I (1). Disregarding the 2007 case, the Court seems to heavily consider human rights by acknowledging the right to hold religion as an absolute right alongside other absolute rights mentioned under Article 28 I (1).

This is a landmark decision made by the Constitutional Court because it changes the previous interpretation of human rights articles in the Constitution. Such landmark decision also improves human rights protection in Indonesia, that is: the legal justification of the existence of absolute rights in Indonesia. Particularly, this decision also marks an important claim in this study: that the right to hold religion, including local belief is an absolute right under the Indonesia Constitution.

The Court in its further reasoning claimed that religion and (local) belief are two different things. However, the existence of both religion and belief are affirmed in the Constitution.[948] The Court emphasised the use of the word 'and' in the constitutional stipulation between 'religion' and 'belief'. According to the court, the use of the word 'and' reflects the equal legal position between religion and belief.[949] The Court further argued that the mention of 'religion'

[943] Ibid.
[944] Ibid.
[945] Ibid 139–40.
[946] Ibid 140.
[947] Putusan Mahkamah Konstitusi Nomor 2-3/PUU-V/2007 [Constitutional Court Decision, Case No 2-3/PUU-V/2007] 412.
[948] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 140.
[949] Ibid.

in the reviewed articles (Articles 61(1), (2) and 64(1), (5) of the Civil Administrative Law) was meant to be limited to the 'recognised religions', thereby excluding belief in One and Only God[950] and therefore contradicting the Constitution.[951]

The Court further examined the dash made in the religion column of the ID cards for the adherents of beliefs other than the 'recognised' religions. The Court emphasised the reviewed articles (Articles 61(1), (2) and 64(1), (5) of the Civil Administrative Law) are meant to regulate administrative matter for the citizens, instead of regulating religious freedom. [952] The Court in its decision granted the application and declared Articles 61(1) and 64(1) of the Civil Administrative Law to be conditionally constitutional as long as the phrase 'religion' to be interpreted to include 'belief'.[953] The Court also granted the rest of the petition, that is to declare Article 61 (2) and Article 64 (5) unconstitutional.[954] However, the case does not clarify the definition and concept of 'belief' which was allowed to be mentioned in the ID card. Another issue untouched by the Court is its acceptance that there are 'recognised religions' in Indonesia. From the perspective of religious freedom, this chapter examines the untouched discussion on these two important notions claiming that the Constitutional Court decision in this regard does not solve the root of problem of religious freedom in Indonesia.

6.2.1 The Concept of Belief

The applicants in this case were asking the Constitutional Court to declare the word 'religion' in article 61 (1) and article 64 (1) constitutional as long as it is interpreted to include 'belief'.[955] The Court in its decision granted the petition and declared the word 'religion' in the reviewed articles unconstitutional if it is not interpreted to include 'belief'. Based on international law, when the Court decision mentions the word 'belief', it should be read as any kind of belief, whether traditional or new; local or foreign; belief in One and Only God or multiple gods or no God; or any kind of conscientious belief. However, the Court in its *ratio decidendi* (reasoning) referred to the term 'belief in One and Only God', saying:

> the word or term 'religion' in Article 61 (1) and Article 64 (1) of the Civil Administrative Law, if we observe, along with the word or term 'religion' in Article

[950] Ibid 148.
[951] Ibid 149.
[952] Ibid.
[953] Ibid 153.
[954] Ibid.
[955] Ibid 31.

61(2) and Article 64(5) of the Civil administrative law, were meant to be read as religions that have been recognised under the law, which mean does not include the belief in One and Only God.[956] [Author's trans]

This is because the Court, after reading the context and historical background of the constitutional articles regarding religious freedom, approves the differentiation between religion and belief under the Indonesian law. What is interesting is that the Court adds the clause 'One and Only God' in analysing 'belief', while the applicants in the case never refer to such specification in defining 'belief'.

According to the Constitutional Court's format of decision writing, there are two types of court reasoning: the *Ratio Decidendi* and the *Obiter Dicta*.[957] Similar to the concept of *Ratio Decidendi* and the *Obiter Dicta* in the general theory of law[958], according to first Chief Justice of the Indonesia Constitutional Court, Jimly Asshiddiqie, *Ratio Decidendi* in the Indonesia Constitutional Court is considered the binding reasoning in deciding the case, while the *Obiter Dicta* is not binding.[959] In the Constitutional Court decision, the difference between *Ratio Decidendi* and the *Obiter Dicta* can be observed. According to the Constitutional Court Regulation No 06/PMK/2005, the *Obiter Dicta* is mentioned under the heading *'Pertimbangan terhadap fakta yang terungkap dalam persidangan'* (Consideration regarding facts revealed at trial). Meanwhile, the *Ratio Decidendi* is mentioned under the heading '*Pertimbangan hukum yang menjadi dasar putusan'* (Legal considerations which become the basis of a decision).

The Court, albeit only mentioning 'belief' in the verdict, has limited the term 'belief' to only those beliefs with monotheistic characteristic. If the Court consciously limits the term 'belief' to 'belief in One and Only God', there must be legitimate background for such action because it disregards freedom of belief mentioned under the Constitutional articles. It may be suspected that the Court referred to the first principle of *Pancasila*, 'The One and Only God' in narrowing the concept of belief. The principle of 'One and Only God' in *Pancasila* was proposed by the Islamist representative in BPUPKI and it came from Islamic teaching. This issue was also not being cleared up during the constitutional amendment in 1999–2002. With the new

[956] Ibid 148.
[957] See Constitutional Court Regulation, No 06/PMK/2005 arts 33(d) and (e).
[958] See eg, (1957) 20 *Modern Law Review*, 387; GW Paton and G Sawer, 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 63(4) *Law Quarterly Review* 461; Adam Rigoni, 'An Improved Factor Based Approach to Precedential Constraint' (2015) 23(2) *Artificial Intelligence and Law* 133.
[959] See <http://jimly.com/tanyajawab?page=287>.

Parliament's agreement not to amend the preamble of the Constitution, the Islamists' demand to re-talk about Islam as the foundation of the state was declined.[960] It resulted in no amendment for the chapter of religion (article 29) of the Constitution. With no clear conceptions of belief and religion under the Indonesia Constitution, the chance for subjective interpretation of the two terms (religion and belief) is high.

