

# THE ROLES OF THE INDONESIAN CONSTITUTIONAL COURT IN DETERMINING STATE-RELIGION RELATIONS

Muchamad Ali Safa'at\*

Faculty of Law, Brawijaya University  
Email: [safaat@ub.ac.id](mailto:safaat@ub.ac.id)

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## Abstract

Indonesia is neither a religious state nor a secular state. Based on the Pancasila state ideology and the 1945 Constitution, Indonesia adheres to a symbiotic model in which the state and religion are different entities but have a mutually influencing relationship. This relationship pattern can be seen from several laws that regulate issues related to religion, especially Islam, which is embraced by the majority of Indonesians. As a political product, the pattern of relations between the state and religion in the law is dynamic. However, in accordance with the principles of a democratic rule of law, the dynamics of democratic politics are controlled by legal instruments, one of which is through the authority to review laws as one of the powers of the Constitutional Court. The Constitutional Court's decisions in cases of judicial review of laws related to religion reinforce the model of the symbiotic relationship between the state and religion. Such decisions affirmed Pancasila as a model of Indonesian secularity that is needed for the sake of individual rights and freedoms, to balance or reconcile religious diversity, social integration and national development, and the independent development of the functional domains of society.

**Keywords:** Constitutional Court Decisions, Constitutional Law, Secularity, State-Religion Relations, Multiple Secularities.

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\* Associate Professor in Constitutional Law at the Faculty of Law, Brawijaya University, Malang, Indonesia.

## I. INTRODUCTION

In general, the relationship between the state and religion is based on three paradigms, namely the integralist paradigm, the symbiotic paradigm, and the secularistic paradigm. The three paradigms form different state patterns, namely (1) a secular state that separates state and religion; (2) state religion; and (3) a state which is not a religious state but does not clearly separate state affairs and religious affairs.

The pattern of state-religious relations in Indonesia is based on Pancasila as the nation's ideology and the basis of the state. Pancasila is a compromise in the middle point between the secular nation state and the Islamic state. Pancasila on the one hand affirms that the state is a separate entity that is not a theocracy. This means that the state remains in a profane or worldly territory with all its rules and devices that are also established and carried out secularly. However, the state's goals and policies, though decided and executed secularly, can be influenced by reasons derived from religious teachings.

One of the phenomena that can be used to look at the development of the relationship between state and religion is the law, especially laws regulating or related to religion. There are two strong reasons for this. First, law in the modern sense is one of the secularization vehicles since it is developed based on rational consideration and not religion.<sup>1</sup> Second, there are two principal functions of the law and legal process: integrative and transformative. Integrative is law as a government mechanism to manage conflict and facilitate social order. Transformative is perceiving law as a vehicle to express values and to change social and political conditions.<sup>2</sup> In other words, the law in relation to religious life can be made to regulate and limit religion, which means secularization; while on the other hand, it can be a legalization of religious law into state law. In Habermas's perspective, law is a tool of social solidarity, especially integration in complex societies. The law that applies based on the principle of legality is

<sup>1</sup> Richard S. Willen, "Religion and the Law: The Secularization of Testimonial Procedures," *Sociological Analysis* 44, no. 1 (Spring 1983): 53.

<sup>2</sup> Ofrit Liviatan, "From Abortion to Islam: The Changing Function of Law in Europe's Cultural Debates," *Fordham International Law Journal* 36, no. 1 (2013): 94.

a transformation of free communication that gives legitimacy to certain social institutions.<sup>3</sup>

In the historical constructivist approach, there are two views of the relationship between religion and state. First, the static view holds that state institutions determine the behavior of religious organizations. Second, the society-centered approach believes that the state is a reflection of the value of society, and conversely, a society with high adherence to religion will influence the political institutions of the country. From the history of Indonesia, Jeremy Menchik stated that the contours of religion and politics are fluid and evolve together over time. Therefore, there is an overlap area between the state and the religious community, as well as an autonomous sphere of state and religious society (Islam). Therefore, there can be no clear line between state and society (religion).<sup>4</sup>

The dynamics of the relationship between the state and religion must be kept within the corridors of Pancasila. This obligation is also attached to one of the authorities of the Indonesian Constitutional Court, namely to review law (*undang-undang*) against the Constitution. Through this authority, the Constitutional Court reviews the law, including several laws relating to religion. The touchstone used by the Constitutional Court is the 1945 Constitution, where Pancasila is part of the Preamble and in its chapters also regulate the right to freedom of religion and worship. In other words, the Constitutional Court has a role in determining the relationship between state and religion and the relationship between religious and secular regions.

This article analyzes the role of the Constitutional Court in determining the relationship between the state and religion, especially in the field of law. The relationship in this case includes the determination of differentiation boundaries and the relationship between the territory of the state and the territory of religion. The analysis is carried out by first explaining the model and dynamics of the relationship between state and religion as well as the development of the

<sup>3</sup> M. Ulric Killion, "The Function of Law in Habermas' Modern Society," *Global Jurist* 10, no. 2 (March 2010): 12-13.

<sup>4</sup> Jeremy Menchik, *Islam and Democracy in Indonesia: Tolerance without Liberalism* (New York: Cambridge University Press, 2016), 94.

theory of distinction and differentiation of state and religion, particularly the theory of “multiple secularities”.

In the next section, the model of the relationship between state and religion based on Pancasila is explained and analyzed for its suitability with the secularity model according to the theory of “multiple secularities”. That theoretical and conceptual analysis will be followed by analysis of several decisions of the Constitutional Court to determine whether or not to strengthen the relationship between state and religion based on Pancasila and its compatibility with the theory of “multiple secularities”.

The decisions analyzed are those on judicial review of laws related to religion, namely Decision Number 19/PUU-VI/2008 on the authority of the Religious Courts as regulated in Law Number 7 of 1989 as amended by Law Number 3 of 2006 on Religious Courts, Decision Number 12/PUU-V/2007 on restrictions on polygamy in Law Number 1 of 1974 on Marriage, Decision Number 140/PUU-VII/2009 on blasphemy in Law Number 1/PNPS/1965, Decision Number 68/PUU-XII/ 2014 on interfaith marriage in Law Number 1 of 1974 on Marriage, and Decision Number 97/PUU-XIV/2016 on the status of “belief” in Law Number 24 of 2013 on Population Administration.

## II. STATE AND RELIGION: THE CONCEPT OF SECULARITY AS DIFFERENTIATION

It has been stated in the Introduction that the relationship between the state and religion is based on three paradigms, namely the integralist paradigm that forms a state based on a certain religion, the symbiotic paradigm that forms a non-religious state model but does not clearly separate state affairs and religious affairs, and the secularistic paradigm that forms a secular state.<sup>5</sup>

According to the integralist paradigm, state and religion are one. There is no distinction between religious institutions and political institutions. The head of state is the holder of religious power and political power. The government is

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<sup>5</sup> Rahmatunnair, “Paradigma Formalisasi Hukum Islam di Indonesia [*Paradigm of Formalization of Islamic Law in Indonesia*],” *Ahkam: Jurnal Ilmu Syariah* 12, no. 1 (January 2012): 101.

run on the basis of “divine sovereignty”. Supporters of this paradigm believe that sovereignty is in the hands of God, which gave rise to the notion of a religious state or theocracy. Government is run (at least claimed) based on God’s words.<sup>6</sup>

The symbiotic paradigm is based on the view that the state and religion are two different entities but need each other so that it is impossible to separate them clearly. Religion requires power in order to obtain guaranteed protection. On the other hand, the state needs religion as an area of ethical and moral-spiritual guidance for the administration of the state and society. Religious law still has the opportunity to influence state laws, even in certain cases it does not rule out the possibility of religious law being used as state law.<sup>7</sup>

The secularistic paradigm proposes a separation between religion and the state. The state and religion are two different institutions and have different territories so that their existence must be separated and they cannot interfere with each other. In a secular state, there is no relationship between state and religion. The state is a matter of human relations with other humans, or world affairs. Conversely, religion is the relationship between humans and God, which is individual. These two things, according to secularism, cannot be combined.<sup>8</sup>

However, in the state history, there are practices that links the three models of the state, namely the existence of secularization, which is found in both religious and symbiotic states. On the other hand, the influence of religion is not always interpreted negatively as being opposed to modernization. Even in a secular state, the influence of religion is unavoidable as it is held by the community to be a value of truth. In every state, it is necessary to distinguish and pattern the relationship between the state and religion in accordance with the values and goals to be addressed. Therefore, each country has its own secularity. Secularity cannot be conceived singly but varies. This is what is called “multiple secularities”.

