
Historical Development over Religious Liberty in the Indonesian Constitution

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Abstract

This paper finding is the existence of recurring unsettled negotiation between the Islamists and the Nationalists during three important constitutional works in Indonesia (the making of 1945 Constitution; the work of Konstituante to draft a new constitution in 1955-1959; and the constitutional amendment 1999-2002). Such fragile political consensus creates a legal gap in the Indonesian legal system: constitutional guarantee on religious liberty on one hand, and discriminative derivative laws and court decisions in relate to religious liberty on the other hand. This paper argues the legal gap happens because historically, discourse over religious liberty never settled during constitutional debates. It leads to ambiguous constitutional articles on religious liberty such as the seemingly contradicting Article 28 I (1) on absolute rights and Article 28 J (2) on the limitation of rights. The ambiguous constitutional articles give no solid basis for protecting religious liberty, especially for minority, although explicitly Article 29 (2) of the Constitution stating, 'The State guarantees freedom of every inhabitant to embrace his/ her respective religion and to worship according to his/ her religion and faith as such'. This paper will explain the unsettled negotiations during the making of Pancasila and the Jakarta Charter in 1945; the debate within Konstituante's work in 1959; and the debate during constitutional amendment in 1999-2002.

Keywords: Religious liberty; Constitution; Indonesia

I. INTRODUCTION

Indonesia fails to protect minority's religious liberty although it recognises and guarantees religious liberty under The Constitution and its derivative laws. This paper mainly argue that such failure is due to a legal gap between the Constitutional article and its interpretation by the Indonesia government through its legal policy and the Court through its decision. The legal gap happens because historically, discourse over religious liberty never gets settled during constitutional debates. There is a need to explain the gap, not to justify the phenomenon, but to understand the context and the root of the problem in search for a better way to solve it. The following parts of this paper will explain the recurring unsettled negotiation between the Islamists and the Nationalists during three important constitutional works in Indonesia (the making of 1945 Constitution; the work of parliamentary-body *Konstituante* to draft a new constitution in 1955-1959; and the constitutional amendment 1999-2002). It will further proves that constitutionality over religious liberty in Indonesia was a result of a fragile political consensus between the Islamist and the Nationalist.

II. METHOD

This paper examines historical context to understand the legal text on religious liberty in the Indonesian Constitution. In doing so, the author read and compares archives related to the making of the Indonesian Constitution in 1945, 1959, and 1999-2002 including legal documents such as the Presidential Decree dated 5 July 1959 and literatures related to the discourse such as Soekarno's '*Dibawah Bendera Revolusi*'. The author also examines dialogues and speeches during constitutional meeting through comprehensive minutes of meetings to understand the debate between the two interest parties in this study: the Nationalist and the Islamist.

III. RESULT AND DISCUSSION

I will start the discussion by explaining the making of Pancasila as the State's ideology and the ultimate source of law in Indonesia. The discussion on Pancasila will be helpful in understanding the construction of the relation between religion and the state in Indonesia especially in relate to the first sila, 'The One and Only God' being explained in the following part. It will then followed by the discussion of Jakarta Charter, the Constitution, the 1959 Presidential Decree, and the Constitutional Amendment in 1999-2002.

The Birth of Pancasila

Legally speaking, the wording of Pancasila is mentioned in the preamble of the Indonesian Constitution. Thus, it is part of the Constitution as the highest law applicable in Indonesia. Beyond the legal system, Pancasila in Indonesia is regarded as the philosophical foundation of the state (*Philosophische Grondslag*) (Atmoredjo, 2016). It consists of five principles: The One and Only God (*Ketuhanan Yang Maha Esa*); Just and Civilized Humanity (*Kemanusiaan Yang Adil dan Beradab*); The Unity of Indonesia (*Persatuan Indonesia*); Government based on Wisdom in Representative Democracy (*Kerakyatan Yang Dipimpin Oleh Hikmah Kebijaksanaan Dalam Permusyawaratan Perwakilan*); and Social Justice (*Keadilan Sosial Bagi Seluruh Rakyat Indonesia*).

