



The Role Of Judicial Review In Protecting Religious Minority Rights In Indonesia

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ARTICLE INFO	ABSTRACT
<p>Keywords: <i>Judicial Review; Freedom of Religion; Human Rights; Constitution; Indonesian Laws</i></p> <p>How to cite: Maula, B. S. (2018). The Role of Judicial Review in Protecting Religious Minority Rights in Indonesia. <i>Veteran Law Review</i>, 1(1), 1-19.</p>	<p><i>Indonesia is a predominantly Muslim country, and Muslims in this country live in a pluralistic society harmoniously in their daily life. The absence of any reference to Islam in the Constitution shows that Indonesia is open to all religions besides Islam. The harmony of relationship among religious followers is preserved in the Indonesian constitution that acknowledges all of citizens have the religious freedom, which the state has to respect, protect and fulfill. The general idea of preserving the rights of religious freedom lies in the history of protecting religious minorities, and it is universally acceptable as one of the foundations of a democratic society. Therefore, ideally, a law which limits civil rights should never threaten the freedom of thought, conscience and religion, or impose limitations to those rights solely on the grounds of religious, political or other views. If the notion of protecting rights is as such, then the question arises is what mechanism can protect human rights as constitutional rights of citizens? The best legal mechanism in this context is to challenge the state and constitutional issues through the courts by means of the judicial review. This paper examines whether the judicial review as one of the best mechanisms to protect constitutional rights of citizens can be a concrete way to deal with human rights protection by challenging the state through the court. This paper concludes that the judicial review of executive acts and legislative power is very likely to be able to protect religious minority rights in Indonesia.</i></p> <p><i>Copyright ©2018 VELREV. All rights reserved.</i></p>

1. Introduction

Indonesia is the world's largest Muslim country. However, the settlement of population is not the same. In the eastern-part, most of them are Christian and Catholic communities, in the center like Bali most of them are Hinduist, while in the western-part like in the island of Java, Sulawesi, Kalimantan and Sumatera are Muslims. So, even though most of the Indonesian populations are Muslims but in the local regions they are separated in Christianity, Catholic, Hindhuism, Budhism and Confusianism. They live in pluralistic society but they interact harmoniously in their daily life.

The harmony of relationship among religious followers is preserved in the Indonesian constitution that acknowledges all of citizens have the

religious freedom, and of course freedom of worship could not be reduced by state and anything.

Religious freedom can be considered one of the most fundamental of human rights, because this right is one of the manifestations of personal liberty which comes from the most inner part of humans. In this way, interference with the freedom of religion and belief will often be experienced as grave violations. Thus, everyone must have the freedom to observe and to practice their faith without fear of, or interference from, others. The general idea of preserving the rights of religious freedom lies in the history of protecting religious minorities, and, even though the right to religious freedom is considered the foundation of Western human rights ideology, it is universally acceptable as one of the foundations of a democratic society. In Muslim majority countries, such as Indonesia, ideally freedom of religion is considered to mean that the government allows religious practices of religious minorities or other sects besides the state religion, and does not persecute believers in other faiths. However, in practice, religious minorities in the country suffer from restrictions on this right.

Take some cases for example. The most recent news said that the Islamic Jihad Front (FJI), with police backing, on Wednesday July 1, 2015 broke up a camping event of 1,500 Christian elementary and junior high school students at the Wonogondang camping ground in Cangkringan, Sleman, Yogyakarta. Members of the FJI claimed that the event, organized by a church from Surakarta, Central Java, was not equipped with a full permit from the police.¹

Moreover, regarding the laws, a new Indonesian decree to regulate places of religious worship is arguably favor the local religious majority, and has drawn criticism from groups ranging from Christians to a minority Islamic sect such as Ahmadiyya. This decree has been challenged in an appeal to the country's Supreme Court. Moreover, on June 9, 2008, Religious Affairs Ministry, Home Ministry, and Attorney General signed a joint-decree ordering the Ahmadiyya community to "stop spreading interpretations and activities which deviate from the principal teachings of Islam," including "the spreading of the belief that there is another prophet with his own teachings after Prophet Mohammed." Violations of the decree are subject to up to five years of imprisonment. Human rights groups have jumped to the defense of Ahmadiyah, encouraging the group to file a judicial review of the 1965 law with the Constitutional Court and the decree with the Supreme Court.

This paper examines whether the judicial review as one of the best mechanisms to protect constitutional rights of citizens can be a concrete way to deal with human rights protection by challenging the state through the courts. The paper will be divided into four parts. The first one will elaborate religious freedom as the foundation of a democratic society by examining human rights provisions in Indonesia's constitution. The second part will discuss some restrictions on religious freedom in Indonesia. The third part of the paper focuses on judicial reviews on the restrictions of religious freedom in Indonesia. In the last part, before conclusion, this paper will examine and

¹ Muryanto, B. (2015). "Islamic Jihad Front disperses Christian camp in Yogyakarta". *The Jakarta Post Online*, retrieved from <http://www.thejakartapost.com/news/2015/07/03/islamic-jihad-front-disperses-christian-camp-yogyakarta.html>

analyze how the judicial review plays a role in protecting religious freedom due to some restrictions from the government of the country.