The term “secularization” has its own historical journey. The word is used in the era of religious wars to declare the separation of territory or property from the control of ecclesiastical power. In anticlerical and progressive circles,

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<sup>6</sup> *Ibid.*, 102.

<sup>7</sup> *Ibid.*, 103.

<sup>8</sup> *Ibid.*, 104.

the term secularization is used to explain the freedom of modern man from the bondage of religion. "Secularization" has been used as an ideological concept that has an evaluative connotation, containing a kind of positive or negative assessment of the separation of religion from social life. Secularization can also be seen as an empirical phenomenon of social development that separated from the domination of institutions and religious symbols.<sup>9</sup>

Secularization theory is criticized by recent religious sociologists.<sup>10</sup> Europe, the region that in the past centuries was the backbone of the Catholic Church, has undergone a process of modernization hand-in-hand with secularization that cannot be stopped or reversed. In contrast, in the United States, the massive development of modernization does not necessarily lead people away from religious institutions, beliefs and practices. Religion remains influential in public spaces, including being a key factor in presidential elections.<sup>11</sup> In other parts of the world, such as Asia, Africa and Latin America, secularization takes place very minimally even though the society has undergone a process of modernization since the beginning of the 20th century. Modernization and secularization do not occur in a single way. Although almost every society in the world is experiencing it, its direction and process are different from each other, influenced by many aspects with different effects.

Secularization that becomes part of the modernization theories that necessitate the separation of religion and state, and the decline of the role of religion, is a haphazard generalization. Even in Western countries, secularization is not uniform. The relationship between religion and state in the West is the result of dynamics and negotiation with different results.<sup>12</sup> Modernization indeed takes place and penetrates the most private areas of human life. However, the

<sup>9</sup> Hans Raun Iversen, "Secular Religion and Religious Secularism: A Profile of the Religious Development in Denmark since 1968," *Nordic Journal of Religion and Society* 119, no. 2 (2006): 83.

<sup>10</sup> Amika Wardana, "Agama dan Penuaan Masyarakat Indonesia: Sebuah Agenda Penelitian [Religion and the Aging of Indonesian Society: A Research Agenda]" (presented in the Monthly Routine Discussion Center for Early Childhood and Elderly Studies at Yogyakarta State University, 2014).

<sup>11</sup> Bryan S. Turner, *Religion and Modern Society: Citizenship, Secularization and the State* (New York: Cambridge University Press, 2011), 143.

<sup>12</sup> Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila [Plenary State: Historicity, Rationality, and Actuality of Pancasila]* (Jakarta: Kompas Gramedia, 2011), 96.

modernization response has also manifested itself in the form of explosions of religious spirit in public spaces.

Therefore, the so-called secularization is not the disappearance of religion from the public sphere. On the contrary, religion penetrates in the process of modernization. Religion in European history has become the foundation of morality and even Western civilization. The nation-state also breeds religious fundamentalism, such as Islamism, against modern assumptions as “humanly revolt against God”. For Muslim-majority countries, secularization has a different meaning because of views of history and doctrine that differ from those of the Western world.<sup>13</sup> Islam has never had a universal ministerial hierarchy. Mosques in Islam are more a place for worship and not a theological institution like the church. The Caliph in Muslim political history is primarily a political leader, not religious leader. Religious scholars or figures in Islam function solely as religious scholars; have no authority like Catholic clergy.<sup>14</sup>

Given the concept of secularization in terms of differentiation, religion is no longer the sole definer of all reality. Differences allow religious institutions to make decisions autonomously, even though state institutions can influence them but without power. With differentiation, religion can also develop relative autonomy to provide a basis of morality to both support and oppose state power. Religious differentiation from state power does not eliminate all religious influence on the state. The religious community can influence public policy but is not a determinant. The influence is positioned as an aspiration equal to the aspirations of other people.<sup>15</sup> When religious leaders are active in public life it will affect people’s lives and give legitimacy to public institutions.<sup>16</sup>

The involvement of religious institutions in the public sphere entails some requirements. First, upon entering the public sphere, religion must not only defend its freedom but also the freedom of other believers to prevent the absolutism of

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<sup>13</sup> Turner, *Religion and Modern Society*, 133.

<sup>14</sup> Ahmad Nur Fuad, “Sekularisasi Politik (Pengalaman Amerika Serikat dan Dunia Islam) [*Political Secularization (The United States and the Islamic World Experience)*],” *Journal of Salam* 12, no. 2 (July - December 2009): 91.

<sup>15</sup> Latif, *Negara Paripurna [Plenary State]*, 107-108.

<sup>16</sup> Mirjam Künkler and Alfred Stepan, “Indonesian Democratization in Theoretical Perspective,” in *Democracy and Islam in Indonesia*, ed. Mirjam Künkler and Alfred Stepan (New York: Columbia University Press, 2013), 7.

the state in the name of one religion. Second, when entering the public domain with the question of secular absolutism, religion does not want to replace it with religion as the basis of state administration, but rather to ethically criticize the secular reality. Third, in entering the public sphere of religion, defending the traditional life pattern based on the values of the technical administrative matters of the anonymous modern state without returning to the model of traditional religious society. The role of religion is through civil society.<sup>17</sup>

The increasing role of religion in the public sphere in various countries shows that religion is compatible with democracy and political civility. Even public religion can act as a significant counterweight to the hegemony of the market and the modern state.<sup>18</sup> In terms of democracy and the role of religion in the public sphere, it must necessarily keep religion as one factor but not a determinant and in an authoritative position. To determine the proper proportions, Olle Törnquist proposed four criteria to be determined first, namely (1) what is meant by public affairs, (2) what is meant by the people, (3) what is the substance and function of democratic institutions, and (4) how people can use it to control public affairs.<sup>19</sup>

An-Naim has claimed Muslims need a secular state, but secular state in this case is the separation between state and religion and the state's neutrality towards religion, not then the separation of religion from politics. The separation between Islam and the state does not prevent Muslims from proposing policies or laws that originate from their religion or belief. All citizens have that right, as long as it is supported by a "civic reason" that is the argument required for policy or law to be accepted by the public at large, who can accept or reject it through public debate without having to judge its religious piety.<sup>20</sup>

Wohlrab-Sahr and Burchardt differentiate secularism and secularization. Secularism is a philosophical ideological movement, the ideology of separation

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<sup>17</sup> Latif, *Negara Paripurna [Plenary State]*, 109.

<sup>18</sup> Robert W. Hefner, "Public Islam and the Problem of Democratization," *Sociology of Religion* 62, no. 4 (2001): 491.

<sup>19</sup> Olle Törnquist, "Muslim Politics and Democracy: The Case of Indonesia," *Journal of Indonesian Islam* 1, no. 1 (June 2007): 4.

<sup>20</sup> An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008), 7-8.



of the state, especially politics and religion. Secularization is the process of distinction between the religious domain and other social areas, including the reduction of religion's role in social life. Secularity is a form, whether cultural, symbolic or institutional, that shows the distinction between religion and other social areas.<sup>21</sup>

Relationships are between not only state and religion, but also include other community domains, including law, education, science, business, and others. The relationship and distinction between religious and secular, and the idea of justification, are empirically different. This implies that religions and other social areas have never been fully separated without contact or collaboration. Therefore, secularity is a result of a negotiation or social contestation process. The boundaries between religious and secular areas are always negotiated, challenged, and renewed. Secularization and secularity are the analytical frameworks to test the historical transformation of all world religions within different structures of modern society.<sup>22</sup>

The rejection of secularism and secularization in Islamic countries does not necessarily mean the absence of a distinction between religion and secular. The idea of multiple-secularities not only captures the conditions as a consequence of the past, but rather the interplay between cultural history and its encounter with modern era.<sup>23</sup> Jose Casanova declares that religion is compatible with modernity, democracy, and civilization. This is in contrast to the dominant sociological discourse that usually places religion in opposite positions to the state or politics. Colonial sociology has long understood pessimistically the increasing role of religion, especially Islam, within the public domain and the law.<sup>24</sup>

The relationship between religion and state is clearer in the Christian than in the Islamic tradition. Fueled by the bitter experience of religious politicization by the church in medieval times, Western Christianity has reached the conclusion of

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<sup>21</sup> Wohlrab-Sahr and Burchardt, "Multiple Secularities: Toward a Cultural Sociology of Secular Modernities," *Comparative Sociology* 11, no. 6 (January 2012): 881.