The government's follow-up policy in this case is to write 'belief in One and Only God' in the belief column of the ID card.[961] I would argue that the mention of 'belief in One and Only God' to replace the dash in the religion column for adherents of religions other than the recognised religions is as discriminatory as the dash. This is because the uniformity of the wording (One and Only God) does not accommodate the variation of belief. Even if all beliefs in Indonesia were based on theistic teaching (One and Only God), they have different names/ identities such as '*Sunda Wiwitan'*, '*Dayak Kaharingan'*, and so forth. If the Indonesian government and the Constitutional Court perceive religion and belief to be equal, they should have allowed any name/ identity of belief to be written, the same way as the name of the 'recognised religions' is allowed to be written in the ID card.

6.2.2 The Official Religion

The second issue I want to highlight is in relation to official religions in Indonesia. The Court mentioned in its *Ratio Decidendi*, 'The term religion under Article 61 (1) and 64 (1) as well as Article 61 (2) and 64 (5) were meant to be read as religion(s) that have been recognised under the law, which mean does not include the belief in One and Only God.'[962] As mentioned in Section 4.2, there has never been a single law formally recognising the six religions in Indonesia. The only law mentioning the six religions is the Indonesian Blasphemy Law. There, the six religions were mentioned along with other religions in the elucidation of the law, not in the body (article) of the law.

Further, under the Legal Drafting Law,[963] the elucidation is not a legal norm. It is an explanation of the law (or article or sub article within the law). The Elucidation is the official

[960] Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evolution of Constitution-Making in Transition* (Kompas, 2008) 124.
[961] BBC News Indonesia, 'KTP Untuk Penghayat Kepercayaan Masih Tersandung Masalah Administrasi' (webpage, 24 February 2019) <https://www.bbc.com/indonesia/indonesia-47331334>.
[962] Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016 [Constitutional Court Decision, Case No 97/PUU-XIV/2016] 148.
[963] *Law No 12 2011*.

interpretation of the law (written norm in the law). Therefore, elucidation should only contain explanations of a word, phrase, sentence, or foreign term and may provide examples.[964] The Elucidation should not contain a (legal) norm[965] and should not formulate any change in disguise from the written norm in the article/ law.[966] Therefore, there is no six official religions as the wording of the elucidation of the Blasphemy Law only stating the six religions as religions adhered by almost all Indonesian (majority).

Interestingly, the practice of Indonesian customary constitutional law by the government also make the claim of 'recognised religions' dynamic. The 1965 Blasphemy Law mentions the six 'first rank' religions including Confucianism, under the Soeharto regime, there were only five 'recognised religions' without the referred law (Blasphemy Law) ever being revised. In 1967 the government enacted a Presidential Instruction (Read as Presidential Decree) Number 14 Year 1967 annulling the existence of Confucianism (one of the six religions mentioned as the major religions in the Blasphemy Law). Therefore, under the Soeharto regime, there were only five recognised religions. Gus Dur (Abdurrahman Wahid) as the president in 2000 dismissed the Presidential Decree No 14 1967 allowing Confucianism to revive in Indonesia. Ever since, the government claimed to have six official religions instead of five, by re-recognising Confucianism.

However dynamic the practice of recognising religions in Indonesia, there is still no firm legal basis to recognise only six religions in Indonesia as well as discriminate against other faith or religions out of the six 'mentioned' religions. The Constitutional Court decision in this case does not discuss this matter, and even refer to the so-called recognised religions in their reasoning. Therefore, it does address the discrimination for other religions and beliefs in Indonesia.

6.3 Conclusion

Before 2013, the government required citizens to mention their religion in the ID card.[967] The policy raised problem of discrimination because only the 'official religions' according to state

[964] Ibid 54, point 176.
[965] Ibid 54, point 177.
[966] Ibid 54, point 178.
[967] This policy began in 1978 Surat Edaran Menteri Dalam Negeri No 477/74054 Tanggal 18 November 1978 [Circular Letter from Ministry of Home Affair, No 477/74054, 18 November 1978} (Indonesia). In 2006, the policy was reaffirmed under the *2006 Administrative Law*. See Undang-Undang No 23 Tahun 2006 tentang Administrasi Kependudukan, Pasal 61 ayat (1) [*Law No 23 2006 on Civil Administration*] art 61(1).

practice were allowed to be mentioned in the ID card.[968] Further, the number of these official or recognised religions has changed over the years. As mentioned in Section 4.2, in 1965 when the Blasphemy Law was enacted, the elucidation mentioned six religions: Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism.[969] However in 1967, Confucianism was banned,[970] and the Ministry of Home Affairs established an implementing regulation regarding religion column in the ID card to only allow five religions to be mentioned: Islam, Christianity, Catholicism, Hinduism and Buddhism.[971] In 2000, The then-President Abdurahman Wahid revoked the 1967 Presidential Instruction to allow Confucianism to be practised again.[972] Confucianism was included back in the group of 'official religions', thus since 2000, there are six 'official religions' in Indonesia. Still, people with religions other than these six recognised religions may not be able to declare their religions in the ID card. Their options are either choosing one of the available six religions, or not having ID card at all. Both options lead to violation of their rights.

Although in 2013 the government revise the Civil Administrative Law allowing people to not declare their religion, which in a way could be used to accommodate the issuance of ID card for people with religions other than the recognised, this policy was still controversial. As mentioned above, even with their religion column left blank, people outside the six 'recognised' religions are still discriminated against. They receive unequal treatment compared with those religion being explicitly stated in the identity card. Therefore, an application for judicial review of the Civil Administrative Law was submitted before the Constitutional Court in 2016. The applicants requested the Civil Administrative Law to be declared unconstitutional for breaching their constitutional rights to non-discrimination. The Constitutional Court in

[968]The government claims that there are six official religions (*agama resmi*) in Indonesia: Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. See Constitutional Court Decision, Case No 97/PUU-XIV/2016, 106. Aside from the term 'official religions' used by the government, some writing frequently uses 'recognised religion' (*agama yang diakui*) in this regard. See eg, Uli Parulian Sihombing et al, *Menggugat Bakor Pakem: Kajian Hukum terhadap Pengawasan Agama dan Kepercayaan di Indonesia* (Indonesian Legal Resource Center, 2008) 4; Kelli A Swazey, *Shifting Waters in the Politics of1 Religion and Its Impacts on Indonesian Traditional Communities* (Center for Religion and Cross-Cultural Studies, 2017) 3; Samsul Maarif, *Pasang Surut Rekogisi Agama Leluhur dalam Politik Agama di Indonesia* (Center for Religion and Cross-Cultural Studies, 2017) 36; Crouch (n 461) 1.

[969] Undang-Undang No 1/PNPS/1965 tentang Pencegahan dan Penyalahgunaan dan/atau Penodaan Agama [*Law No 1/PNPS/1965 on Blasphemy Law*] (Indonesia), elucidation of art 1.