2. Analysis and Discussion

2.1 Religious Freedom as the Foundations of a Democratic Society

Indonesia is admitted as a member of the United Nations following its independence. As a member state, Indonesia is governed by the United Nations Charter. Article 55 of the UN Charter proclaims one of the purposes of the UN Charter as being to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.² Pursuant to article 56 of the UN Charter, “all members of the United Nations pledge to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set forth on article 55”.³

The General Assembly of the United Nations considered that the UN Charter obliged member states to promote human rights and condemned those who violated such rights.⁴ It is important to observe that the UN Charter recognized the entitlement of human beings to rights by reason of their humanity alone. It means that the dominant approach to the normative foundations of international human rights standards regards human rights as moral entitlements that all human beings possess by virtue of their common humanity.⁵

In a democratic country, human rights are guaranteed by a constitution to every citizen, which the state has to respect, protect and fulfill. Because a constitution is the supreme law, human rights as citizens’ constitutional rights must be enforced unconditionally. If the rights are ignored or abused, it constitutes a violation of the constitution. With respect to human rights, it can be said that human rights are based on respect for the dignity and worth of all human beings and seek to ensure freedom from fear and want as the highest aspiration of the common people. Rooted in ethical principles, and usually inscribed in a country’s constitutional and legal framework, human rights are essential to the well-being of every man, woman and child. Premised on fundamental and inviolable standards, they are universal and inalienable.⁶ At the level of the concept, human rights are rights that “derive from the inherent dignity of the human person”.⁷ Despite its popularity and universal acceptance, opinions still differ considerably about the conceptual interpretation and scope of human rights.

² Charter of the United Nations (1945)

³ *Ibid.*

⁴ UN General Assembly Resolution 719 (VII); 1953, and UN General Assembly Resolution 285 (111); 1949.

⁵ Macklem, P. (2007). “What is International Human Rights Law? Three Applications of a Distributive Account”. *Bernard and Audre Rapoport Center for Human Rights and Justice University of Texas School of Law*, retrieved from http://www.utexas.edu/law/academics/centers/humanrights/publications/macklem_texas_paper.pdf

⁶ United Nation Development Program. “Integrating Human Rights with Sustainable Human Development: A UNDP Policy Document 1998”, retrieved from http://www.undp.org/governance/docs/HR_Pub_policy5.htm

⁷ International Covenant on Civil and Political Rights (ICCPR), preamble.

However, the maximum level, or common standard, of the protection of human rights can be seen in the text of the Universal Declaration of Human Rights (UDHR). The UDHR lists numerous rights to which people everywhere are entitled, but the UDHR is not a legal document which has legally binding force. In fact, it is only a general statement of principles, which have power in the world of public opinion. Its principles have been translated into legal force such as systems of law which aim to protect human rights. These systems, laws and instruments have predominantly been developed and administered by the United Nations (UN).

These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), along with various treaties that make up the international human rights regime, which have been ratified by more than 190 countries.⁸ According to international law, international treaties which have been ratified must be implemented by state parties in good faith by committing themselves to making laws in their country to protect these human rights. However, over half the countries of the world have not ratified the ICCPR or the ICESCR or other international human rights treaties.⁹

Moreover, even though the concept of human rights plays an important role in international level, in practice international factors actually have little or even no effect on domestic respect for human rights. Camp Keith, for example, argues that there is no statistical correlation between ratification of the International Covenant for Civil and Political Rights and increased respect for human rights.¹⁰ Similarly, Hathaway's study of various international human rights treaties, confirms these findings. Hathaway concludes that treaty ratification is not only ineffective, but at times can actually produce negative results: "treaty ratification is not infrequently associated with worse, rather than better, human rights ratings than would otherwise be expected".¹¹ Landman also comes to question the true effectiveness of international human rights covenants.

Specifically, he finds that the effect of signing or ratifying these covenants on domestic respect for human rights is not quite strong which may impart optimism about the future effectiveness of international human rights covenants.¹² The lack of effectiveness of the ratification of human rights treaties may be because, as Hathaway points out, the covenants are simply complementing the effect of simultaneous domestic processes of democratization, increasing wealth, and growing interdependence.¹³

The lack of the effectiveness of some human rights treaties implementation is more visible in Muslim countries. This may be because

⁸ Landman, T. (2005). *Protecting Human Rights: A Comparative Study*, Washington, DC: Georgetown University Press, p. 60.

⁹ Electronic Resource Centre for Human Rights Education, retrieved from http://www.hrea.org/erc/Library/First_Steps/part1_eng.html

¹⁰ Keith, L. C. (2002). "Judicial Independence and Human Rights Protection around the World." *Judicature*, (Vols. 85, No. 4, pp. 195 - 200).

¹¹ Hathaway, O. A. (2002). "Do Human Rights Treaties Make a Difference?" *The Yale Law Journal*, 111, 1935-2042.

¹² Landman, T. (2005). *Protecting Human Rights*, p. 73.