<sup>22</sup> *Ibid.*, 882.

<sup>23</sup> Wohlrab-Sahr and Burchardt, "Multiple Secularities," 885.

<sup>24</sup> Syafiq Hasyim, *State and Religion: Considering Indonesia Islam as Model of Democratization for the Muslim World* (Berlin: Liberales Institut, 2013), 6.

the necessity of separating the religious domain from the state domain. Islamic history does not have this problem so it is still a debate to date whether Islam necessitates a particular state form or not.<sup>25</sup>

Burchardt and Wohlrab-Sahr call secularity models in different countries “multiple secularities”. The concept of multiple secularities represents the practices of distinctions between religion and secular to capture their boundaries. It also brings consequences on the shift and re-interpretation of the meaning of religion.<sup>26</sup>

The concept of “multiple secularities” is used in contrast to the monolithic concept of the secularity of modernism. “Multiple secularities” explains three main themes. First, there are different meanings and cultural stages in distinguishing between religious and secular spheres, including the relationship between religious history and ethnic diversity, in the process of nation state formation, as well as the cultural concept used as a path of secularization and sacred values attached. Second, in explaining the influence of global interconnection on the secularity of a society. The diversity of secularity today is often associated with international migration, a regime that respects religious plurality, the emergence of post-national citizenship, and the changing role of religion in international politics. The meaning of secular territory is also influenced by international human rights regimes. This theme explains under what conditions the interrelationship between secularity and different regions can occur, why some societies develop their own meaning of secularity while others refuse. Third, the institutionalization that seeks to explain the different forms of secularity institutionalization; what is the concrete form of the notion of secularity institutionalization, how the shift of institutionalization occurs separately from state institutions, and whether there is an alternative to the cohabitation of religion and modernity.<sup>27</sup>

Based on the “multiple secularities” approaches and social problems to be solved, Wohlrab-Sahr and Burchardt divide the forms of secularity into four models. First, secularity for the sake of individual rights and freedoms. Second,

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<sup>25</sup> Hasyim, *State and Religion*, 6.

<sup>26</sup> Berlin Boston De Gruyter, *Working with a secular age: interdisciplinary perspectives on Charles Taylor's Master Narrative* (Berlin: Berlin Boston De Gruyter, 2014), 115.

<sup>27</sup> Marian Burchardt and Monika Wohlrab-Sahr, “Multiple Secularities: Religion and Modernity in the Global Age – Introduction,” *International Sociology* 28, no. 6 (November 2013): 606.

secularity in order to balance or reconcile religious diversity. Third, secularity for the sake of social integration and national development. Fourth, secularity for the sake of the independent development of the functional domains of society. The four basic forms of secularity are related to different guiding ideas: first is the idea of freedom and individuality; second is tolerance, respect, and nonintervention; third is renewal, enlightenment, and modernity; and the fourth is the idea of rationality, efficiency, and autonomy.<sup>28</sup>

### III. STATE AND RELIGION BASED ON PANCASILA AND THE CONSTITUTION

Pancasila was created from the interaction of thoughts and social movements of Indonesian society. The thoughts of the nation's founders were influenced by nationalism theories and movements from both the West and Islam, synthesized with local conditions and viewpoints. Western thought became a reference although aspects of individualism and liberalism were rejected.<sup>29</sup> On the other hand, it is undeniable that Islam was part of the formation of Indonesian nationalism. Islamic organizations like *Sarekat Islam* had aspired for independence.<sup>30</sup> Muslim leaders who referred to Islamic thought, rejected the separation of state and religion, wanted Islam as the state's basis. An Islamic state is, in their view, not a theocracy but a divine democracy or a theo-democracy.<sup>31</sup>

As Indonesia's founders prepared a constitution, the debate over whether Indonesia should be a national state or an Islamic state went through several stages. Each stage shows progress and has implications for the orientation of the state-religion distinction and relationship. Indonesia's declaration of independence on August 17, 1945, was followed a day later by the promulgation of the 1945 Constitution and Pancasila. This was not a final stage that had been preceded

<sup>28</sup> Wohlrab-Sahr and Burchardt, "Multiple Secularities," 890.

<sup>29</sup> Kaelan, *Negara Kebangsaan Pancasila: Kultural, Historis, Filosofis, Yuridis, dan Aktualisasinya* [Pancasila National State: Cultural, Historical, Philosophical, Juridical, and Its Actualization] (Yogyakarta: Paradigma, 2013), 2-3.

<sup>30</sup> Deliar Noer, *Gerakan Modern Islam di Indonesia 1900-1942* [Modern Islamic Movement in Indonesia 1900-1942] (Jakarta: LP3ES, 1980) in Syafii Maarif, *Studi tentang Percaturan dalam Konstituante: Islam dan Masalah Keagamaan* [The Study of the Constituent Assembly: Islam and Religious Issues] (Jakarta: LP3ES, 1985), 79.

<sup>31</sup> M. Natsir, "Persatuan Agama dan Negara" [The Union of Religion and State] in M. Natsir, *Agama dan Negara dalam Perspektif Islam* [Religion and State in Islamic Perspective] (Jakarta: Media Dakwah, 2001), 93.

by social change. On the contrary, social change, especially among Muslims in consideration of Pancasila, occurred in phases in the period surrounding the declaration of independence and then long thereafter.

The first phase was the achievement of the first agreement between the Islamists and the nationalist group on the formulation of Pancasila containing the Jakarta Charter, which has the character of an Islamic state based on the first principle of “Belief in God, with the obligation to carry out Syariah Islam for its adherents”. This principle implies the absence of separation between state and religion. The state has the authority to enter religious territory, namely to use the state power to ensure the implementation of sharia law for Muslims.

The second phase was an agreement at the promulgation of the 1945 Constitution by the Preparatory Committee for Indonesian Independence (PPKI) on August 18, 1945, including the preamble section containing Pancasila with the first principle “Belief in the One Almighty God”. Omission of phrase “with the obligation to carry out Syariah Islam for its adherents” was to accommodate the aspirations of non-Muslim communities and the addition of the phrase “the One Almighty God” accommodated the principle of monotheism in Islam.<sup>32</sup>

With the formulation based on the second agreement in the Preamble to the 1945 Constitution, the state adheres to the principle of belief in God, but this is not related to a particular religion. The state has no obligation or authority to ensure the implementation of religious teachings by respective religious communities. This principle cannot simply be interpreted as a separation between state and religion, but affirms the existence of distinction. The state is not affiliated with any particular religion.

The second phase was intended to be a temporary agreement because the 1945 Constitution was originally created as a temporary constitution. Islamist groups accepted the omission of the Jakarta Charter with the promise that an Islamic state could be championed again after general elections were held to form organs

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<sup>32</sup> John A. Titaley, “Hubungan Agama dan Negara dalam Menjamin Kebebasan Beragama di Indonesia [The Relationship between Religion and the State in Ensuring Religious Freedom in Indonesia],” in Chandra Setiawan and Asep Mulyana (eds.), *Kebebasan Beragama atau Berkepercayaan di Indonesia [Freedom of Religion or Belief in Indonesia]* (Jakarta: Komnas HAM, 2006), 21.

that would draw up a permanent constitution. Hence the debate on the basis of the state reappeared when the Constituent Assembly from 1957 to 1959 sought to form a new constitution. The nationalists wanted to defend Pancasila and the Islamist group proposed Islam as the basis of state. Discussions were tough and unable to reach a final decision because neither group controlled an absolute majority. The government proposed returning to the 1945 Constitution for the sake of political stability and replacing liberal democracy with a more guided democracy.<sup>33</sup> Returning to the 1945 Constitution meant upholding Pancasila.