[970] Through *Presidential Instruction No 14 1966 on Chinese Religious Belief and Culture*.

[971] Surat Edaran Menteri Dalam Negeri No 477/74054 Tanggal 18 November 1978 [Circular Letter from Ministry of Home Affair, No 477/74054, 18 November 1978} (Indonesia).

[972] See Keputusan Presiden Republik Indonesia No 6 Tahun 2000 tentang Pencabutan Instruksi Presiden Nomor 14 Tahun 1967 tentang Agama, Kepercayaan, dan Adat Istiadat Cina [*Presidential Decree No 6 2000 on the Cancellation of Presidential Instruction No 14 1967 regarding Chinese Religion, Belief, and Customs*] (Indonesia).

2017 grant the claim and order the government to write down any name of religion or belief claimed by the applicant of identity card.

The 2017 ID card case is a landmark decision made by Constitutional Court as it changes the way we perceive absolute rights in Indonesia, particularly regarding the right to hold religion or belief. The Court also set the legal position between religion and (local) belief in Indonesia: that both are equal, and equally protected and guaranteed under the Constitution.

However, despite granting the application to allow local beliefs to be mentioned in the ID card, the Constitutional Court decision on Case No 97/PUU-XIV/2016 does not clarify the use of term of 'religion' and 'belief' within the Indonesian law. It also does not touch upon the controversial status of recognised religions in Indonesia. This shows how Indonesia's legal framework on religious freedom has not been fully advanced by the Constitutional Court decision. Although the adherents of local beliefs may write their belief system in the religion column in the ID card, they can only write 'belief in One and Only God' instead of stating the real name/ identity of the belief. By contrast, the name of the 'recognised religions' may be mentioned. The different treatment from the government approved by the Constitutional Court shows the lack of understanding of this issue from a religious freedom perspective, especially on the issue of recognition.

Chapter 7: Conclusion

7.1 Introduction

The previous chapters of this thesis have demonstrated the politics of religion-making in Indonesia, in the sense that Islamic values were negotiated and influenced the legal text. This process occurred in three different arenas: constitutional debates, lawmaking by Parliament and executive, and judicial review in the Constitutional Court. In the constitutional debate and the making of law by legislature and executive, the politics of religion-making is more obvious than that which occurs in the Constitutional Court. This is because politicians were explicit in delivering their aspirations. In the Constitutional Court reasoning, judges were more subtle in showing their preference to Islam. This chapter will summarise the brief concluding answer to the research question: 'How religious politics influences lawmaking during constitutional debates, legislation process, and constitutional review?' This will be done by recalling the objectives of this study. Chapter 2 elaborated upon the key theoretical concepts used to locate this study within academic debates about religious freedom. This includes discussion of religion-making, religious freedom and its limitations, and balancing other rights and interests. Chapter 3 examines the politics of lawmaking, specifically on the issue of religion (religion-making) during the three important constitutional debates (1945, 1959 and 2000) to understand the constitutional framework of religious freedom conceptualised by the drafters. The discussion of *Pancasila* and the *Jakarta Charter* are central to the analysis in Chapter 3. Chapter 4 examined the religion-making regarding Blasphemy Law, particularly on how this law is used to discriminate against religious minorities. It includes discussion of Constitutional Court decisions affirming the constitutionality of the Blasphemy Law. Chapter 5 examined the politics of lawmaking in regard to the Marriage Law and Constitutional Court decisions on the judicial review of this law, particularly on the issues of polygamy, children born out of wedlock and interfaith marriage, because these three issues are closely intertwined with religious freedom. Last, Chapter 6 examined the politics of lawmaking regarding the Civil Administrative Law and the policy of mentioning religion on the ID card. This analysis is important to reveal the unresolved issue of official religions and the concept of local belief after the Constitutional Court decision on the ID card case.

7.2 Key Theoretical Concepts

Three key concepts were used in this study: religion-making; religious freedom and its limitations; and balancing human rights. Chapter 2 introduced these concepts to locate this study within academic debates about religious freedom.

7.2.1 Religion-Making

The first concept helps us understand the sociological framework of the study: that law-making processes, particularly those that relate to religious issues, are not immune to political interests. The politics of law-making and religion-making are two connected concepts in this study. Focusing on the politics of law-making implies that law should not be treated as an autonomous field of study. In this framework, legal texts are the result of political negotiation involving the interests of different stakeholders. Political negotiations are mainly conducted by members of Parliament who have the authority to create law. However, judges can also be involved in the politics of law-making through their decisions, particularly when they decide judicial review cases involving the constitutionality of laws. In this regard, I argue that the politics of law-making means that judges are not value free. Judges' interpretations of certain legal texts are influenced or determined by their political and religious background and interests. Interestingly, because judges work in panels and each judge shares different political backgrounds, they may also include their political interests in the reasoning.

While the politics of law-making is a general term in relation to the political behaviour of lawmakers, religion-making is a specific term related to the construction or definition of religion. Within the study of law, the process of religion-making addresses the politics of law-making in relation to religious issues. This theoretical concept is a recent development in the study of religion and state, which it departs from a classic understanding of the secular and post-secular state, describing the dialogue of religious and secular reasoning in shaping the law. In this study, the process of religion-making is strictly defined as political bargaining and negotiation involving the interests of religious groups within the making of law related to religious issues.

Studying the Indonesian context, this thesis focuses on the politics of law-making, particularly in the framework of religion-making, both in Parliament and the Constitutional Court, with Islam as the main religion. As a Muslim-majority country, Islam has always been an important

issue in Indonesia. This is also the case in law and politics. Islamist political parties and movements are two significant actors in the law-making process, especially laws regarding religious issues. Islamist politicians aspire for Islamic values to be incorporated within the Indonesian legal system. They have been fighting for their aspiration to use Islamic law since the idea of political movement and political party emerged, long before the declaration of independence in 1945. Since the first election in 1955, Islamist political parties have always been a major player in Indonesian politics, particularly in the Parliament (DPR).

However, Indonesia is not an Islamic state and the incorporation of Islamic values within the state's law is only the aspiration of a small minority. Islamist politicians need to negotiate their aspirations with non-Islamist politicians. Non-Islamist politicians, whom I term 'nationalists', may be Muslim, but they aspire to a more nationalist interest to unite the different religiosity of the Indonesian people. Hence, they do not endorse Islam or any other religion. One such nationalist is Hatta, the first vice-president of Indonesia. He was a Muslim, but he was the politician who proposed to erase the controversial seven words ('the obligation to perform Islamic law for Muslim') from the Constitution during the constitutional debate in 1945.