¹³ Hathaway, O. A. (2002). "Do Human Rights", p. 2016.

religious liberty supposedly burdens some Muslim states with a competence to protect indigenous religions of the majority by the prohibition of apostasy and proselytizing any other religions. As a result, the impact of this policy may influence religious minority groups' rights in practicing their religion and belief. However, in a democratic county, where a constitution is regarded as the highest law, people can do a constitutional complaint in order to challenge the state's violation of their rights. Constitutional complaints and judicial review are perhaps the most powerful among the mechanism for the legal protection of constitutional rights.¹⁴

According to Ján Klucka, most modern constitutions contain a bill of fundamental rights and freedom which are directly applicable and not mere declarations of goodwill.¹⁵ Most legal systems let constitutional provisions prevail over any other law, and will also allow for some form of judicial review. Nevertheless, in some countries, such as in Indonesia, judicial remedy of a constitutional complaint is not always applicable.

Therefore, legal perspectives of the state of religious human rights in the constitutional systems of the world require special emphasis of particular juridical mechanisms for the regulation of human rights with a religious base or substance. The constitutional mechanism devised to this end will evidently differ in accordance with the premises of their founders as to the function of the state and the purport of the law in relation to religious belief and activity and concerning the institutional church.¹⁶

2.2 Restrictions on Religious Freedom in Indonesia

According to Stahnke and Blitt, there are four categories of countries which have majority Muslim population. The first is countries which declare themselves as an Islamic-State; the second category is countries stating Islam as the official religion of the state; the third is countries declaring themselves as secular-state; and the fourth category is countries which have not made any constitutional declaration concerning the Islamic or secular nature of the state, and have not made Islam the official state religion.¹⁷ Indonesia is a part of the last category.

Stahnke and Blitt say that under international human rights standards, a state can adopt a particular relationship with a religion of the majority of the population, including establishing a state religion, provided that such a relationship does not result in violations of the civil and political rights of, or discrimination against, adherents of other religions or non-believers.¹⁸

¹⁴ Editors, (1994). "Constitutional Complaints: The European Perspective". *International and Comparative Law Quarterly*, (Vols. 43, p. 142).

¹⁵ Klucka, J. "Suitable Rights for Constitutional Complaint", Workshop on "the Functioning of the Constitutional Court of the Republic of Latvia". *European Commission for Democracy through Law, Riga, Latvia, 3-4 July 1997*, retrieved from [http://www.venice.coe.int/docs/1997/CDL-JU\(1997\)019-e.pdf](http://www.venice.coe.int/docs/1997/CDL-JU(1997)019-e.pdf)

¹⁶ Witte, J. J., & Vyver, V. D. (1996). *Religious Human Rights in Global Perspective: Legal Perspective*, The Hague: Martinus Nijhoff Publishers, p. xviii.

¹⁷ Stahnke, T. & Blitt, R. C. (2005). "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries". *Georgetown Journal of International Law*, (Vols. 36, 2005, pp. 947-1078).

¹⁸ *Ibid.*

However, many human rights violations happen in Muslim countries whatever their constitutional recognition of a state religion. Indonesia is one of the Muslim countries which remain restricting the rights to freedom of thought, conscience, and religion or belief, even though the country has constitutional provisions regarding human rights protection.

Indonesia is a predominantly Muslim country, but the absence of any reference to Islam in the Constitution shows that Indonesia is open to all religions besides Islam. This is in accordance with international human rights norms which stipulate, among other things, that the government is not only prohibited from limiting religious freedom, it is also unacceptable, according to International standards of democracy, to endorse a particular religion.

The Constitution of Indonesia provides for freedom of religion, and the government generally respected this right in practice, particularly since the amendment to the Indonesian Constitution in 2000. Freedom of religion is a mandate of the Indonesian Constitution (*The 1945 Constitution*), of which article 29(2) declares that “the State guarantees the freedom of every citizen to embrace their religion and to worship according to their religion and conviction”. This is reinforced with article 28E, introduced by an amendment to the 1945 Constitution, which states that “[e]very person shall be free to embrace and to practice the religion of his or her choice”, and “every person shall have the right to the freedom to hold beliefs, and to express his or her views and thoughts, in accordance with his/her conscience”.¹⁹ The constitutional provisions were then reinforced with Indonesia’s ratification of the International Covenant on Civil and Political Rights in 2006 and its subsequent incorporation into domestic law.²⁰

In addition to the constitutional provision above, Law No 39/1999 on Human Rights states in article 22(1) that “every person is free to profess their religion and to worship in accordance with their religion and conviction”, and also based on article 22(2), the freedom to profess one’s religion and to practice one’s convictions and beliefs are guaranteed by the state. However, the legal and constitutional guarantees of religious freedom have not been fully borne out in practice. Restrictions continued to exist on some types of religious activity. Moreover, according to a report released by the U.S. State Department, security forces occasionally tolerated discrimination against and abuse of religious groups by private actors, and the government failed to punish perpetrators.²¹

This condition could be caused, among other things, by the government’s policy and law which would legally permit tightened restrictions on religious liberty if conditions changed. Gvosdev says that some ‘democratic’ countries have some strategies by which governments can legally restrict religious freedom. According to Gvosdev, the most obvious

¹⁹ Article 28E (1) and (2).