Despite the outstanding wording of Pancasila, I would argue the making of Pancasila was problematic, mainly on the issue of representation. With the fact of Indonesia having multicultural society, BPUPKI the appointed team who created *Pancasila*, was dominated by the Nationalists and the Islamists who had been debating on whether or not to use Islamic law in their idea of Indonesia as an independent state. The debate between Nationalists and Islamists parties in Indonesia can be tracked back to the early 1900s when civil movements for independence started to rise to fight against the Dutch colonial government. *Budi Oetomo*, regarded as the first Indonesian organization established in 1908, and *Partai Nasional Indonesia* established in 1927 were among nationalist movements. In the other side, *Sarekat Dagang Islam* which later changed into *Sarekat Islam* was the first Islamist movement created in 1905, followed by *Masyumi* and other Islamist parties seek to establish Islamic law in their image of Indonesia as an independence state.

In the 1930s, Natsir who represented the Islamists and Soekarno who represented the nationalists rebutted each other's arguments about how their idea of Indonesia as an independent state will embrace Islam. While Soekarno promoted secularism, as he believed religious issues to be classified as private matters, Natsir in opposition argued that Islam should be recognised in the public sphere. Hence, Natsir idea of an independent state in Indonesia was a state where Islamic law will regulate the life of the nation (Subekti, 2008).

The debate between Islamists and nationalists took a further level in 1940s when the Japanese government lost its control over 'Indonesia' after they got lost in the world war II (Benda, 1955; Ricklefs, 2012). During the transition, Japanese government created a team (*Dokuritsu Junbii Chosakai*/BPUPKI) to prepare the Indonesian independence on 1 March 1945. There were 69 representatives from different social classes and status included in the team. The most important issue discussed by the team was a design of the state ideology as the foundation of the new born Indonesia.

The Islamist representatives in BPUPKI was led by Ki Bagoes Hadikoesoemo, Abdul Kahar Muzakki, Abikusno Tjokrosujoso, and A. Wahid Hasjim who argued for an Islamic state in Indonesia (Effendy, 1994). They further argued that religion and state should not be separated (Subekti, 2008). On 31 May 1945, Ki Bagoes Hadikoesoemo delivered his speech on behalf of the Islamist party. His claim was that religion (Islam) is the base of unity as it builds fair government and upholds justice, based on democracy and deliberation as well as religious liberty (Latif, 2011). The Islamists were also proposing Islam to be the foundation of the state (Indonesia). Following after, the Islamists firmly propose sharia or Islamic law to be applied in Indonesia; that the Indonesian president must be Muslim; and that Islam will be the official religion of Indonesia (Subekti, 2008).

As a counter-opinion, the Nationalists were also delivering speech before the meeting. There were three important speeches delivered in BPUPKI on the issue of state ideology from the nationalists perspective helping them to conclude the agreement in BPUPKI: Yamin's speech on 29 May 1945; Soepomo's speech on 31 May 1945; and Soekarno's speech on 1 June 1945 (Nasution, 1995; Subekti,

2008). Yamin as the first speaker in the team promoted what he called '*negara kebangsaan yang berketuhanan*' (nation-state based on theism) (Subekti, 2008). In his concept, Yamin introduced five ideas to be the base of Indonesia as a state: nationalism, humanism, theism, democracy, and social welfare (Subekti, 2008). Along with this conception, Yamin also proposed his draft of the constitution containing his operational legal term from the above mentioned five principles: The One and Only God (*Ketuhanan Yang Maha Esa*), Unity-based Nationalism (*Kebangsaan Persatuan Indonesia*), Just and Civilized Humanism (*Rasa Kemanusiaan yang Adil dan Beradab*), Wisdom and Deliberation in Representative Democracy (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan*), and Social Justice (*Keadilan sosial bagi seluruh rakyat Indonesia*) (Subekti, 2008).

Yamin's speech is very similar to today's Pancasila although Soekarno be the one widely known as the creator of Pancasila. A.B. Kusuma and R.W.E. Elson argue that there is controversy surrounding who should be credited as the original thinker behind Pancasila. The so called 'De-Soekarnoisation' conducted by Soeharto's men (the later president of Indonesia after Soekarno) such as Nugroho Notosusanto who was given a task to write text book on Indonesian history to be used across school education in Indonesia. In this 'New Order' (*Orde Baru*) era, it was promoted that Yamin was the one originally conceptualised Pancasila before Soekarno, and that Soekarno just summarised what Yamin already set during the meeting on 29 May 1945 (Kusuma & Elson, 2011).