The political negotiation between Islamists and nationalists continues in Parliament during the making of law involving religious issues and in court proceedings on cases related to religious issues. This has been a constant phenomenon from the 1940s until today. Aside from political negotiation within the Parliament and courtroom, Islamist movements also play a significant role in exerting pressure in the making of law involving religious issues. In the Indonesian context, MUI, Muhammadiyah and Nahdlatul Ulama are the most influential Islamic civil society organisations that the Indonesian government must anticipate. These three organisations are mostly involved in public discourse about religious issues, including the making of law. However, aside from these more moderate Islamic organisations, there are more radical Islamic organisations pressuring the government to accommodate their Islamic interests during law-making. They show their engagement by demonstrating and using social media in building public opinion endorsing their Islamic interests.

7.2.2 Religious Freedom and Its Limitations

Although this study focuses on the process of religion-making in Indonesia, it does not stop at describing the process. To gain a more critical understanding, this study bases its normative perspective on the idea of religious freedom and its limitations under international law and

Indonesian domestic law. Normatively, this study is concerned with the extent to which the right to religious freedom is protected in Indonesian law. The understanding of this concept is important to guide this study in the legal framework. As a human right, religious freedom is protected, both under international and Indonesian law. However, this right is not entirely unlimited. To understand this, a differentiation between two aspects of religious freedom needs to be made: the internal dimension (*forum internum*) and the external dimension (*forum externum*). The internal dimension of religious freedom is the right to adopt or have religion or belief. This is an absolute right, both from a philosophical and legal normative perspective.

From a philosophical perspective, the internal dimension of religious freedom is belief. It lies within one's mind (thought) or heart (faith). Because of its location, belief may not be observed or verified by others. Therefore, it may not be limited. In a legal principle, it is said, '*cogitationis poenam nemo patitur'* (nobody endures punishment for thought). Even if the law tries to limit or criminalise a thought, a court cannot verify the alleged crime. In this sense, someone may express or declare the opposite of his or her thoughts without impairing his or her real thoughts. Therefore, a law that prohibits or limits thought, including the right to hold religion or belief, is useless and un-executable.

From a legal normative perspective, the right to hold religion is an absolute right under international law (ICCPR) and the Constitution. Under Article 18 of the ICCPR and its General Comment (No 22), the right to have or adopt religion or belief may not be limited. Further, Article 4 of the ICCPR does not allow state parties to derogate from Article 18. Indonesia ratified the ICCPR in 2005; thus, it has been bound by this international legal framework since then. In the domestic legal framework, Indonesia also protects the internal dimension of religion as an absolute right. Article 28 I(1) of the Constitution states that the right to have religion may not be limited under any circumstances. Therefore, the Indonesian legal framework accepts and confirms that the legal framework of the internal dimension of religious freedom is an absolute right.

However, the external dimension of religious freedom—the right to manifest religion or belief—is not an absolute right. This claim is also explainable both from a theoretical and legal normative perspective. From a theoretical perspective, manifestation is an explicit act. It can be observed by others and may conflict with other people's rights.

Under the legal normative framework, both in the ICCPR and the Constitution, the right to manifest religion may be limited under strict clauses: the limitation must be prescribed by law, necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others (ICCPR); and stipulated by the laws with the purpose of solely guaranteeing recognition and respect for the rights and freedoms of others and to comply with just demands in accordance with considerations for morality, religious values, security and public order in a democratic society (Constitution). Therefore, under the legal framework, the state must have strong reasons to justify limits on the freedom to manifest religion.

7.2.3 Proportionality Test and Balancing Other Rights

Proportionality test is German concept to justify any limitation to human rights. This study elaborates on Robert Alexy concept with its three sub-principles in examining the proportionality: suitability, necessity, and proportionality in a narrow sense that involve the law of balancing. The concept of balancing rights is necessary regarding the limitation of the right to manifest religion, particularly when an individual's right to manifest religion conflicts with the human rights of other individuals. In this study, this concept of balancing rights is important in understanding the case studies analysed in this thesis (Blasphemy Law, Marriage Law and Civil Administrative Law), particularly when the Constitutional Court tests the constitutionality of the reviewed laws. This is because the three laws were judicially reviewed before the Constitutional Court by applicants claiming their rights were violated by the respective laws. In this sense, the Court needs to balance the involved rights. This concept of balancing rights is the legal mechanism to discipline the politics of law-making and religion-making, in the sense that it must comply with this legal framework.

The Blasphemy Law, Marriage Law and Civil Administrative Law have one aspect in common; these laws regulate and limit the right to manifest religion. Under Blasphemy Law, the right to manifest religion will be limited if it is viewed as deviant or blasphemous to religion. The Blasphemy Law tends to advantage the adherents of the majority religion and disadvantage adherents of minority religions. In the Indonesian context, most people punished under the Blasphemy Law have been members of religious minorities accused of blaspheming Islam according to the majority's perspective. The offenders include minorities within Islam, such as Shia and Ahmadiyya, who share different interpretations of being Muslim from the Sunni as the Muslim majority in Indonesia. They were prosecuted because their interpretation of Islam is different from the Sunni interpretation; therefore, they are considered blasphemous to

(majority) Islam. If we examine these two cases (Shia and Ahmadiyya) carefully, the concept of blasphemy should be reciprocal. If the minority's interpretation is blasphemous to the majority, the majority's interpretation is blasphemous to the minority. Blasphemy Law also threatens freedom of speech and freedom of expression. This is because the manifestation of religion limited under Blasphemy Law may be in the form of speech or expression. For this reason, we need to understand the importance of freedom of speech. Four arguments justify the importance of freedom of speech: (1) it allows discussion that leads to discovering the truth; (2) it is an aspect of self-fulfilment; (3) it is a form of citizen participation in democracy; and (4) it is a checking mechanism to hold the government accountable.

Blasphemy Law is used to prosecute minorities who manifest their religion or belief in the form of freedom of speech or expression. Therefore, it violates two rights simultaneously. Although the rights to manifest religion and freedom of speech or expression are not absolute rights, the government needs to provide strong reasoning to limit these rights.

The Marriage Law regulates and limits the right to manifest religion, such as in polygamy, children born out of wedlock and interfaith marriage. Other human rights involved in this law are children's rights, women's rights and minority rights. Women's rights are involved in the case of polygamy because the Marriage Law allows polygamy, subject to compliance with certain strict conditions. Children's rights are involved in the case of children born out of wedlock because the Marriage Law exempts the biological father from responsibility for children born out of wedlock. The Marriage Law also generalises all religious teaching to disallow interfaith marriage. With other human rights involved in the Marriage Law cases, the Constitutional Court needs to weigh these rights carefully to achieve an appropriate balance.