²⁰ Asian Human Rights Commission (AHRC), (2006). “Indonesia: Ratification of Key Human Rights Instruments Must be Followed by Legal Reform”, a *Statement by the Asian Human Rights Commission*, retrieved from <http://www.ahrchk.net/statements/mainfile.php/2006statements/457/>

²¹ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Indonesia* (2008), retrieved from <http://www.state.gov/g/drl/rls/irf/2008/108407.htm>

method is the insertion of provision of state's interests into the constitution, "which grants to the government the power to proscribe groups and practices deemed to be in conflict with state goals".²² In Indonesian case, Gvosdev found that the Indonesian government had enacted some rules "redefining 'religious freedom' in a narrower or more restrictive fashion than the general understanding".²³

Hence, the Indonesian government actually has been maintaining a right to define what constitutes a religion in the country, and has ensured through its policies that its citizens follow an acceptable religious faith.²⁴ Therefore, even though the Indonesian Constitution guarantees freedom of religion to its citizens,²⁵ the provision should be interpreted as 'freedom of worship', not 'freedom to practice on their beliefs', because the government officially recognizes only six religions, and legal restrictions also still continue on certain types of religious activity, particularly among unrecognized religions and sects of recognized religions considered "deviant".²⁶

Only six religions are officially recognized by the government. Therefore, other religions, including religious sects, are discriminated against, particularly in relation to the rights protection and civil registration system which restricts the religious freedom of persons who do not belong to the six recognized faiths. Local traditional religions (animists), Ahmadis, Baha'is, and members of other small minority faiths found it difficult to register marriages or births.²⁷

Moreover, because the government requires all adult citizens to hold a National Identity Card (ID card) which, among other things, identifies the holder's religion, members of religions not recognized by the government are generally unable to obtain an ID card unless they incorrectly identify themselves as belonging to a recognized religion. Some human rights groups found that some local Civil Registry officials rejected applications submitted by members of unrecognized or minority religions, and others accepted applications, but issued the Identity Card that inaccurately reflected the applicants' religion. Some animists received ID cards that listed their religion as Islam. Many Sikhs registered as Hindu on their ID cards and marriage certificates because the Government did not officially recognize their religion.²⁸

²² Gvosdev, N. K. (2001). "Constitutional Doublethink, Managed Pluralism and Freedom of Religion", *Religion, State & Society*, (Vols. 29, No. 2).

²³ *Ibid.*

²⁴ Kipp, R. S. & Rodgers, S. (1987). "Introduction: Indonesian Religions in Society". in Rita Smith Kipp & Susan Rodgers (eds), *Indonesian Religions in Transition*, Tucson: University of Arizona Press, p. 23.

²⁵ Article 29 (2) of the Indonesian Constitution.

²⁶ U.S. Department of State, Bureau of Democracy, Human Rights and Labour. (2008). *Annual Report on International Religious Freedom: Indonesia*. (2008), retrieved from <http://www.state.gov/g/drl/rls/irf/2008/108407.htm>

²⁷ The Tandem Project, United Nations, Human Rights & Freedom of Religion or Belief, (2008), from http://www.tandemproject.com/issue_statements/statements/072408_upr_files/072408_upr.pdf

²⁸ *Ibid.*

According to Salim, the discrimination against citizen with unrecognized religions actually stems from the misinterpretation of a Soekarno-era presidential decree No. 1/1965 on the Prevention of Abuse and Disrespect of Religion.²⁹ The elucidation to this decree listed the six religions to which most Indonesian people adhere: Islam, Catholicism, Protestantism, Hinduism, Buddhism and Confucianism. In 1967, under Presidential Instruction No. 14/1967, President Soeharto dropped Confucianism from the list of recognized religions because of its allegedly strong relationship with communism. Salim argues that both decrees were not meant to imply that those religions were the only religions that were officially acknowledged, but since 1974 (after the enactment of Marriage Act No. 1/1974), religion has become a decisive factor in validating marriages, and the term 'religion' has been interpreted based on previous regulations, i.e. on the last decree in particular.³⁰

Moreover, regulations on identity cards require their holders to indicate their religion, which result in discrimination against citizens who subscribe to religions other than any of the six major religions.³¹ Fortunately, in 2001, President Abdurrahman Wahid annulled that instruction, allowing Confucianism to once again become a recognized religion in Indonesia. However, other minority religions still do not enjoy the same rights and protection from the government.

Not only related to the issuance of ID cards for people with unrecognized religions, the construction and expansion of houses of worship are also restricted. The Indonesian government continued to restrict the construction and expansion of houses of worship by issuing Joint Ministerial Regulation (No. 9/2006 of the Minister of Religion and No. 8/2006 of the Minister of Home Affairs) on the Establishment of Places of Worship,³² and it also maintained a ban on the use of private homes for worship unless the local community approved and a regional office of the home affairs ministry provided a license.³³ Christians in Indonesia feel increasingly uneasy, especially after some Islamists forced several unlicensed churches to shut down.³⁴ Besides sealing several churches across Indonesia, some Islamists

²⁹ Salim, S. (2007) "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era", in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government*, Singapore: p. 116.

³⁰ *Ibid.*

³¹ *Ibid.*

³² McLeod, R. H., & MacIntyre, A. (2007). This decree replaced a 1969 decree that had been blamed for allowing mob action directed to the destruction or closure of a number of illegal places of worship. See Arskal Salim. "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era", in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government*, Singapore: p. 116, and Melissa Crouch, "Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?", *Singapore Journal of Legal Studies*, 2007, pp. 96-116.