The second speaker in the meeting was Soepomo on 31 May 1945. He started his opinion by rejecting the idea of Islamic state in Indonesia and approving Hatta's position that religion must be separated from the state (Subekti, 2008). This is because Indonesia consists of different religiosity. To prefer majority's religion will discriminate minority ones (Nasution, 1995). Soepomo said, 'To establish Islamic state in Indonesia means to not have a unity. The state will only embrace majority, Islam. There will be '*minderheden*' (Dutch term for minority), left out by the state (Latif, 2011; Nasution, 1995). For Soepomo, the unity of Indonesia was more important. He argued for an integral state that united all the different social classes and statuses in Indonesia. In this model of the state, each of the groups in the society, whether they are majority or minority, would be protected and their differences would be honoured (Subekti, 2008).

Soekarno delivered the third and final speech from the nationalist's side on 1 June 1945. This day marked the birthday of Pancasila as it was formally introduced as a term. Before arguing for his idea of the state ideology, Soekarno set to clarify the definition of the foundation of state itself. He said, 'what we are being asked is, what in Dutch we call it '*Philosofische grondslag*' of independent Indonesia. *Philosofische grondslag* is a fundamental, philosophy, the deepest thought, soul, the deepest yearning to build an independent Indonesia (Nasution, 1995).

After defining his idea of the philosophical foundation of the state, Soekarno continued his speech by proposing his five principles to be used as the philosophical foundation of Indonesia: Indonesian nationalism, internationalism or humanism, deliberation or democracy, social justice, and theism. He continued, 'All the people should believe in God in a civilised way, with no 'religious selfishness'. 'Indonesia is supposed to be a theistic state! Let us practice religions, be it Islam or Christian, in a civilised way. What does a civilised way mean? It means respecting one another (Nasution, 1995).

This phenomenal speech known as 'The birth of Pancasila' ended the debate between Islamists and nationalists in BPUPKI (Nasution, 1995). When the members of BPUPKI vote for the state ideology, whether they prefer the Islamist or the Nationalist proposal, the result was 15 people out of 60 members of BPUPKI agreed to use Islam as the foundation of the state while the other 45 members chose for nationalism (Latif, 2011).

The Jakarta Charter

After the vote, the members of BPUPKI agreed to create a small team of nine people, four among them were Islamists representatives, four nationalists representatives, and one Christian representative. The team was led by Soekarno and given task to create the preamble of the Constitution named Jakarta Charter (*Piagam Jakarta*). Political tension was high during the appointment of the team. It can be seen by the revision of the membership. In the beginning, the team was meant to have only eight members to gather ideas from all of the other members of BPUPKI in order to draft the preamble of the proposed

constitution. Soekarno as the head of the team thought it was not proportional to have only two representatives of Islam in the team. He was then revising the team by adding more Islamist representatives. The new team named *Panitia Sembilan* (Team Nine) consisted of five representative of the Nationalist side (Soekarno, Hatta, Yamin, Maramis, and Soebardjo) and four representatives of the Islamist side (Wachid Hasjim, Kahar Moezakkir, Agoes Salim, and Abikoesno Tjokrosuejoso) (Konstitusi, 2008). The idea to add more Islamist representatives in the team was to reach a better agreement between the Nationalists and the Islamists (Bahar, et al 1998). The meeting of Team Nine was held on 22 June 1945 (Utomo, 2019). They compromised whether or not to adopt this proposal:

“... which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in God, with the obligation to observe Islamic law for adherents of Islam, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, so as to realize social justice for all the people of Indonesia” (Utomo, 2019)

The most controversial words or widely known in Indonesia as ‘tujuh kata’ (seven words) are: ‘with the obligation to observe Islamic law for Muslims’ (*dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya*). It is controversial because the mention of Islam in the Constitution can be seen as a preference to Islam in Indonesia. Before the team reached an agreement on the seven words, an unexpected war-related paused their discussion. On 9 and 11 August 1945, the United States bombed Hiroshima and Nagasaki, marking Japan’s loss of World War II. This bombing changed the whole circumstances of the debate between the Islamists and the Nationalists (Bahar & Hudawati, 1998).