President Soekarno concluded the debate in the Constituent Assembly by issuing the Presidential Decree of 5 July 1959, which restored the 1945 Constitution and dissolved the Constituent Assembly. The accommodation of the Islamic group's aspiration is embodied in the consideration of the Presidential Decree stating, "That we are certain the Jakarta Charter of July 22, 1945, inspired the 1945 Constitution and is part of the chain of unity with the Constitution." This consideration is viewed by Ismail Sunny as the basis that Islamic law has an authoritative ground in the Indonesian legal system.<sup>34</sup>

The Presidential Decree and the recognition of the Jakarta Charter inspiring the 1945 Constitution constitutes the third phase of Pancasila. After this phase, the issue of the state's basis was not debated in the legal constitutional sphere. The position of Pancasila grew stronger during President Soeharto's New Order administration, which firmly pursued a single ideology policy in both political life and religious social life.<sup>35</sup> The state monopolized the interpretation of Pancasila, which in its development was more directed to provide legitimacy for the state power and policies.

The fourth phase is the contestation of Pancasila's meaning, especially the principle of "Belief in the One Almighty God" in regard to the relationship

<sup>33</sup> Konstituante Republik Indonesia [*Constituent Assembly of the Republic of Indonesia*], *Risalah Perundingan Tahun 1959 [Treatise of Negotiations 1959]* (Jakarta: Konstituante RI, 1959), 27.

<sup>34</sup> Ismail Sunny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia [The Position of Islamic Law in the Indonesian Constitutional System]," in Amrullah Ahmad et al., *Dimensi Hukum Islam Dalam Sistem Hukum Nasional [The Dimensions of Islamic Law in the National Legal System]* (Jakarta: Gema Insani Press, 1996), 133-134; Ernst Utrecht, "Religion and Social Protest in Indonesia," *Social Compass* 25, no. 3-4 (September 1978), 399.

<sup>35</sup> Hasyim, *State and Religion*, 17.

between state and religion. Based on Pancasila, state and religion are two different entities, but there is not yet any agreed constitutional framework on whether they should be separated or not, and if they are related, what form should be taken by the relationship. This contestation is more intense in Indonesia's era of democracy, so it can be seen obviously in the reformation period that followed the resignation of Soeharto in 1998.

Although the meaning of Pancasila, especially the principle of "Belief in the One Almighty God" does not yet have an established constitutional framework, there have been many thoughts based on philosophical studies that try to explain and give meaning to Pancasila, especially in relations between state and religion.

The relationship between state and religion in the concept of Pancasila cannot be separated from the influence of religion in the formation of Indonesian national identity and the distinct function to resist colonialism. Islam has evolved by not only being in private territory, but becoming a spirit in managing public affairs. The Indonesian people have never experienced such bitter experiences as in Europe in the relationship between religion and state, so the policy of political secularization and a neutral state position against religion run by the Dutch colonial government was unsuccessful.<sup>36</sup>

Pancasila is a dynamic institutionalization of Indonesian secularity and experienced shifts of meaning and implementation.<sup>37</sup> Pancasila was born as the result of agreement needed to overcome the issue of the diversity of the Indonesian people, who needed unity or integration in order to realize nationality. Pancasila is a form of secularity for the sake of national unity in order to achieve progress, from independence to the welfare of Indonesian society.<sup>38</sup>

Pancasila is the result of a cultural process parallel to the political secularization since before independence, although it does not produce secularism.<sup>39</sup> With the Pancasila as the basis of the state, then religion is no longer a dominant factor

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<sup>36</sup> Latif, *Negara Paripurna [Plenary State]*, 56.

<sup>37</sup> Burchardt and Wohlrab-Sahr, "Multiple Secularities: Religion," 606.

<sup>38</sup> *Ibid.*, 890.

<sup>39</sup> Rumadi, "Sekularisasi Politik Dalam Pemilu 2014 [Political Secularization in 2014 Elections]," *Koran Sindo*, April 23, 2014.

but must compete with other views. Religious life is more of an individual choice and not the domain of the state. As a profane entity, the state does not merge with any particular religious institution. Each religion retains its own institutions and systems, even if the state has the obligation to protect and facilitate religious life, both through the law and the action of the state. Herein lies Pancasila, which embraces the distinction between the territory of the state and religion as the root of modernization and the rationalization of the state political life.<sup>40</sup>

Pancasila does not embrace the separation between religion and state, but it also does not become the basis of a religious state. Both are distinguished and interconnected but still not mutually occupied. Religion is an area of society where the role of the state is to protect and facilitate. Governance is the territory of the state but religion can play a role by strengthening social ethics and influencing state policies and laws through the political and legal mechanisms. Theoretically, religion becomes a “public religion”, different from the thesis of separation and privatization, and supports the thesis of differentiation. Religion and state are not separated, but are distinguished by the limits of their respective authorities called twin tolerations.<sup>41</sup>

In order to achieve twin toleration, the involvement of religious institutions in political societies must be subject to the principles of public reason and deliberation. Religious teachings may inspire but must be formulated substantially in order to fulfill rational democratic legitimacy, not just literally referring to the scriptural postulates. A public decision is rational if it is based on fact, oriented to the long-term public interest, and involves the participation of all groups. Nevertheless, before the debate on the territory of the state by promoting rationality and facts, the success of the democratic decision-making process is often won first in the internal religious groups. In this process of internal debate, the argument is not free but it must be rooted in a comprehensive religious doctrine.<sup>42</sup>

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<sup>40</sup> Fuad, “Sekularisasi Politik [Political Secularization],” 92.

<sup>41</sup> Latif, *Negara Paripurna*, 43.

<sup>42</sup> Alfred C. Stepan, “Religion, Democracy, and the Twin Tolerations,” *Journal of Democracy* 11, no. 4 (October 2000): 45.

Pancasila is an open ideology.<sup>43</sup> This has consequences of open interpretation by all community groups. The state does not need to monopolize the interpretation of Pancasila because that would definitely lead to a dictatorship. But without a single legitimate interpretation, there will be uncertainty over boundaries between the religious and state areas. Each group has an interpretive space to specify the demarcation between state and religion, and in what affairs and ways does the state have authority to regulate religion. Of course, the interpretation to be used is the interpretation of the state in the legal form. But since religion has room to influence state law then state law can be overrun by majority interpretation. For example, in the Blasphemy Law,<sup>44</sup> the determination of whether an action has deviated from the fundamental teachings of a religion comes from a majority religious group interpretation, which is of course detrimental to a minority. Another case is in the Marriage Law,<sup>45</sup> which determines that marriage is lawful if held according to religion. The terms and procedures of marriage according to a religion are determined by the majority religious views. The entry point of religion using formal legal instruments has become stronger since the Blasphemy Law only determines the six religions recognized by the state.

On the other hand, since the state has space to regulate religion, there is a space for state intervention in religion. The determination of a religion category made by the state to create a distinction between religion and belief, as well as a recognized and unrecognized religion, is a form of state intervention within the religious domain. Considering that the state is a secular institution, the more the area of religious life is governed by the law of the state, the greater the potential for the state's intervention in religion, which also means the more secularization that is formed and operated by secular institutions.<sup>46</sup> The community's adherence to religious law is no longer due to religious considerations, but the compliance of citizens to the law of the state.

<sup>43</sup> Nurcholish Madjid, *Tradisi Islam: Peran dan Fungsinya dalam Pembangunan di Indonesia [Islamic Tradition: Its Role and Function in Development in Indonesia]* (Jakarta: Paramadina, 1997), 14.

<sup>44</sup> Government Regulation No. 1/PNPS/1965 on Prevention of Religious Abuse or Blasphemy, which was later made into law by Law No. 5/1969.