³³ Salim, A. "Muslim Politics in Indonesia's Democratization". p. 116.

³⁴ U.S. Department of State, Bureau of Democracy, Human Rights and Labour. (2007). *Annual Report on International Religious Freedom: Indonesia*, retrieved from <http://www.state.gov/g/drl/rls/irf/2007/90137.htm>

have also damaged mosques and other facilities belonging to the Ahmadiyya group.³⁵

That is because the new decree stipulates that any attempt to set up a house of worship must take into account the religious composition of the district where it is expected to stand. If authorities find a request fits the composition, applicants need to show at least 90 people in the area will use the facility and that at least 60 other residents from other religions approve of having it in their neighborhood.³⁶

Furthermore, regarding the freedom of religious sects to practice on their beliefs, the Indonesian government continued to restrict the religious freedom of groups associated with forms of Islam viewed as outside the mainstream. In 2005, an Islamic religious leader in East Java, Mohammad Yusman Roy, was prosecuted and jailed for promoting the use of Indonesian language prayer. He was charged with “despoiling an organized religion”, a crime that carries a maximum punishment of 5 years in jail.³⁷

Moreover, on June 9, 2008, the Indonesian government by Religious Affairs Minister, Home Minister, and Attorney General issued a decree tightening restrictions on the minority Ahmadiya community.³⁸ The decree orders the Ahmadiya to “stop spreading interpretations and activities which deviate from the principal teachings of Islam,” including “the spreading of the belief that there is another prophet with his own teachings after Prophet Mohammed”. Violations of the decree are subject to up to five years of imprisonment.³⁹

From the explanation above, it can be seen that despite the availability of significant legal documents acknowledging international principles and standards of human rights, human rights violations, particularly religious restrictions in Indonesia, are not likely to come to a rapid end. In the country where the state takes upon itself the function and power to enforce religious scruples, religious freedom finds itself under particular stress.

Many rights are already guaranteed in the Indonesian Constitution, which rights include freedom of expression, freedom of religion, the right to information, freedom of assembly and association, etc. These rights may only be abrogated by the special procedures laid down for constitutional amendment. Ideally, a law which limits civil rights should never threaten the freedom of thought, conscience and religion, or impose limitations to those rights solely on the grounds of religious, political or other views, or in a racially or sexually discriminatory manner.

Such a law should not exceed its desired aim, but if a limitation would be applied, it should only be made for particularly important reasons. Therefore, all citizens would be treated equally and they would have the

³⁵ Ibid.

³⁶ Salim, A. “Muslim Politics in Indonesia’s Democratization”. p. 116.

³⁷ U.S. Department of State, Bureau of Democracy, Human Rights and Labour. (2005). *Annual Report on International Religious Freedom: Indonesia*, retrieved from <http://www.state.gov/g/drl/rls/irf/2005/51512.htm>

³⁸ Setunga, P. (2008). “Religious Freedom not Secure in Indonesia”. *World Wide Religious News (WWRN): Asia/Pacific-Indonesia/Brunei*, retrieved from

<http://www.wwrn.org/article.php?idd=28810&sec=61&con=19>

³⁹ Ibid.

rights to freedom from legislation limiting civil rights solely on grounds of political, religious or other belief, and freedom from legislation which discriminates against anyone on racial, ethnic or sexual grounds.

If the notion of protecting rights is as such, then the question arises is what mechanism can protect human rights as constitutional rights of citizens? According to Danie Brand, the best legal mechanism to deal with human rights protection is to challenge the state and constitutional issues through the courts.⁴⁰ The judicial review before the Constitutional Court can be one of the best mechanism in this context.

2.3 Judicial Reviews on Restrictions of Religious Freedom in Indonesia

Judicial review is the process by which the courts exercise and annul the acts of the executive and the legislative authorities in the field of public law where it finds them incompatible with a higher norm.⁴¹ Judicial review is performed either by a specialized constitutional court or by a court with more general jurisdiction, typically a supreme court.⁴² Judicial review is an example of the functioning of separation of powers in a modern governmental system (where the judiciary is one of several branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.

The dominant justification for the strong position of the constitutional courts is based on the role of those courts in the protection of individual rights; in particular, those explicitly entrenched in the constitutions. It has been accepted that constitutional courts must have strong powers to monitor the constitutionality of legislation if constitutional rights are to be meaningful. The most popular argument used to support the existence of, or demand for, strong constitutional courts is that democracy is not based on blind respect for unrestrained majority will, and individual and minority rights are among the most important constraints upon the majority.

The political majority is capable of looking after its own interests, but giving sufficient protection to the minority and individual dissidents, whether the dissidence is understood in political, moral, or religious terms, is hard to be implemented. According to Sadurski, the majority should not be allowed to always prevail over those who disagree with its preferences and choices, and the values reflected in constitutional rights reflect this “precommitment” regarding the outer borders of the majority’s reach.⁴³ As the majority cannot be trusted with observing predetermined limits upon its powers, an

⁴⁰ Brand, D. (2005). “Introduction to Socio-Economic Rights in the South African Constitution”, in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa*, Pretoria: Pretoria University Law Press, pp. 38-39.