17 August 1945, Soekarno and Hatta declared the Indonesian Independence and soon after, the premature draft of the Constitution with its unsettled discussion on Islamic law was set to be the Indonesian Constitution. At that time, the current version of the Preamble of the Constitution was the version 22 June with the controversial seven words still attached to it. On 18 August 1945, the team realised It would be discriminative to mention Islam in the constitution (Syarif, 2016). Hatta, the then vice president, proposed to erase the seven words to maintain the unity of the newly establish state (Bahar & Hudawati, 1998; Subekti, 2008). He was approached by the Christians parties from the eastern part of Indonesia, claiming they will separate themselves from Indonesia if Islamic preferences continued to appear in the Constitution (Nasution, 1995; Subekti, 2008). The Islamists agreed to remove the Islamic provisions for two reasons: (1) for the sake of the Unitarian republic that was just one day old; and (2) they were assured that the Constitution would only be temporary as Soekarno (the president) said (Subekti, 2008). Thus, there would be more time to negotiate the provisions, as the new parliament would create the comprehensive constitution in the near future (Subekti, 2008). The agreement is known as a ‘gentlemen’s agreement’ in Indonesian history as the Islamists and nationalists compromised to postpone their debate (Latif, 2011; Subekti, 2008).

The final result of the work by the nine-membership team was the adoption of Pancasila in the last several clauses of the preamble to the Constitution (‘with people’s sovereignty ...’) read as follow:

‘Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in a form of the State of the Republic of Indonesia, with people’s sovereignty based on the belief in One and Only God, Just and Civilized Humanity, the Unity of Indonesia and a Democratic Life guided by wisdom in Deliberation/Representation, and by realizing Social Justice for all the people of Indonesia (Constitution of the Republic of Indonesia (The Constitutional Court of the Republic of Indonesia, 2015).

Since then, Pancasila becomes state ideology as well as the ideology of law in Indonesia (Notonagoro, 1995). As sacred as it sounds, Pancasila always become the ultimate source of laws in Indonesia and the ultimate source of laws. This means, all of the laws in Indonesia may not contradict to Pancasila. Today, the first principle of *Pancasila*, ‘The One and Only God’ becomes filter for religions and religious activities to be allowed to exist in Indonesia. Moreover, this principle also set a standard for religiosity in Indonesia: that Indonesia is a religious state, instead of secular state (Butt & Lindsey, 2008).

In his 1951 study of Pancasila, (Notonagoro, 1951) concludes that Pancasila is not only a political conception, but also a world view, a paradigm, and result of deeply meaningful contemplation from life experiences and knowledge (Notonagoro, 1951). Furthermore, he explains that the origin (*causa materialis*) of the principles stated in Pancasila is Indonesian (Notonagoro, 1951). In other words, he claims that Indonesians already held the principles of Pancasila. However, I would argue this argument is problematic and it is discriminatory to say that the origin of Pancasila is Indonesia as a whole, while the debate in BPUPKI was only between the interests of Islamists and the nationalist.

On 'The One and Only God'

The principle of 'One and Only God' was proposed by the Islamist representative in BPUPKI and it came from Islamic teaching. The negotiation was about Islam and not about other groups. Although the concern of the nationalists in the debate was to eliminate privilege over Islam, the end product (Pancasila and the 1945 Constitution) still has some privilege for Islam. The wording 'One and Only God' itself originated in the Islamic teaching of 'tawhid' (Kamali, 2008). It might not be suitable to Christian teaching of Trinity, which refers to The Three consubstantial persons (The Family Bible Encyclopedia, 1972) or the absence of god in Buddhism (Nyanaponika Thera study on Buddhism and the God-Idea, 2008). These various ideas about god, present in Indonesia, cannot easily be fitted to Notonagoro's interpretations of 'One and Only God' in Pancasila. I would argue that Pancasila has set a filter for religions other than Islam to exist in Indonesia: that those religions must fulfil the requirement of belief in one and only God. No matter what god these religions believe, as long as they believe in single god (one and only), they may exist in Indonesia. In contrast, if they believe in multi gods or no gods, then they may not be permitted to exist in Indonesia.

Notonagoro also explains that the principle of One and Only God in Pancasila refers to God as *causa prima* in an objective realism (Notonagoro, 1987). It means that there might be different conceptions of God, but as long as the religions in discussion refer to the almighty God, that will fit to Pancasila. This interpretation of the principle is vague. In fact, there are other religions, which do not believe in God, such as Scientology and the teaching of traditional belief of animism that already existed in Indonesia long before modern religion (Hasan, 2012). Does it mean that Pancasila will only recognise those religions with a belief in god? If so, it discriminates against other religions or faith with no concept of god. For this, Notonagoro argues that the Principle of Belief in One and Only God has an absolute meaning, that in Indonesia, there is no room for atheism or anti-religion, and compulsion in religion (Notonagoro, 1987). Such statement is contradictory in a sense that the filter Pancasila set for religions to be allowed to exist in Indonesia, that is the belief in one and only God is an act of absolute compulsion for religion.