<sup>45</sup> Constitutional Court Law, Law No 1 of 1974, on Marriage.

<sup>46</sup> Iza Rumesten RS, "State Role in Balancing Harmony in a Diversed Society: Regulating Religions in Indonesia," *Brawijaya Law Journal* 5, no. 2 (October 2018): 195.



Based on the explanation above, Pancasila is the basis of Indonesian secularity, which was formed through a historical process since the preparation for independence. Pancasila is a collective agreement to achieve social integration that accommodates the religious character of the Indonesian people, especially the Muslim majority community, while still giving respect for freedom to adherents of other religions and belief. This is in accordance with the first and third models of multiple secularities, namely secularity for the sake of individual rights and freedom, and secularity for the sake of social integration and national development. Acceptance of Pancasila by Islamic groups is a form of secularity in order to balance or reconcile religious diversity.

#### IV. LEGAL POLICY ON RELIGIOUS (ISLAMIC) LAW

For colonial states, the reality of legal pluralism run by the colonial government is of serious concern as it places citizens in unequal conditions and often discriminates on the basis of race, religion, ethnicity, and regionalism. The struggle for freedom is not merely liberation but also to end discriminatory legal treatment. Therefore, one character of the post-colonial state is to reject legal pluralism. Legal unification is a state policy to replace the plural colonial law. Legal unification contains the consequences of not adopting different laws based on the religion held by the community. However, current developments have been different since many countries have adopted legal pluralism, particularly in private areas.<sup>47</sup>

A single, unified legal system development orientation can be seen in Indonesia mainly during founding President Soekarno's Old Order and the beginning of Soeharto's New Order. The orientation of the national law's development in the Broad Guidelines of State Policy (GBHN)<sup>48</sup> is the establishment of a national legal system based on the source of national law order originating from Pancasila and the 1945 Constitution. In the field of religious life, the policy is to improve

<sup>47</sup> Mirjam Künkler and Yüksel Sezgin, "The Unification of Law and the Postcolonial State: The Limits of State Monism in India and Indonesia," *American Behavioral Scientist* 60, no. 8 (July 2016): 988.

<sup>48</sup> The Broad Guidelines of State Policy (*Garis-Garis Besar Haluan Negara*, GBHN) were promulgated as a decision of the People's Consultative Assembly as the highest state organ, based on the pre-amendment 1945 Constitution.

the religious life and belief in God Almighty, which must be in harmony and in accordance with Pancasila.

The state stands between the two interests of realizing a simple and definitive legal unification and accommodating the plurality of laws in society. The existence of the Marriage Registration Law<sup>49</sup> during the Old Order, then later the Marriage Law, Compilation of Islamic Law (KHI),<sup>50</sup> Zakat Management Law,<sup>51</sup> Hajj Law,<sup>52</sup> Waqf Law,<sup>53</sup> Sharia Banking Law,<sup>54</sup> and State Sharia Securities Law (SBSN)<sup>55</sup> are widely seen as successes of the Islamic group in incorporating Islamic law into state law, but in fact it is more a necessity to unify the law. There are three objectives of those laws. First, is to unify the laws that apply to Muslims. Second, is to maximize the economic potencies of Muslims. Third, to protect and facilitate the implementation of religious life. These three objectives are secular because they are only related to social affairs and made by the state as a secular institution.

The goal of Islamic law unification, including the simplification of Islamic groups, can be clearly seen in the formation of the Marriage Law and KHI. The Marriage Law was established to be applicable to all citizens. This unity is manifested in the form of administrative and procedural unity, although substantively determined by the respective religions and beliefs. The KHI arose because of the need of the Ministry of Religious Affairs and the Supreme Court for streamlined Islamic law applicable in religious courts to decide cases of marriage, inheritance, and waqf.<sup>56</sup> The Supreme Court, as a judicial supervisor of religious courts, lacked an authoritative source of material Islamic law, which led to different verdicts among the courts, resulting in public unrest.<sup>57</sup>

<sup>49</sup> Law No. 22 of 1946.

<sup>50</sup> President Instruction, Law Number 1 of 1991.

<sup>51</sup> Law No. 23 of 2011 on Zakat Management.

<sup>52</sup> Law No. 13 of 2008 on Hajj Management.

<sup>53</sup> Law No. 41 of 2004 on Waqf.

<sup>54</sup> Law No. 21 of 2008 on Sharia Bank.

<sup>55</sup> Law No. 19 of 2008 on State's Sharia Securities.

<sup>56</sup> Mohamad Abdun Nasir, "The Kompilasi Hukum Islam and Debates on Shari'a: Reconsidering Islamic Law in Indonesia" [The Compilation of Islamic Law and Debates on Shari'a: Reconsidering Islamic Law in Indonesia], *al-ahkam* 22, no. 2 (2012): 198.

<sup>57</sup> Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia [Indonesian Fiqh: Compilation of Islamic Law and Counter Legal Draft of Compilation of Islamic Law in the Frame of Indonesian Legal Politics]* (Cirebon: Institut Studi Islam Fahmina [Fahmina Institute of Islamic Studies], 2014), 157.

The second goal, maximizing the economic potential of Muslims, can be seen in the formation of the Sharia Banking Law, Waqf Law, SBSN Law, and Zakat Management Law. The Zakat Law was established so that zakat can be utilized and accounted for to improve the welfare of the community, especially alleviating poverty and eliminating social disparities. The aim is to manage zakat professionally, including by the provision of consideration and supervision organs.<sup>58</sup> The Waqf Law does not merely place waqf as part of worship that should be facilitated but instead sees the high economic potential to advance general welfare as one of the goals of the state. Therefore, waqf should be developed for the social benefits in accordance with the principles of sharia.

The main objective of the formation of the SBSN Law is to increase state revenue in order to drive the national economy sustainably. The formation of SBSN is expected to mobilize public funds widely and develop the economic and financial sectors of sharia as part of the national economic system.<sup>59</sup> The Sharia Banking Law was made to respond to the needs of the people of Indonesia for sharia banking services and products that are increasing and varied.<sup>60</sup> Sharia banking arrangements are also needed to raise public funds to drive the national economy.

The purpose of facilitating worship can be seen from the formation of the Hajj Law. This law is a form of recognition of citizens' freedom to worship, which raises the obligation for the state to facilitate such worship to run safely, orderly, and smoothly.<sup>61</sup> The role of the state in pilgrimage management is also considered important because it concerns the good name and dignity of Indonesians abroad, especially in Saudi Arabia, considering the mass implementation of the hajj.<sup>62</sup>

One law that leads to legal pluralism is the Aceh Special Autonomy Law,<sup>63</sup> which provides space for the enforcement of Islamic law, through the establishment of regional law, which is different from national law. However, this condition

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<sup>58</sup> General Elucidation, Law No. 38 of 1999 on Human Rights.

<sup>59</sup> Consideration of Law No. 19 of 2008 on State Sharia Bond.

<sup>60</sup> Ibid.

<sup>61</sup> Consideration of Law No. 17 of 1999 on Organizing the Pilgrimage.

<sup>62</sup> General Elucidation of Law No. 17 of 1999 on Organizing the Pilgrimage.

<sup>63</sup> Law No. 11 of 2006 on Aceh's Governance.

cannot be separated from the background of the conflict in Aceh province underlying the granting of special autonomy. Moreover, the Islamic law imposed thus far in Aceh relates only to some minor criminal offenses concerning decency.<sup>64</sup> Similarly, “sharia” local regulations in some areas of Indonesia generally only regulate decency.<sup>65</sup>

## V. THE ROLE OF THE CONSTITUTIONAL COURT

To ascertain the Indonesian Constitutional Court’s role in determining the Pancasila-based relationship between state and religion, and how the Constitutional Court’s decisions affirm differentiation, an analysis of the following decisions is presented.