⁴¹ Lewis, C. B. (2004), *Judicial Remedies in Public Law*. 2nd ed., London: Sweet & Maxwell, p. 7.

⁴² Horowitz, D. L. (2006). “Constitutional Courts: A Primer for Decision Makers”. *Journal of Democracy*, (Vols. 17, No. 4, pp. 125-137), retrieved from http://muse.jhu.edu/journals/journal_of_democracy/v017/17.4horowitz.html

⁴³ Sadurski, W. (2005). *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*, The Netherlands: Springer, p. 107.

independent, non-majoritarian institution is needed to police, monitor and enforce those limits.⁴⁴

Governmental structure greatly determines the form of the judicial review system.⁴⁵ The governmental structure of both Indonesia falls under the separation of powers. This allows the basic potential for creating the rule of law, at least in form. However, once the executive, the parliament, and the Supreme Court are separated and are placed at the same level structurally, the court is only granted power to review legal norms below the rank of a law in Indonesia; while legal norms made by parliament could be reviewed by the Constitutional Court.⁴⁶

The fact that the Supreme Court is granted the power to review legal norms made by the executive in Indonesia can be appreciated in the case of the issuance of joint ministerial decree which restricts the practice of religious freedom of the minority Ahmadiyya community, because legal norms made by the executive are not only for implementing laws made by the parliament.⁴⁷

In the case of restriction of religious freedom, even though the constitution provides for freedom of religion and the government generally respects this right, in practice the Indonesian government places some restrictions on this right. In Indonesia, believing in the One God is one of the state principles; however, the practice of Islamic beliefs other than Sunni Islam is restricted significantly in this country. The arguments in support of this view rest on those of cultural relativism, which is framed in terms of 'Asian values'. The country's leaders have argued that in the country's social context, it is more important to preserve social harmony and collective welfare than to uphold a Western notion of human rights which focuses on an individual's right against the state.⁴⁸

Therefore, when Indonesian government enacted a ministerial decree regulating establishment of places of worship, or issued a decree forbidding Ahmadiyya members from spreading interpretations and holding activities that deviate from the principal teachings of Islam, the reason behind the issuance of the decrees would be for the sake of maintaining public order and preserving social harmony. In fact, the decree on Ahmadiyya itself is ambiguous not clearly articulating a position on Ahmadiyya and whether continued worship would be also considered a form of "spreading its

⁴⁴ *Ibid.*

⁴⁵ Zhang, Y. (1995) "Comparative Studies on Judicial Review in East and Southeast Asia". IIAS Symposium The Netherlands: retrieved from <http://www.iias.nl/iiasn/iiasn6/iiasnews/zhang.html>

⁴⁶ *Ibid.*

⁴⁷ The hierarchy of laws and regulation in Indonesia is as follows: the Constitution, Parliament enacted Laws, Government Regulation (enacted by the President as mandated by a specific law), Presidential Regulation (enacted by the President as mandated by a specific Law or at his own initiative) and Regional Regulation (enacted by the Regional House of Representative). In addition to the Presidential Regulation, there is ministerial decree, including joint-ministerial decree, which acts as an implementing regulation of the Presidential Regulation. For further information, see Jimly Asshiddiqie, 2006. *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta : Konstitusi Press, pp. 301-367.

⁴⁸ Faruq, S. S. (1999). 'Human rights and the Constitution'. in Ramdas Tikamdas and S.S. Rachgan (eds). *Human Rights and the National Commission*, Kuala Lumpur: Hakam, p. 185.

interpretations” of Islam. The decree is actually a compromise that would please all parties, those who want the ban of Ahmadiyya and those who support religious freedom in Indonesia. Likewise, the purpose of the enactment of the decree on establishment of places of worship was perhaps not to restrict religious freedom, but to ensure harmony between people of different religious persuasions.

However, those aims of the regulations, which demonstrate the responsibility of the state for guaranteeing the right of all citizens to the freedom of religion or belief, did not achieved and resulted in people’s dissatisfaction. This condition could be cause by the fact that the regulations are favors the local religious majority, because Muslims constitute the majority in Indonesia. Therefore, the regulations generally work against the interests of non-Muslims or other religious minorities such as Ahmadiyya.

Because of this fact, people who were not satisfied with the government’s policies filed the judicial reviews to uphold their rights to the freedom of religion. The Indonesian government’s decree on the establishment of places of worship stipulates that any attempt to set up a house of worship must take into account the religious composition of the district where it is expected to stand. If authorities find a request fits the composition, applicants need to show at least 90 people in the area will use the facility and that at least 60 other residents from other religions approve of having it in their neighborhood. In practice, it is often very difficult for minorities to obtain building permits, not only because they may be unable to get approval from the required number of residents, but also because local officials tend to take the side of members of the religious majority who wish to refuse the request.⁴⁹

Moreover, when the government issued a decree restricting the ability of the Ahmadiyya to practice freely, it shows that the Indonesian government actually still hesitates to let go of state control over religion. The government does not follow the constitution but is instead trying to accommodate radical groups, which are actually very small in number, vowing to continue their fight for a complete ban on the Ahmadiyya group. Those regulations fail to protect minorities and to build religious liberty in a multicultural society. Therefore, in order to seek judicial remedies for human rights due to the defects in the system and current legislations, judicial review plays a significant role to safeguards human rights completely.