For argument saying that Pancasila leaves no rooms for atheism and anti-religion, the Constitution may be too ambiguous in this regard (Crouch, 2016). With a clear segregation between the Nationalists and the Islamists in BPUPKI, the discussion in the team was heavily on the Islamist's interest, such as the proposal to adopt Islamic law in Indonesia. The Nationalist side was trying to balance the Islamist's demand by negotiating a middle way. As a result, the Constitution and its preamble contain Islamic values, such as monotheism, in a subtle way under the clause, 'The One and Only God'. Yet the role of Islamist parties during the independence movement cannot and should not be ignored (Reid, 2011), there is a need to accommodate the interest of minorities as well. On the issue of monotheism, for example, there was an ignorance that others might adopt different conceptions of deity such as polytheism or atheism. Such specific non-Islamic thought was never been discussed in the team while they were busy debating whether or not religious obligation (Islamic law) should be put in the constitution.

Constitution

After the long discussion on the preamble of the Constitution, the drafter of the Constitution continued to work on the articles of the Constitution. Islamic values were still highlighting the debate, particularly on two issues: that the president of Indonesia must be Muslim; and the obligation to practice Islamic law (sharia) to Muslim. The issue about obligation to practice Islamic law for Muslim was proposed to be written in a dedicated chapter for religion in the Constitution (Chapter XI). This chapter was designed as the operational legal-norm from the first principle of Pancasila, 'The One and Only God.' The proposal was to have an article stating, 'The state shall be based on the One and Only God,

with the obligation to practice Islamic law to Muslim'. Using the agreement during the discussion on the preamble of the Constitution, Hatta proposed to cut off the article by saying that it will unite the nation (Subekti, 2008). The team agreed to adopt Hatta's proposal (Subekti, 2008).

Despite the agreement for the sake of uniting the nation, I would argue Article 29 (1) marks an important claim of the relation between state and religion in Indonesia. The wording of the Article, 'The State based on the One and Only God' is the state's endorsement of monotheism. This article set a legal position for the state. It obliges the state to embrace certain 'religiosity': monotheism. To be more precise, this Constitutional article closes the door for secularism in Indonesia because the state has brought religion into public law. However, the states also reject the proposal to adopt Islamic law, therefore Indonesia is not an Islamic state (Butt & Lindsey, 2008). Thus, some academics claim Indonesia as a religious state (Butt & Lindsey, 2008; Notonagoro, 1987).

To claim that Indonesia is a religious state is problematic because claiming the state to be religious may give an impression that the state must embrace a certain or particular idea of religiosity. It was not meant by the agreement of the team when they decided to adopt the clause 'One and Only God'. As Soekarno says, 'All the people should believe in God in a civilised way with no religious selfishness. Indonesia is supposed to be a theistic state. Let us practice religions, be it Islam or Christian, in a civilised way. What does a civilised way mean? It means respecting one another (Nasution, 1995).' By this, I would prefer to legally say that Indonesia is a monotheistic state, instead of religious state.

Furthermore, the wording of Article 29 (2), 'The state guarantees the freedom of every inhabitant to embrace his/ her respective religion and to worship according to his/ her religion and faith as such.', opens an ambiguity in term of what right being guaranteed by the state. The Constitutional Court later in their decision interpreting this Article. The Court says that the Indonesian Constitution does not give room for campaign on freedom to not adopt religion and freedom to promote anti-religion (Constitutional Court of Indonesia, Court Decision Number 140/PUU-VII/2009). The tricky part is that, positively, the Constitution gives right to people, to practice their religion. It does not say the right of people to not practice religion. However, in legal terms, it does not mean that the Constitution prohibits it. For a comparative purpose, in the United States, religious liberty clause offers protection for both adopting religion and not adopting it. The United States' Supreme Court in the case of *Torcaso vs Watkins* when the Supreme Court suggests that the constitution (of The United States) attaches equal value to belief and disbelief, and that the important thing is the choice, not the outcome (Garvey, 1996).