The Civil Administrative Law, particularly the mention of religion in the ID card, discriminates against minorities because the government uses its recognition of official religions to treat 'recognised' and 'unrecognised' religions differently. Adding to the complexity, members of religious minorities whose religion is not recognised by the state were refused ID cards; they therefore had difficulties accessing social welfare benefits. When the government allowed them to finally have ID cards, but their religion column was left blank (the name of religion is not mentioned), they were accused of being communists and anti-religion; thus, they were discriminated against.

The three laws examined in this study involve conflicting human rights all protected under the Constitution. Therefore, the constitutional judges in examining the constitutionality of the laws need to balance these rights. Chapters 4–6 (the cases studies) show how the Constitutional Court did not satisfactorily balance these rights, especially in Blasphemy Law cases.

7.3 Constitutional Debates About Religion

The second step to answer the research question is to explore the constitutional debates about religion in Indonesia. This discussion is important for two reasons: (1) to grasp the constitutional understanding of religious freedom in Indonesia; and (2) to understand the politics of religion-making in the constitutional debates.

The first discussion is about the state ideology, the *Pancasila* and the *Jakarta Charter*. *Pancasila* is mentioned in the *Jakarta Charter* in part of the draft preamble of the Indonesian Constitution. The draft was made by representatives of the Indonesian people appointed by the Japanese occupation government in 1945. As discussed in Chapter 3, the group was divided into two main parties: Islamists and nationalists. Islamists wanted to incorporate Islamic law in the designed constitution. Nationalists did not want to preference Islam in the design of the Constitution.

The most significant clause debated was the controversial seven words, 'with the obligation to perform Islamic Law for Muslim' (*dengan kewajiban menjalankan Syariah Islam bagi pemeloek-pemeloeknya*) in the first principle (*sila*) of *Pancasila*, 'one and only God' (*Ketuhanan Yang Maha Esa*). On 22 June 1945, the drafters agreed to adopt the seven words along with the first principle of *Pancasila*. Thus, it was drafted, 'one and only God, with the obligation to perform Islamic Law for Muslim' (*Ketuhanan Yang Maha Esa dengan kewajiban menjalankan Syariah Islam bagi pemeloek-pemeloeknya*). Interestingly on 18 August 1945, one day after the declaration of independence, the seven words were erased, leaving the first principle of *Pancasila* as 'one and only God'. The removal of the seven words was the result of political negotiation. Representatives of Christians and the eastern part of Indonesia approached Hatta, one of the drafters, threatening not to join the newly established state if the seven words were mentioned in the Constitution. Hatta forwarded the message to Soekarno, who then lobbied Islamists to remove the seven words. In his lobby, Soekarno promised

Islamists that if they agreed to remove the seven words for the time being, there would be time to discuss the words later when the state achieves political stability. The Islamists agreed to remove the seven words but insisted on reincorporating the words in the 1955–1959 constitutional debate to draft the promised new constitution. With this agreement, the seven words were also cut from Article 29(1) of the Constitution, leaving the clause, 'The State is based on the One and Only God' (Negara Berdasar atas *Ketuhanan Yang Maha Esa*).

During the four years of the constitutional debate (1955–1959), Islamists and nationalists renegotiated the inclusion of the seven words. They could not reach agreement, so on 5 July 1959, then-President Soekarno ended the constitutional debate by establishing a Presidential Decree to reinstall the 1945 Constitution. Interestingly, in its preamble, the Presidential Decree stated that the *Jakarta Charter*, dated 22 June, inspired and thereby is part of the Constitution. The *Jakarta Charter* (22 June) is the version containing the seven words on the obligation to perform Islamic law.

The mention of the *Jakarta Charter* (version 22 June) in the Presidential Decree 1959 had two consequences: (1) it was mentioned in the general explanation of Blasphemy Law to support the constitutionality of the law in Indonesia; and (2) the idea of mentioning Islamic law was raised again by Islamist representatives during the constitutional amendment of 1999–2002, arguing that the Presidential Decree 1959 reinstalled the seven words in the preamble of the Constitution and Article 29(1) of the Constitution. The mention of the *Jakarta Charter* in the general explanation of Blasphemy Law can be used to analyse the reasoning of the Constitutional Court in upholding Blasphemy Law, as examined in Chapter 4. On the constitutional debate during the amendment of 1999–2002, it was agreed to not change the preamble or Article 29(1) of the Constitution. However, this does not mean that there was no discussion or debate about religion and religious freedom during the amendment. There was heated debate about religion, and it was set to be voted on, but the number of Islamist representatives in the Parliament was slightly less than the nationalists, so they withdrew the initiative to vote on the issue of religion and religious freedom.

Another important result from the 1999–2002 constitutional amendment was the incorporation of a newly dedicated chapter on human rights in the Constitution. Among these rights are religious freedom and the classification of the internal dimension of religious freedom (the right to have or adopt religion) as an absolute right under Article 28 I(1). In 2017, this

stipulation of religion as an absolute right became the basis of a landmark decision by the Constitutional Court in relation to religious freedom in the ID card case.

7.4 Blasphemy Law

My discussion on the politics of religion-making in the Blasphemy Law case focuses on how the law has been used to construct the politics of religious freedom in Indonesia. The Blasphemy Law was originally designed in early 1965 by Soekarno to strengthen Indonesian socialism. This can be observed in the legal consideration of Blasphemy Law—that is Presidential Decree No 2 1962 on Prohibition of organisations that are not in line with the ideals of Indonesia's socialism. The mention of the *Jakarta Charter* (version 22 June) in the general explanation of Blasphemy Law confirms Soekarno's conception of NASAKOM (nationalism, religiosity and communism) that merges the idea of nationalism, religiosity and communism—in which communism and socialism were identical under Soekarno's regime.

However, in late September 1965, ten months after the enactment of the Blasphemy Law, a nationwide tragedy involving one of Soekarno's main allies, the communists, changed the political use of Blasphemy Law. With the collapse of Soekarno's regime, Soeharto took power and the law was used to prosecute communists, framing them as anti-religious and thereby blasphemous to religion. Among the first victims of the use of the Blasphemy Law for these purposes was HB Jassin, an alleged communist journalist who was prosecuted for blaspheming Islam through his publication.