2.4 The Role of the Judicial Reviews in Protecting Religious Rights in Indonesia

There are strong arguments that judicial review will serve as an important check against tyranny of majority. Alexis de Tocqueville, in observing the American political system, as Carrese mentions, argued that an independent judiciary especially one empowered with judicial review is one of the most powerful barriers erected against the tyranny of political

⁴⁹ Salim, A. “Muslim Politics in Indonesia’s Democratization”, p. 120.

assemblies.⁵⁰ Moreover, Waldron agrees that the constitutionalization of basic rights together with judicial review nowadays tends to be seen as “a global model for democratization with new democracies turning almost instinctively to some version of this constitutional arrangement”.⁵¹ Dworkin also argues that this arrangement is the most important political theory which serves as the main bulwark in protecting individual constitutional rights.⁵²

This positive expectation of judicial review is reflected in much of the international legal community. Ackermann, for example, states that a system of judicial review in countries which are committed to the establishment of a human rights-based democracy is essential not only for the effective protection of human rights, but also to the viability of a constitutional dispensation.⁵³ Similarly, Maduna believe that judicial review is essential for the protection of human rights, and it is the greatest possible degree of judicial control that should be striven for.⁵⁴

Ideally, the constitutional framework which guarantees basic human rights can prohibit governments from enacting into law policies which restrict people’s freedom.⁵⁵ Concerning this matter, there are two basic principles which are common to all constitutions which ensure basic human rights protected. The first principle is “consistency” or “fairness”. This principle guarantees a basic equality in how individuals are treated by their governments over time and across different communities. Governments should treat their communities equally and similar in weight and significance to the kinds of interests which have supported similar constraints of other people’s freedom in the past.⁵⁶

The second principle is ways governments use to pursue their objectives. This principle guarantees governments to respect a basic equality in the interest and capacity of all people to organize their own lives in a different way. Therefore, this principle prohibits law makers from drafting laws which limit people’s freedom, and which are either over or under inclusive, including limiting the benefits of a legislative scheme to a particular group of individuals.⁵⁷

With those two principle, the concept of judicial review which serve as an important check against tyranny of majority will be realized as a tool to the protection of individual rights. However, empirically, the expectation that the

⁵⁰ Carrese, P. O. “Judicial Statesmanship, the Jurisprudence of Individualism, and Tocqueville’s Common Law Spirit”. *The Review of Politics*, (Vols. 60, No. 3, Summer, 1998), pp. 465-495.

⁵¹ Waldron, J. “Judicial Review and the Conditions of Democracy”. *The Journal of Political Philosophy*, (Vols. 6, N. 4, 1998, pp. 335-355).

⁵² Dworkin, R. (1999). *Freedom’s Law: The Moral Reading of the American Constitution*. Cambridge, Massachusetts: Harvard University Press, p. 18

⁵³ Ackermann, L. W. (1989-1990). “Constitutional Protection of Human Rights: Judicial Review”. *Columbia Human Rights Law Review*, No. 21, p. 59.

⁵⁴ Maduna, P. M. (1989-1990). “Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa”. *Columbia Human Rights Law Review*, No. 21, p. 73.

⁵⁵ Beatty, D. 1994. “Human Rights and the Rules of Law”. in David M. Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective*, London: Martinus Nijhoff Publishers, p. 19.

⁵⁶ *Ibid.*, p. 20.

⁵⁷ *Ibid.*

courts exercising the power of judicial review would serve as guarantors of individual human rights has not materialized as predicted.

In Indonesia, judicial review is the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice. The judicial review is conducted by the Supreme Court and the Constitutional Court, depending on the types of the regulations to be challenged. The Constitutional Court has the power to strike down the laws, if it believes the law is unconstitutional or contrary to the Constitution; while the Supreme Court has the jurisdiction to review executive laws or executive acts which are believed contrary to the higher laws or to the Constitution.

As mentioned above that there are some provisions in the Indonesian Constitution that guarantees religious rights, and there is no particular religion mentioned in the Constitution. However, the Constitution is not neutral towards religion in the sense that it prefers and supports a theistic worldview rather than a non-theistic worldview. It can be indicated from article 28E (1) of the Constitution which give the citizens the right to adhere a religion, but it does not include to be an atheistic. The neutrality of the Indonesian constitution regarding religious freedom is on the theistic view, which it prefers the most. Moreover, even though the constitution does not mention the rights to change one's religion, there is no prohibition or punishment from the government for those who convert from or to Islam. According to Hosen, mentioning the right to change one's religion in the Constitution is not appropriate in the Indonesian context, in which Muslim is the biggest population that condemns apostasy.⁵⁸

Based on this fact, the idea of state-recognized religions in Indonesia actually has no constitutional basis, and the power struggle within a particular religion is clearly not the business of the government. Therefore, the government has no constitutional authority to dictate its citizens, for example, on which version of God she/he should worship. Forcing a particular religious interpretation would also infringe the Constitution, and the government could be challenged by judicial review.