Despite the ambiguity of religious liberty clause and the state's endorsement of monotheism in the Constitution, the 1945 Constitution was enacted on 18 August 1945 with the promise of the President to review the Constitution once the state has a better situation to do that. The priority during the era was to maintain the independence of the newly established state. During the first decade of the state, recurring war with the Dutch endanger the establishment of the state. It was not until 1955 that Indonesia able to had its first election to establish *Konstituante* (Nasution, 1995), a dedicated parliamentary body to create a new constitution promised by Soekarno.

1959 Presidential Decree

Elected in 1955, *Konstituante*, the first Indonesia's elected parliamentary-body was given task to create a new draft of the Constitution. Similar debate to what happened during the work of BPUPKI in 1945 re-emerged. The Islamists and the nationalists continued their negotiation on the issue of Islam and the state (Nasution, 1995). The difference was a third party joining the debate in *Konstituante*: the socialists (socio-economic) (Nasution, 1995). The socialist was not a significant party in *Konstituante*. They only had 10 representatives out of 514 members of the parliament from the elected political parties. The Islamists had 230 seats, while the nationalists had 274 (Nasution, 1995). The government invited 30 representatives of minorities to join *Konstituante*. They were 12 Indonesian-Chinese representatives, 12 Indonesian-European representative, and 6 representatives from Irian Jaya (today's province of Papua), which was still under the Dutch colony. All of these additional representatives joint the nationalists (Pancasila) block in *Konstituante* (Nasution, 1995).

Although the nationalists had the most seats in *Konstituante*, they still needed at least 2/3 supports (360 seats) to win a vote. Not a single block was able to consolidate this number until 1959, more than 3 years after its establishment, when *Konstituante* declared to be failed in creating the new promised

constitution. Similar to the 1945 debate, the failure of Konstituante was due to deadlock in the issue of religion and state ideology (Nasution, 1995; Subekti, 2008). Soekarno as the president at the time did not want to wait any longer for Konstituante to finish the work. Claiming for national crisis, symbolic significance of 1945 Constitution, and the need of a stronger government (Nasution, 1995), Soekarno established a presidential decree in 1959 to dissolve Konstituante and declaring Indonesia to use the original 1945 Constitution along with a statement that Jakarta Charter is included in the Constitution (Soekarno, 1965).

The important thing to be noticed from the Decree is the statement made by Soekarno that ‘the Jakarta Charter version 22 June inspired (*menjiwai*) the 1945 Constitution and is part of the chain of unity with the aforementioned Constitution’ (Soekarno, 1965). Although the position of this statement is in the ‘*ratio decidendi*’ instead of the ‘*legal statement*’, it gives a significant difference in the reading of the Decree: that Jakarta Charter, once edited by Team Nine in BPUPKI, was reintroduced.

It is important to note that Soekarno wrote ‘version 22 June’ referring to the Jakarta Charter with the controversial 7 words (*dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya*). Notonagoro explains, with the 1959 Presidential Decree, the first principle of Pancasila ‘One and Only God’ is unchanged in its wording but the meaning of it got additional interpretation and should be read as follows: ‘Conformity with the essence of One and Only God, with the obligation to practice Islamic law (shariah) for Muslim on the basis of just and civilized humanity’ (Notonagoro, 1987).

According to Notonagoro, the statement was not meant to compel Islamic law to all Indonesian. It will only bind Muslims in Indonesia. It may be read as a violation of religious liberty (thus, a violation of Article 29 paragraph 2 of the Constitution) because it forces the Indonesian Muslim to observe sharia, although *Dewan Pertimbangan Agung* (Supreme Consultative Council) had explained that the realization of Jakarta Charter will not reduce the meaning of Article 29 (2) of the Constitution (Notonagoro, 1987). This leaves an ambiguous meaning of the existence of the seven words.

1999-2002 Constitutional Amendment

The original 1945 Constitution remain to be used until 1999 when the Constitution was thoroughly amended. In 1998, Soeharto resigned from his position as the Indonesian president after 32 years.

Habibi, the then vice president, took over the position as the Indonesian president and scheduling election to form a new government. The new elected parliament decided to amend the Constitution instead of renewing (creating a new one). The amendment of the Constitution took 4 years from 1999-2002 with each year dedicated to discuss certain issue in the Constitution; it was a total rewrite of the 1945 Constitution. The first amendment in 1999 concerned the issue of limitation of power of the government; the second amendment in 2000 focused on local autonomy and human rights among other things; the third amendment in 2001 continued the discussion on limitation of power and redefining the presidential system; the fourth amendment in 2002 continued the discussion on election, economy, and amendment provision among other things (Indrayana, 2008).