During Soeharto's 32 years regime, the Blasphemy Law was rarely used to prosecute people. Less than ten people were charged under Blasphemy Law from its establishment in 1965 until the collapse of Soeharto's regime in 1998. In contrast, hundreds of cases were examined by the court in light of the Blasphemy Law since the *reformasi* until today. In recent years, Blasphemy Law has been used to prosecute religious minorities for having different interpretations of religion from the majority. Among the prominent cases of people charged under Blasphemy Law was Basuki Tjahaja Purnama (Ahok), the then-incumbent candidate for governor of the capital city, Jakarta, who was prosecuted for blaspheming Islam during his political campaign in late 2016. Ahok, a Chinese-descent Christian, was competing against Muslim candidates to continue his tenure as governor in Jakarta. The case was heavily politicised by mass demonstrations of Islamist movements, who rejected the non-Muslim candidate for Jakarta's governor.

The Blasphemy Law was judicially reviewed before the Constitutional Court at least three times—2009, 2012 and 2017. The 2009 case was a landmark decision made by the Court and was referred to when the Court addressed the 2012 and 2017 cases. The 2009 case was submitted by human rights activists and those concerned with the issue of religious freedom, including former President Abdurrahman Wahid (Gus Dur). The applicants argued that Blasphemy Law limits the internal dimension of religious freedom; thus, it violates Article 28 I(1) on the protection of religion as absolute right.

Interestingly, although the Court agreed with the argument that the Blasphemy Law is indeed problematic and in need of revision, the Court upheld the law, stating that for the need of general protection and anticipating horizontal and vertical social conflicts, the Blasphemy law is highly important. The Court emphasised the first principle of *Pancasila*, 'one and only God' in affirming the constitutionality of the Blasphemy Law, arguing that Indonesian people are religious; thus, there should be a law to prevent the suppression of religiosity in Indonesia. The Court also emphasised the need to prevent religious conflict and discord in a heterogeneous society, a utilitarian argument that disregards the interest of the minority. The Blasphemy Law heavily favours the majority because the interpretation of deviant teachings is measured by the majority's perspective.

Two important notes on the politics of religion-making during the Constitutional Court case relate to the judges' profiles and political pressure from Islamist movements. Three constitutional judges were appointed by the DPR (Parliament) and therefore are affiliated with Islamic political parties. Among the judges were also former members of Parliament (MPR) who had worked on the constitutional amendment in 1999–2002. Interestingly**,** Hamdan Zoelva, one of the judges, was the speaker of the Islamic political party that proposed the reinstalment in the Constitution of the seven words of the obligation to perform Islamic law for Muslim. The same judge argued for the need to affirm the constitutionality of the Blasphemy Law. The role of the Islamist movement demonstration, especially the *Aksi 212*, was also influential in addressing the importance of upholding the Blasphemy Law. Although the demonstration was not a direct response to the Constitutional Court hearing, the mass demonstration explicitly intimidated and threatened the district court judges during the trial of Basuki Tjahaja Purnama.

The politics of religion-making in the Blasphemy Law is highly dynamic. The law was used politically by the regime and political elites. Unfortunately, religious minorities and those with

different interpretations of religion were prosecuted under this law. Normatively, the use of the Blasphemy Law to limit the minority's freedom to manifest religion and freedom of speech is not appropriate. The government and Constitutional Court argued for the importance of the Blasphemy Law to prevent social conflict. The social conflict they addressed in the reasoning concerned potential violence against the people accused of a blasphemous act. Instead of using standard criminal law procedure to prosecute assaulters, the government's policy (later approved by the Court) was to use the Blasphemy Law to limit victims' freedom to manifest religion and freedom of speech because they were viewed as the reason for the attack.

With the multiple human rights involved in this case, it should also be noted that the Blasphemy Law breaches not only the right to manifest religion, but also the right of the minority to survive as a distinct religious group, and their freedom of speech and expression. On the other hand, Blasphemy Law does not protect religious freedom. It protects religion, not people. The problem is when numerous people adhere to the same religion, but they share different interpretations of it. The use of a majoritarian perspective to decide whether an act is blasphemous discriminates against the minority, because the minority see the majority's act as blasphemous from their perspective. However, if we give the authority to interpret religious teaching to the state (government, Parliament, and judges), they do not have the capacity to exercise such religious authority. Therefore, in this thesis I have shown that the Blasphemy Law is not a justifiable limit on religious freedom.

7.5 Marriage Law

My study of the politics of religion-making in regard to the Indonesian Marriage Law focuses on the issue of the incorporation of Islamic law in the state's unified Marriage Law. Before the independence of Indonesia in 1945, the Dutch colonial government applied different marriage laws to different groups of people in recognising legal pluralism. Muslims used the Compilation of Islamic Law called *Compendium Freijer*, the Indonesian Christians used *Huwelijks Ordonantie Christen Indonesia* (*HOCI*)—*Staatsblad* 1933 No 4, while Europeans and the Chinese used the Civil Code. After the declaration of independence in 1945, the idea to have a unified Marriage Law was proposed. However, the Islamic movements made a reservation about the draft of the unified Marriage Law; they would not approve the draft if it was not in accordance with Islamic law, while the original proposal of the government was to see marriage as a civil matter, using no reference to religious institutions. The Islamic movements' pressure through demonstration and political lobbying in the Parliament was

significant in the drafting of the Marriage Law and contributed to the failure of the Parliament in the making of the Marriage Law in three different attempts: 1952–1954, 1958–1959 and 1967–1968.

The Marriage Law was finally enacted in 1974. Under the law, marriage is not only seen as a civil matter but also a religious ceremony. This is to accommodate the aspiration of the Islamic movements. Although the Marriage Law is designed to be a unified law, it accommodates the authority of different religious institutions to validate marriage by saying that 'a valid marriage is a marriage conducted in accordance with the parties' religion'. However, some of the provisions under the Marriage Law were taken from Islamic teachings, such as the permissibility of polygamous marriage, the status of a child born out of wedlock, and the absence of interfaith marriage. These three provisions applied to every Indonesian, including non-Muslims, even though the law does not directly force non-Muslims to use Islamic law.

The preference in favour of Islam under the Marriage Law does not stop at those provisions. The Office of Religious Affairs (*Kantor Urusan Agama*/ KUA) under the Ministry of Religious Affairs has the responsibility of registering Islamic marriages. Meanwhile other marriages not conducted under Islamic law will be registered in the Civil Registry Office under the Ministry of Home Affairs. To further implement the endorsement of Islamic law for Marriage, the government reconceptualised the Islamic court in 1989 by introducing procedural laws to settle Islamic marital disputes. Two years later, the government established a new Compilation of Islamic Law (under Presidential Instruction No 1 1991) as a source of material law for Islamic marital disputes in the newly reconceptualised Islamic Court.