In the case of Ahmadiyya, the Ahmadi group could bring forward judicial review on the Joint Ministerial Decree which limits their rights to the freedom of religion or belief to the Supreme Court. Actually, there are at least two options for the Ahmadiyya group to file the judicial review, either to the Supreme Court or to the Constitutional Court. If the Ahmadiyya group goes to the Supreme Court to file the judicial review petition, they should find a higher law, to which the joint-decree is considered contrary as a basis of the petition, because, as mentioned above, the judicial review in the Supreme Court is only applicable for subordinating laws and regulations, but not for parliamentary legislations.

The judicial review of the latter should be brought forward to the Constitutional Court. Therefore, if the case of Ahmadiyya is brought to the Constitutional Court, as a second option, the petitioners cannot file the judicial review of the Joint-Decree, but they can file the law which becomes the basis of the decree. It is the Law No. 1/PNPS/1965 on the Prevention of

⁵⁸ Hosen, N. (2007). *Shari'a and Constitutional Reform in Indonesia*. Singapore: ISEAS, p. 120.

Blasphemy and Abuse of Religions which prohibits “deviant” interpretation of religious teachings that can be challenged in the Constitutional Court whether this law is incompatible with the Indonesian Constitution.

Another law which becomes the basis of the Joint-Decree of the Ahmadiyya case, and, therefore, it can be challenged in the Constitutional Court is article 156 (a) of the Criminal Code, which threatens to jail people who deliberately in public express hostile, insulting or abusive views towards religions with the purpose of preventing others from adhering to any religion, for a maximum five years.

In my view, both laws are in contradiction with the Indonesian Constitution that guarantees full freedom of religion. The Indonesian Constitution contains no specific reference to any religions and that article 29 (2) of the Constitution was meant to protect not only major religions but also all beliefs. Any attempt to prohibit certain religious interpretation such as done through articles 1 and 3 of the Law No. 1/PNPS/1965 would therefore infringe the constitution and in conflict with human rights norms. Hence, if the judicial review of these laws succeeds and the government then abolishes the laws on religious offence, it will be the first state in Asia in making a historic decision to abolish the law that criminalized blasphemy.

However, if the government still needs a blasphemy law to prevent harm to others and the law is still permitted by human rights norms, it should contain very restrictive conditions, namely that it is applicable only when it is “...necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others”.⁵⁹ Moreover, the restriction should not only be “necessary” in order to prevent harm, but it should also be “proportional” to the goal. However, the Law No. 1/PNPS/1965 and Article 156a of the Criminal Code have other purpose than preventing harm, which make them inconsistent with human rights norms.

Furthermore, regarding the joint ministerial decrees (No. 9/2006) on the Construction of Worship Places, as mentioned above, minority groups of Christians and Muslims, including Ahmadiyya, are seeking judicial review of the new decree on houses of worship that they say will obstruct them from practicing their faiths. The judicial review on the decree is brought forward because even though this Joint-Ministerial Decree is a replacement regulation to the Joint-Ministerial Decree No. 1/1969, which had been criticized for its contribution in justifying violence at places of worship, some attacks on places of worship have persisted with disregard to the right to freedom of religion protected in several legal instruments. The new decree suffers the same basic problems as the old one.

Therefore, according to Crouch, it does not uphold the right to religious freedom, particularly for religious minorities.⁶⁰ Slogans relied on by the government and some Indonesian Muslim groups like ‘one law for all’ neglect the fact that treating everybody in the same manner when they are in unequal situations perpetuates inequality. Places of worship in Indonesia are no longer sites of religious freedom, but they are increasingly becoming

⁵⁹ ICCPR article 18(3)

⁶⁰ Crouch, M. (2007) “Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?”. *Singapore Journal of Legal Studies*, pp. 96-116.

contested places of tension and violence, particularly Christian churches and Ahmadiyya mosques.⁶¹ Therefore, judicial review of this decree is a starting point to have the rights to freedom of religion protected based on the Constitution and international human rights norms.

3. Conclusion

There are many provisions in the Indonesian Constitution and in its legal system which is supportive of human rights. The chapter on fundamental liberties, the provisions for constitutional supremacy and judicial review are meant to achieve a fair balance between the need for freedom and the need for order and stability. However, some provisions on discretionary powers granted to the government have made serious implications for human rights. In a democratic country, the court has the power to examine the “reasonableness” of a law and to hold that a harsh, cruel and oppressive law is unconstitutional. Theoretically, Indonesia with its Constitutional Court has reached that ideal.

Indonesia has different characteristics of constitutional provisions on the protection of religious liberty. The Indonesian Constitution contains no specific reference to any religions which means all religions and beliefs have the same status in the Constitution. Any attempt to prohibit certain religious freedom would therefore infringe the constitution. Therefore, the judicial review of executive acts and legislative power is very likely to be able to protect religious minority rights in Indonesia.

Ideally, the power of judicial review serves as an important means of legal examination against tyranny of majority, and it should be put to be a substantial factor in the protection of human rights; however, empirically, the expectation that the courts exercising the power of judicial review would serve as guarantors of individual human rights has not materialized as expected.

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⁶¹ *Ibid.*

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