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

- a. Article 28 E (1): “Every Person shall be free to embrace a religion and to worship according to his/her religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place to reside in the territory of the state and to leave it, as well as be entitled to return.”
- b. Article 28 E (2): “Every person shall be entitled to freedom to be convinced of a belief, to express thought and attitude in accordance with his/ her conscience.”
- c. Article 28 I (1): “The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever (Constitution of the Republic of Indonesia, 2015)”

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

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

'In the exercise of his/ her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for moralities, religious values, security, and public order in a democratic society (Constitution of the Republic of Indonesia, 2015).'

Constitutional Court in interpreting human rights clauses in the Constitution argues that Article 28 J (2) limit all of the rights stated in the previous Constitutional Articles. This is mainly the case for religious liberty as the Court says,

'In exercising his/ her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedom of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society. The Court in the same case also argued that, '...for the need of general protection and anticipating horizontal and vertical social conflicts, [the] Blasphemy law is very important (Constitutional Court of Indonesia, Court Decision Number 140/PUU-VII/2009).'

 Therefore, albeit restricting the applicants' religious liberty, the Court justify the existence of Blasphemy Law and in the same time, justifying limitation of religious liberty in Indonesia.

I would argue against the Constitutional Court in this regard, especially for the reason that religious liberty is an absolute right stated under Article 28 I (1). The Constitutional Court argues that Article 28 J (2) is *lex specialis* to other articles of human rights in the constitution due to its position as the last article in the human rights chapter of the Constitution (Constitutional Court Decision, Case No. 97/PUU-XIV/2016). I would object the Constitutional Court argument based on the reason that the articles are not contradictory; and that the classification of rights in Article 28 I (1) and 28 J (2) are different.

First and foremost, the articles in Human Rights chapter of the Constitution were being made in the same amendment process. There is no possibility that the creator of the articles would make two conflicting articles. If they would limit (the essence of) religious liberty or the right to life, they will not put these rights in Article 28 I or simply would not create Article 28 I (1). Article point 28 I (1) and 28 J paragraph (2) are regulating different matters and they are not in contradiction. Article 28 I stating the absolute rights in Indonesia, which should not be limited, including religious liberty. Article 28 J paragraph (2) regulates the limitation clause for the manifestation of rights. These are not the same thing. For example in religious liberty, the essence of right is believing in the teaching of religion, while the manifestation is praying. Someone may be prohibited to pray in the middle of the road as it limits his manifestation of religious liberty, but his religious liberty is not violated. He still holds his believe and can pray somewhere else. But, if someone is prohibited to believe, he may not practice or manifest his belief in the same condition that he is not allowed to believe.

Interestingly in 2017, the same Constitutional Court held that religious liberty under Article 28 I paragraph (1) affirms the right to religious liberty as an absolute right (Constitutional Court Decision, Case No. 97/PUU-XIV/2016). Because the right of religious liberty is stated in the Constitution, argued the Court, it establishes the obligation of the state to respect, protect, and fulfil the right (Constitutional Court Decision, Case No. 97/PUU-XIV/2016). The inconsistent decision regarding religious liberty by the Constitutional Court shows a very serious problem that the Court has no firm conception of religious liberty.

IV. CONCLUSION

The constitutional debates between the Islamists and the Nationalists regarding religious liberty never get settled. In 1945, the debate was postponed, giving priority to establish the state as it was promised by the President that the debate would be continued in the later constitutional work. In 1959, the four years

debate forced to deadlock resulted in the reinstatement of the 1945 Constitution with an ambiguous phrase of 'Jakarta Charter version 22 June 1945 in spirit and part of the Constitution'. During the Constitutional amendment 1999-2002, there were two separate discussions: on human rights (chapter XA of the Constitution) and on religion (chapter XI of the Constitution). The chapter on religion remained untouched while the parliament introduced the new-dedicated chapter on human rights. There are two seemingly contradictory articles regarding (1) religious liberty as an absolute right and (2) limitation of rights. The Constitutional Court whose task is to interpret the Constitution has inconsistent argument in regard to religious liberty. In the Blasphemy Law cases the Court says that religious liberty can be limited, but in the 2017 ID Card case, the Court argues that religious liberty is an absolute right.

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