### 5.1 The Limitation of Religious Court Authorities

In case Number 19/PUU-VI/2008, a citizen named Suryani filed a petition for judicial review of Law Number 7 of 1989 as amended by Law No. 3 of 2006 (the Religious Court Law). The petitioner filed for Islamic criminal law to be enforced in Indonesia as one of the Religious Court’s jurisdictions. The petitioner argued that Islamic law with all its branches, including criminal law (*jinayah*), must be applied because Indonesia is a state based on “Belief in the One Almighty God”. The petitioner also argued that adherents of every recognized religion may ask the state to enforce his or her respective religious laws. According to the petitioner, Article 49 Paragraph (1) of the Religious Court Law is contradictory to Article 28I Paragraph (1) of the Constitution, which states, “the right of religion ... is a human right that cannot be deprived under any circumstances”, and Article 28I paragraph (2), which states, “Every person has the right to be free from discriminative treatment based upon any grounds and has the right to protection from such discriminative treatment”, for excluding the authority to try Islamic criminal cases.

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<sup>64</sup> Amran Suadi and Mardi Candra, *Politik Hukum Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah [Political Law Perspective of Islamic Civil and Criminal Law and Sharia Economics]* (Jakarta: Prenadamedia, 2016), 390-392.

<sup>65</sup> Robin Bush, “Regional ‘Sharia’ Regulations in Indonesia: Anomaly or Symptom?” in Greg Fealy and Sally White (eds.), *Expressing Islam: Religious Life and Politics in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2008), 176.

The Constitutional Court rejected the petitioner's argument, declaring that Indonesia is not a religious state although it is also not a secular state. Indonesia is not a religious state based solely on one particular religion, but Indonesia is also not a secular state that does not pay any attention to religion and devotes full religious affairs to individuals and society. In relation to the foundations of the Pancasila philosophy, national law must ensure the integrity of the ideology and integration of the territory of the state, and establishing justice and civility religious tolerance. Thus, national law becomes the integrating factor that unifies the nation. The decision held that state service to citizens is not based on majority or minority adherents of religion, tribe, or race.

In the context of constitutional law, Islamic law is not a formal source of law, but the material source of law. Islamic law is indeed a source of national law, but it is not the only one, because in addition to Islamic law, customary law and Western law as well as other legal traditions became sources of national law. Therefore, Islamic law can be one of the material sources as an ingredient of national law. Islamic law may be used in conjunction with other sources of law.

## **5.2 Polygamy: State Authority to Regulate Muamalah**

The petitioner, M. Insa, filed a petition for a judicial review of the Marriage Law, as it would not allow him to perform polygamy unless he could meet certain conditions, including his first wife's consent. Polygamy permits are granted by the courts if they meet the terms and conditions of the Marriage Law. The petitioner argued that some aspects of the Marriage Law are contrary to Islamic law, including Article 3 paragraph (1), which states that in principle marriage is monogamy.

In deciding this case (Decision No. 12/PUU-V/2007), the Constitutional Court not only used constitutional arguments, but also a sharia argument. According to the Court, polygamy is not an Islamic creation, because before Islam revealed polygamy has been practiced widely and for a long time. Instead, the coming of Islam is to gradually regulate the existing practice of polygamy to ensure it is not applied arbitrarily by men.

The Constitutional Court stated that the purpose of marriage is to create peace of heart (*sakinah*), which can only be created if both partners keep *mawadah*, which is to love each other without expecting something and being willing to sacrifice to give joy. To achieve this, the law requires the permission of an existing wife if the husband wants to be polygamous. The Constitutional Court also stated that according to Islamic law, polygamy is permissible (*mubah*), not a necessity or recommended, provided that it can do justice. If not able to give justice, polygamy may become *makruh* (objectionable, but not prohibited).

Furthermore, the Constitutional Court considered that the state is the highest organization in society formed based on agreement. The state not only has the authority to govern, but also the obligation to regulate to ensure justice. Therefore, the state also has an obligation to support the realization of a *sakinah* family.

The Constitutional Court affirmed that polygamy could be regulated by human beings because from the religion side, marriage is part of the human relationship (*muamalah*) and not the individual relationship with God (worship). Worship is arranged in detail in the Qur'an and cannot be changed, in contrast to *muamalah*, which only sets the basic principles in the Qur'an and leaves the detailed settings as human authority. Polygamy is not worship, but *muamalah*, so the state is not prohibited to determine the requirements that must be met.

### 5.3 Blasphemy Law

In response to a petition against Indonesia's Blasphemy Law, the Constitutional Court made a decision that affirmed the relationship between state and religion. This verdict can be interpreted as "religiousation" because it incorporates religious judgment as one element in criminal law. Decision Number 140/PUU-VII/2009 concerned the review of Law Number 1/PNPS/1965 on the Prevention of Religious Abuse and/or Blasphemy (the Blasphemy Law).

The case was filed by seven non-governmental organizations and four religious leaders, namely Abdurrahman Wahid, Musdah Mulia, M. Dawam Rahardjo, and Maman Imanul Haq. The provisions of the petition covered Articles 1 to 4 of the Blasphemy Law. The petitioners presented four main arguments. First, Article 1

of the Blasphemy Law is discriminatory because it gives the right to determine “deviant interpretations” and “deviant religious activities” to the state, which the state cannot essentially do. This is because the state is not entitled to declare a belief as deviated or perverted because the question of belief is the domain of God and the private domain of the individual. The petitioners argued Article 1 of the Blasphemy Law is contrary to the guarantee of freedom to believe, to express thoughts and attitudes according to conscience, and therefore contrary to the principles of the rule of law.

Second, Article 2 paragraph (1) and paragraph (2) of the Blasphemy Law are contrary to the principle of equality before the law and the principle of legal certainty because they allow the government to prohibit and dissolve religious activities that it considers to be deviant. Such norms constitute a restriction of freedom of association, assembly, and expression as guaranteed by the Constitution.

Religious manifestation (*forum externum*) including the right to associate, organize religious institutions, and to gather in worship (*forum internum*) are part of freedom of religion. Dissolution and prohibition of an organization or belief based on mere interpretations and activities considered in Article 1 of the Blasphemy Law cannot be justified in a rule of law, because it would violate human rights.

The petitioners argued Article 2 paragraph (2) of the Blasphemy Law is contradictory to the principle of the rule of law because the procedure of an organization’s dissolution is contrary to the principle of tolerance and diversity. Organizational dissolution and prohibition should be conducted through an independent and open court process taking into account the right to freedom of religion, diversity, and tolerance.

Third, Article 3 of the Blasphemy Law is considered discriminatory because it imposes a five-year prison sentence for persons, adherents, and members of a banned organization. According to the petitioners, this is a form of legal uncertainty as it poses a coercion threat that would lead to criminalization of religious freedom.

The act of interpreting and conducting religious activities is the *forum internum* of the right to freedom of belief, expressing thoughts and attitudes, according to one's conscience. Meanwhile, deliberate actions that publicly convey, advocate or obtain public support for religious interpretation and activities are the realization of the right to freedom of thought, religion and belief, so that they cannot be arbitrarily restricted. Article 3 is a limitation for coercive purposes because to declare those certain interpretations or activities as deviant are based on only one single interpretation.

The general elucidation of the Blasphemy Law says, "in recent years belief has multiplied and evolved in a very dangerous direction to the existing Religions". This shows that one of the aims of the Blasphemy Law is to protect recognized religions rather than protect individuals to express their own religion and beliefs. The protection of these recognized religions lies in another section in the elucidation of the Blasphemy Law, which states, "this Presidential Decision first prevents the occurrence of misappropriation of religious teachings which are regarded as fundamental teachings by the scholars of the religion concerned".

Fourth, Article 4 point (a) of the Blasphemy Law, which supplements Article 156a in the Criminal Code, is considered contradictory to the 1945 Constitution. The words "hostility", "abuse" and "defamation" in Article 156a are not measurable as they relate to the subjective assessment of the character, religious feeling, and worship.

Historically, the concept of "offense against religion" sought to protect the sanctity of religion itself, not the religious freedom of its adherents (individuals). Religion needs to be protected from the actions of people who can degrade and defame religious symbols, such as God, the Prophet, and the scriptures. However, because of the absence of a single religious understanding, who can behave in the name of religion to stand as a defender of religion?