Even though the Marriage Law was designed to accommodate Islamic law, it causes problems for Muslims. This is because Muslims may have different interpretations and level of willingness to obey or manifest Islam in their life. In some of the cases, the coercion to use certain Islamic law provision conflicts with other human rights such as children's rights and women's rights. The Marriage Law was then submitted for judicial review before the Constitutional Court. Chapter 5 of this thesis has shown how the constitutional judges balanced these conflicting rights in the case of polygamy, child born out of wedlock, and interfaith marriage.

The polygamy case was submitted by a Muslim man, who argued that the strict requirement of permission from the first wife for a husband to enter a second marriage made it difficult for

him to have a polygamous marriage. Further, the applicant argued that practising polygamy is part of his right to manifest religion because polygamy is an Islamic teaching. He asked the Court to delete the requirement clause for polygamy under the Marriage Law as it violates his right to manifest religion protected under the Constitution. The Court in its decision affirmed the constitutionality of polygamous marriage in Indonesia. This shows that the Court does not object to the accommodation of Islam under the Marriage Law. However, the Court did refuse to delete the strict requirement for polygamy under the Marriage Law despite the fact that this requirement is a limitation that is not found in the Islamic law traditions. According to the Court, the strict requirement clause for polygamy under the Marriage Law affirms the state's authority to filter and adjust Islamic law in accordance with the Indonesian context, including accommodating and balancing other peoples' rights involved in the case, especially women's and children's rights that will be affected by polygamous marriage. However, I found the Court's decision to uphold the weakness of the wife as the reason for polygamy to be lack in gender equality perspective.

The child born out of wedlock case was a landmark decision made by the Constitutional Court showing a similar pattern to adjust Islamic law by balancing women's and children's rights. One of the provisions submitted to be judicially reviewed in this case was Article 43(1) of the Marriage Law: 'Child born out of wedlock only has civil relation with its mother and the mother's family'. The stipulation was adopted from Islamic teaching, 'A child has a civil relation with his legitimate husband of the mother, and those commit adultery gets nothing'. The Constitutional Court in its decision give conditional interpretation for Article 43 (1) to be constitutional: that it should not eliminate the civil relationship between the child and his biological father. The decision of the Court was soon protested by *MUI,* a national organisation that claims to be the authoritative Islamic organisation in Indonesia. Seeing the Court decision had breached Islamic teaching, MUI responded by explaining its Islamic legal opinion to reject the Constitutional Court decision. MUI also asked its followers to disregard the Constitutional Court decision and continue to uphold Islamic teaching, saying that children born out of wedlock should not have a civil relationship with their biological father. Such acts that incite civil disobedience show the level of political confidence of the Islamic organisation in resisting the state law.

The Court's treatment of the case of interfaith marriage was a little different. The Court in its decision did not confront Islamic law to balance other rights involved. It affirmed that religion

is the very foundation of society and according to the Court, no religions in Indonesia allow interfaith marriage. Therefore, the Court held that interfaith marriage should not be allowed in Indonesia even though such prohibition may limit one's civil right to establish family protected under the Constitution. In assessing the conflicting rights, the Court determined that the right to establish family may be limited under Article 28 J (2) of the Indonesian Constitution. In its reasoning, the Court reaffirmed the importance of religious values in Indonesia by stating that the limitation of marriage, including the prohibition of interfaith marriage set under the Marriage Law, is necessary to implement the (first) principle of *Pancasila* and the Constitution, and accommodate the social aspect of the (religious) society.

7.6 Civil Administrative Law

In the case of Civil Administrative Law, the politics of religion making concerns the issue of the religion column in the ID card. It relates to the debate about official religions and the concept of belief under the Indonesian law. To understand the discussion of official religions, Chapter 6 of this thesis has explained the attempt to define religion in 1952. Although the attempt failed, and Indonesia has no legal definition of religion until today, the 1952 debate remains influential and re-emerged during the 1973 and 1978 parliamentary hearing in conceptualising religion and belief; during the constitutional amendment in 2000; and during the Constitutional Court hearing of the judicial review of the Civil Administrative Law in 2016–2017.

The first issue is regarding the construction of belief and religion. Under the ICCPR, religious freedom protects theistic, non-theistic and atheistic belief, as well as the right not to profess any religion or belief. This means that belief is broader than religion, and religion is just one example of belief. Further, the ICCPR states that religion is not limited in its application to traditional religions, or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. Newly established religions or beliefs or religions and beliefs that represent religious minorities are also covered.

By contrast, in the Indonesian legal framework, the idea of belief has been narrowed down in two ways. Firstly, with the first principle of *Pancasila* and Article 29 of the Constitution stating the state based on the One and Only God, it closes the possibility of non-monotheistic belief to legally exist in Indonesia. Although it may exist as a thought and as *forum internum*, belief out of the monotheistic concept may not receive legal protection and guarantee by Indonesian law.

Interestingly, to survive as one recognised religion in Indonesia, Hinduism with its distinct concept of polytheism must adjust its conception of deity by acknowledging the concept of monotheism. In the similar reasoning for survival, the concept of deity in Buddhism and Confucianism has also been adjusted to conform to *Pancasila*'s monotheism.

Secondly, the concept of 'belief' is narrowed to traditional belief. Interestingly, the narrow definition of belief as traditional belief was subject to political negotiation in 1952, 1973, 1978, 2000 and 2017. In 1952, when the Ministry of Religious Affairs attempted to define religion, it did not include traditional belief. It was on purpose that the proposed definition of religion required religion to have a prophet and written scripture, as well as international recognition, to be classified as a 'recognised' religion. This strict definition excludes traditional beliefs from the concept of religion either because they do not have written scripture or a prophet. Due to protests from various minority groups, the proposal to define religion was cancelled.

Having no definition of religion and belief, in 1973 the Parliament (MPR) established an umbrella law in the form of Parliamentary Decree (TAP MPR) on the Outline of State Policy, known as Garis-GBHN, where religion and belief were constructed as two equal different things. With this legal construction, the Parliament tried to balance the political interest of the Islamic movements that traditional belief should not be defined as religion with the aspiration of traditional belief to be acknowledged. The Parliamentary Decree further stated that the state has the obligation to protect beliefs the same way as it protects religion. Chapter 6 of this thesis has argued that the accommodation of the interests of the adherents of traditional beliefs was due to the incorporation of association of traditional beliefs to GOLKAR, the newly established political vehicle of Soeharto's regime at the time.