The Constitutional Court rejected the petition. This ruling was based on the basic argument of the recognition of religious values in the Constitution and the first principle of Pancasila, the "Belief in the One Almighty God". Based on that principle, the understanding of the Indonesian rule of law does not have to be



the same as the concept of *rechtsstaat* (law) and the rule of law. The principle of the Indonesian rule of law should be understood from the perspective of the 1945 Constitution, which puts the principle of “Belief in the One Almighty God” as the main principle, as well as the religious values underlying the nation, not the separation between religion and state.

The Constitutional Court acknowledged that belief in God is the domain of the *forum internum*. However, that does not include freedom of non-religion. In the name of freedom, a person or a group cannot erode the religiosity of society that has been inherited as the values that imbue various laws and regulations in Indonesia.

The Indonesian Constitution does not allow for the promotion of freedom of non-religion, freedom for anti-religious promotion and it is not permissible to insult religious teachings or scriptures that are the source of religious beliefs or insult the name of God. This element indicates the main difference between the rule of law of Indonesia and the Western rule of law. In the government, the establishment of law, as well as the judiciary, the divine base and the teachings and religious values become the measuring tool for determining good law or bad law, even to define constitutional or unconstitutional law.

Based on the framework as described above, the Constitutional Court refers to the restriction of human rights on the basis of “religious values” as mentioned in Article 28J paragraph (2) of the 1945 Constitution. This is in contrast to Article 18 of the International Covenant on Civil and Political Rights (ICCPR) that does not include religious values as a limitation of individual freedom. Consequently, the state has a role to balance between human rights and basic obligations to realize a just human right. The state has a role to ensure that in the exercise of religious freedom one does not hurt the freedom of religion of others. This is where the state will realize its goal to achieve the best life possible.

The Constitutional Court considered that the Blasphemy Law does not impose restrictions on religious freedom, but restricts the expression of feelings or acts of hostility, abuse or defamation of a religion and restricts interpretation or activities that deviate from the main religious teachings. The Blasphemy Law

is considered not to prohibit a person from interpreting a religion or performing religious activities that resemble a religion embraced in Indonesia individually. That which is forbidden is intentionally publicly conveying, advocating or seeking public support, to make interpretations of a religion held in Indonesia or to carry out religious activities that resemble religious activities of that religion, where such interpretations and activities deviate from the main religion. If it is not regulated then it is feared such action could cause clashes and horizontal conflict, unrest, division, and hostility in society.

Freedom of belief, according to the Constitutional Court, is a freedom that cannot be limited by coercion and cannot even be judged, because it is in the mind and heart of a person. However, if the freedom to express thoughts and attitudes according to their conscience (*forum externum*) has to do with relationships with other parties in society, then such freedom can be limited.

The Constitutional Court stated that although the interpretation of beliefs on religious teachings is part of the freedom of *forum internum*, the interpretation must be in accordance with the main religious teachings through the right methodology based on the relevant religious teachings of their respective scriptures, so the freedom to do interpret a religion is not absolute. Interpretations that are not based on methodologies commonly recognized by religious adherents and not based on the relevant scriptural sources will generate reactions that threaten public order and security when presented or performed in public. In such cases, according to the Constitutional Court, restrictions can be applied. In this consideration, the Constitutional Court does not consider that in the Blasphemy Law there is no element of security and public order threats.

The Constitutional Court views that every religion has a commonly accepted main doctrine, so that the main religious teachings are determined internally by respective religions. Indonesia, as a religious state, has a Ministry of Religious Affairs that serves and protects the healthy growth and development of religion. The Ministry of Religious Affairs has organizations and tools to collect opinions from within a religion. The state does not autonomously determine the main religious teachings of a religion, but only based on the internal agreement of

religion concerned, thus there is no statism in determining the main religious teachings on the Blasphemy Law.

The Constitutional Court declared that decisions in the form of “orders and stern warnings” against a belief or idea is not a form of coercion that violates human rights. The State has a function as a social control and is given authority based on the mandate of the people and the constitution to regulate the social life in accordance with the 1945 Constitution. Therefore, in the event of a situation that causes conflict and disruption of public order, the only authority authorized to impose such compulsion is the state. If this authority were to be revoked, the state would no longer have a role to exercise law enforcement against irregular acts that abuse and/or tarnish religion, violate the law and disrupt public order. Revocation of Article 2 paragraph (1) of the Blasphemy Law would lead to more dangerous anarchy.

The Constitutional Court actually advised that the Blasphemy Law should be revised, both within the formal scope of legislation and substantially, in order to have material elements that are more clarified so as not to cause misinterpretation in practice. However, since the Constitutional Court does not have the authority to edit laws, but only to declare them constitutional or unconstitutional, then considering the substance of the Blasphemy Law as a whole, the Constitutional Court declared the Blasphemy Law to be constitutional. The amendment of the law is the authority of legislators through the legislation process.

#### **5.4 Inter-religions Marriage**

Case Number 68/PUU-XII/2014 involved a petition for a judicial review of Article 2 paragraph (1) of Marriage Law, which states, “a marriage is legitimate if it has been performed according to the laws of the respective religious beliefs of the parties concerned”. The petitioners argued this provision is contrary to the equality before the law and government under the 1945 Constitution’s Article 27 paragraph (1) and Article 28D paragraph (1) on the right to form families and have children through legal marriages, as well as the right to freedom of religion and belief. They argued the provision is also contrary to the Constitution’s Article

28E Paragraph (1) and Paragraph (2), Article 29 Paragraph (2), and the right to freedom from discriminatory treatment under Article 28I Paragraph (2).

According to the petitioners, the provision implies the illegality of marriage that is carried out outside the state's interpretation of the bride and groom's respective religions and beliefs. The state "insists" that every citizen be subject to its interpretation of a religion or belief. The simplest example can be seen in the issue of inter-religious marriage. Each religion and belief have different views on inter-religious marriage. In fact, there can be different views in one religion about the validity of inter-religious marriage. The result is a lack of clarity on the legal status of the inter-religious marriage, whether it is legal or illegal.

The petitioners requested that the provisions of Article 2 paragraph (1) of the Marriage Law be amended to, "Marriage is valid, if carried out according to the law of each person's religion and belief, as long as the interpretation of religion and belief is submitted to the prospective bride."

The Constitutional Court did not answer the problem on the interpretation of religious law, but emphasized the relationship of state and religion, and its consequences on the Marriage Law. The Constitutional Court declared that the "Divine Principle" in the 1945 Constitution is a manifestation of religious recognition. As a state based on the belief in the "One Almighty God", actions or deeds committed by citizens have a close relationship with religion. One of the actions closely related to religion is marriage.

The aim of marriage is forming a happy, everlasting family or household based on belief in the "One Almighty God". A marriage is considered valid if carried out in accordance with the law of each religion or belief and is recorded according to such law. As a contract or agreement, marriage is a legal relationship between a man and a woman to live together as husband and wife. The contract is a formal relationship, both for those who bind themselves or for others in society. As an inner or spiritual bond, marriage is the affinity based on same willingness and sincerity between a man and a woman to live together as husband and wife. The contractual and spiritual bond in marriage is also a clear form of

assertion that a man and a woman want to form a happy and mortally durable marriage and family.

In the life of the nation and state based on Pancasila and the 1945 Constitution, religion becomes a foundation and the state has an interest in marriage. Religion is a foundation for the individual community. The state also plays a role in providing guidance to ensure the legal certainty of life together in the bonds of marriage. In particular, the state provides protection to form families and to have children through legitimate marriages that are manifestations and guarantees of human survival. Marriage should not be seen only from a formal aspect, but must also be seen from the spiritual and social aspects. Religion establishes the validity of substantive marriage, while the state establishes administrative legitimacy.

### **5.5 Recognition of Beliefs**

Indonesia's recognition of six official religions means that native-faith groups had long been unable to state their beliefs on their mandatory identity cards, thereby denying their right to freedom of belief. This situation prompted four citizens of indigenous beliefs to petition the Constitutional Court for a review of Law Number 23 of 2006 as amended by Law Number 24 of 2013 on Population Administration (the Population Administration Law).

On 7 November 2017, the Constitutional Court ruled on case Number 97/PUU-XIV/2016 on the review of the Population Administration Law. In this decision, the Court emphasized that religion and belief are two different things but have equal status.

The petitioners complained they could not put their beliefs on their ID cards since their beliefs are not recognized by the state based on Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law. The petitioners argued the provisions are contrary to the rule of law principles as contained in the 1945 Constitution's Article 1 paragraph (3), the equality of citizens before the law in Article 27 paragraph (1), and the right of citizens not to be discriminated as guaranteed by Article 28I paragraph (2).

The Constitutional Court stated that the right to adhere to a religion or belief is a constitutional right, not a gift from the state. The state is formed precisely to protect (which also means respecting and guaranteeing the fulfilment of) such rights. In the context of Indonesia, this statement is no longer merely something of doctrinal value but has become the norm in the Constitution and therefore binds all branches of state power and citizens.

Article 28E paragraph (1) and paragraph (2) of the 1945 Constitution covers the state's recognition of the right to freedom of religion and belief for anyone, and Article 29 of the 1945 Constitution is an affirmation of the role that must be carried out by the state to ensure that every citizen is free to embrace religion and beliefs. Article 28I paragraph (1) of the 1945 Constitution affirms that the right to freedom of religion and belief is included in the group of rights that cannot be deprived under any circumstances. The state, especially the government, has the obligation and responsibility to respect, protect, and fulfil these rights under Article 28I paragraph (4) of the Constitution.

Article 28E paragraph (1) and paragraph (2) and Article 29 paragraph (2) of the Constitution place religion in relation to belief, where religion is belief itself. However, this provision can also be interpreted that religion and belief are two different things or not the same, but both are recognized for their existence. Such understanding arises because textually Article 28E paragraph (1) and paragraph (2) of the Constitution regulates religion and belief separately.

The formula used by the Constitution mentions the word "religion" and the word "belief" simultaneously by using the conjunction "and". From the technical aspect of norm formulation, the use of the word "and" shows a cumulative nature. Thus, the word "religion" and the word "belief", which are formulated cumulatively, indicate that "religion" and "belief" are two things that can indeed be grouped differently.

Article 61 and Article 64 of the Population Administration Law are under the sub-chapter "Population Documents". A population document is one that has legal force as authentic evidence, which includes the regulation of a number

of citizens' rights, including freedom of religion and belief. Efforts to carry out an orderly population administration must not reduce the rights of the citizens, including freedom of religion and belief.

The provisions in Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law, regulate that the "religion" is recognized religion in accordance with statutory regulations. In other words, freedom to adhere a religion is limited to religion that recognized in accordance with statutory regulations. Consequently, *a contrario*, the responsibility or constitutional obligation of the state to guarantee and protect freedom of religion is limited to citizens who adhere to a recognized religion. This is not in line with the spirit of the 1945 Constitution, which explicitly guarantees that every citizen is free to embrace religion and belief and to worship according to that religion and belief. More fundamental, Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law implicitly construct the freedom to adhere to a religion as a gift of the state.

The Constitutional Court stated that the word "religion" as contained in Article 61 paragraph (1) and Article 64 paragraph (1) of the Population Administration Law must be declared contrary to the 1945 Constitution as long as it is not interpreted as including "belief". That is, the word "religion" in Article 61 paragraph (1) and Article 64 paragraph (1) of the Population Administration Law must be interpreted as including "belief". Therefore, the religion column on Family Cards and ID cards for believers is filled with "believers" and not left blank or marked with a line.

Based on the analysis of decisions above, it shows that the Constitutional Court has used the pattern of relations between the state and religion based on Pancasila to review several laws related to religion. The Constitutional Court places Pancasila as a reference in determining the differences and relations between the state and religion. There is no decision of the Constitutional Court that shows a tendency toward becoming a religious state or becoming a secular

state. The state and religion are interrelated within certain limits. This is in line with Hosen's research, which concludes that there is no indication of efforts to change the ideology or put the sharia Islam above the Constitution. Islamic law goes along with national law and can even be restricted by national law. On the other hand, the decisions of the Constitutional Court also emphasize an understanding different to that of Western rule of law, which uses religion as one measure of whether a law is good or not, or even constitutional or not.<sup>66</sup>

In line with that, Alfitri argues that the Constitutional Court declares itself as a legal authority in interpreting the Constitution, and therefore has the power to interpret and limit Islamic law in Indonesia under the Constitution. The Constitutional Court declares itself not bound by the classical interpreters of Islamic law and their opinions. The Constitutional Court has established its power to interpret and limit Islamic law in accordance with the state agenda (such as the enforcement of human rights).<sup>67</sup>

The analysis of the decisions above also shows that the secularity of Pancasila fulfills four models of secularity based on the theory of multiple secularities. In Decision Number 19/PUU-VI/2008 it was emphasized that based on Pancasila, national law must be able to ensure the ideological and territorial integrity of the state as well as uphold justice and religious tolerance. National law is a unifying factor for the nation that serves not on the basis of adherents of the majority or minority religions. This represents all models of secularity, namely for the sake of individual rights and freedoms; in order to balance or reconcile religious diversity; for the sake of social integration and national development; and for the sake of the independent development of the functional domains of society.

Decision Number 19/PUU-VI/2008 also confirms that although religious interpretation is an area of freedom in the *forum internum*, interpretation must be in accordance with main religious teachings so as not to cause reactions that threaten public order and security. This limitation of interpretation is a model of

<sup>66</sup> Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law* 16, no. 2 (March 2016): 8-9.

<sup>67</sup> Alfitri, "Putusan Mahkamah Konstitusi Sebagai Tafsiran Resmi Hukum Islam di Indonesia [Constitutional Court Decisions as the Official Interpretation of Islamic Law in Indonesia]," *Jurnal Konstitusi* 11, no. 2 (June 2014): 313.



secularity that is needed to achieve social integration and national development. The secularity model for social integration and national development can also be found in Decision Number 12/PUU-V/2007, which states that the state has an obligation to support the formation of a *sakinah* family by limiting polygamy even though according to religious law it is permissible.

Decision Number 140/PUU-VII/2009 recognizes that belief in God is the domain of the *forum internum*. However, the state has a role to ensure that in the exercise of religious freedom does not hurt the freedom of religion of others. The state can limit activities that are part of religious freedom so as not to interfere with the rights of others and to further the quality of life of the community. On the one hand, this is a form of guarantee of rights and freedoms, and on the other hand it is an effort to realize social integration.

In Decision Number 68/PUU-XII/2014, the Constitutional Court stated that marriage is not only a contract but also a spiritual bond based on religion. Therefore, the legal requirements for marriage based on religion, which are the substance of the Marriage Law, do not conflict with Pancasila. However, a marriage must be registered according to state law. State law and religious law have different domains in the marriage process. This is a form of secularity for the sake of individual rights and freedoms and for the sake of social integration and national development.

Decision Number 97/PUU-XIV/2016 affirms that the state was formed to protect rights, including the right to adhere to a religion or belief. Every religion and belief should get the same service. Religion and belief are two different things, but both must be treated equally based on their position towards the state, not against other religions or beliefs. Therefore, “belief” must also receive the same and equal services as “religion”, including to be included on the national ID card. The view of a religion toward another religion or belief may not be the state’s view. This is a form of differentiation between religious and state areas that is needed for the sake of individual rights and freedoms.

## VI. CONCLUSION

The Constitutional Court has a significant role in determining the differentiation and relationship between state and religion. The decisions of the Constitutional Court affirm and sharpen the differentiation and relations between state and religion based on Pancasila. There is a clear distinction between state institutions, state law and religion. The state remains in a profane or worldly realm with all its rules and devices, which are also established and carried out in a secular manner. Religion could influence and enter as the substance of state law, but the state could limit the religious law that becomes the substance of state law.

Through its decisions, the Constitutional Court plays a role in affirming Indonesian secularity based on Pancasila, thereby fulfilling four models of multiple secularities, namely secularity for the sake of individual rights and freedoms, secularity in order to balance or reconcile religious diversity, secularity for the sake of social integration and national development, and secularity for the sake of the independent development of the functional domains of society.

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