However, this legal construction was dramatically changed five years later in 1978. The 1978 Parliamentary Decree on the Outline of State Policy (TAP MPR tentang GBHN) made an explicit statement that (traditional) belief (in One and Only God) is not religion. Further, traditional belief is set to be part of culture and managed under the Ministry of Education and Culture. In the same year, the government, through the Ministry of Home Affairs established a policy to mention religion in the national ID Card (KTP). However, according to this document, only recognised religions could be mentioned in the ID card. The term official religions referred to six religions being mentioned under the elucidation of Blasphemy Law as the religions adhered to by majority of the people: Islam, Catholicism, Christianity, Hinduism, Buddhism and Confucianism. Interestingly, based on Presidential Instruction in the year 1967,

Confucianism was removed from the group of official religions. This meant that Confucians, along with the adherents of traditional beliefs and religions other than the recognised ones, were not able to obtain an ID card because the mention of religion in the ID card was a requirement.

During the constitutional debate in the year 2000, the discussion of belief and religion re-emerged. Islamic parties persisted to make explicit stipulation in the Constitution to separate the mention of traditional belief from religion. However, because of the political circumstances during the amendment, the chapter on religion was not changed. Traditional belief is currently still mentioned under Article 29(2) of religious freedom. This means that the constitutional framework of religion and belief are both equally protected.

In 2006, the government established the Civil Administrative Law. One important aspect regulated under the law was the content of the ID card which included the religion column. Essentially, the law made no substantial change to the old policy of mentioning religion in a column in the ID card established in 1978. However, the 2006 Civil Administrative Law had a stronger legal position compared with the Ministry of Home Affairs policy in 1978. In 2013, the government revised the Civil Administrative Law allowing the religion column to be left blank. It may be understood that the government started to realise that many people did not have an ID card because of the policy that required everyone to have religion. The political interest of the regime behind the revision of the law may be related to the general election scheduled to be held in the following year in 2014. The adherent of traditional beliefs and religions other than the recognised ones were then able to obtain an ID card. With the card, they could participate in the election. The regime might have anticipated support in the election from these people who were facilitated to obtain an ID card.

However, having an ID card with its religion column left blank causes discrimination for the adherents of traditional beliefs. They may be accused of being communist and anti-religion by the community. Further, they encountered difficulties in accessing jobs, education and other opportunities because of the negative stigma. Because of this, an application for judicial review of the Civil Administrative Law, particularly on the stipulation of religion column was submitted before the Constitutional Court. In a landmark decision, the Court held that the adherents of traditional belief have an equal right of religious freedom, alongside the adherents of official religions in Indonesia. Declaring the stipulation of leaving the religion column in the ID card blank unconstitutional, the Court ordered the government to create a technical

policy to accommodate the mention of 'belief in One and Only God' in the religion column of the adherents of traditional belief.

Even though the Constitutional Court decision enhanced the protection of religious freedom, the issues of official religions remain unresolved. Chapter 6 of this thesis has argued that the claim was not supported under the Indonesian legal framework. The claim was based on the elucidation of the Blasphemy Law, despite the fact that the elucidation is not a legal norm. Further, the elucidation of the Blasphemy Law does not mention the six religions (Islam, Catholicism, Christianity, Hinduism, Buddhism and Confucianism) as the official ones. It only states that those six religions are the religions adhered to by the majority of the Indonesian people. The elucidation of the Blasphemy Law further mentions that other religions, such as Judaism, Zoroastrianism, and Shintoism are not prohibited in Indonesia. Adherents of other religions are entitled to the guarantee set out in Article 29(2) of the 1945 Constitution, namely, freedom to adhere to their own religion and to worship according to that religion and belief, provided they do not violate the provisions of Law No 1/PNPS/1965 or other regulations. Therefore, the claim of official religions that excludes other religions is in itself contradictory to its supposed legal basis (the mention of religions under Blasphemy Law).

Still on the issue of an official religion, the treatment of Confucianism also has its own problems. While Confucianism was mentioned as one of the six official religions referring to the explanation of Blasphemy Law, it was excluded in 1967 with a Presidential Instruction. Although the 1965 Blasphemy Law was originally a Presidential Decree in lieu of law before it was reaffirmed as law in 1969; it was designed to be equal to law that was made in emergency (martial law). Therefore, substantial revision or change of the law should be made. However, the Soeharto regime was practising the politics of religion-making in the issue of Confucianism by disregarding the legal procedure and it implemented a politically motivated policy to discriminate Confucianism. Chapter 6 of this thesis argued that such political action was conducted by Soeharto to weaken Chinese influence in Indonesia. This is because Soeharto perceived Confucianism and other Chinese teaching to be related to or close allies of Soekarno, his political rival.

7.7 Theoretical Contribution

As a constitutional law study, the contribution of this thesis lies within the analysis on the politics of lawmaking regarding religious freedom, from the constitutional debates, the making of law in the Parliament, the use of the law, and the Constitutional Court reasoning in judicially reviewing the laws. By analysing the politics of lawmaking in relation to religious freedom, this thesis gives a more comprehensive understanding of the Indonesian legal framework of religious freedom, including the political construction behind such distinctive framework.

This study considers the political debate behind the constitutional articles on religious freedom. It explains the negotiation between the Islamists and the nationalists during three constitutional debates (in 1945, 1959 and 2000). Based on this rich understanding of the political context behind the constitutional articles on religious freedom, this study provides a basis for criticising controversial laws affecting religious freedom: the Blasphemy Law, the Marriage Law and the Civil Administrative Law. It analyses not only the legal text of these laws, but also examines the political influences during the making of the laws, the use of the laws, and constitutional review of the laws.

An analysis on the politics of lawmaking, particularly the politics of religion-making in Indonesia, is the main contribution of this thesis. It helps us to understand why and how Indonesian framework of religious freedom is formed, including the fact that the negotiation between the Islamists and the nationalists continues to recur in all stages of lawmaking: Constitutional debates, lawmaking in Parliament, the implementation of the law, and constitutional review.

In building the understanding of the politics of lawmaking in regard to religious freedom in Indonesia, this thesis illustrates the politics of religion-making. Examining the discourse surrounding the constitutional debates on religious freedom, this thesis explains how the politics of religion-making occurs in Indonesia. Theoretically, it affirms the concept of religion-making from above, that is: reflecting 'a strategy from a position of power, where religion becomes an instrument of governmentality, a means to legitimize certain politics and position of power'.[973] Although the concept of religion-making is usually used in religious

[973] Dressler and Mandair (n 38), 21-2

studies and sociology, this concept can also be used to enrich the study of constitutional law, especially regarding the politics of lawmaking.

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