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A Prophetic Law Perspective on Judicial Independence of the Indonesian Constitutional Court: Looking Back on 20 Years

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Abstract

This research analyzes the pattern of Constitutional Court judicial reviews decisions in the last 20 years since its establishment against Islamic populism cases. This research applies legal normative methodology by conducting a literature review based on secondary data analysis and case study approach. This research concludes that, first, the Constitutional Court in Indonesia is inseparable from the influence of Islamic populism which is proven by the existence of 4/7 decisions that fulfilled the variable on the characteristics of populist decisions. Apart from the strong relationship between the state and religions, this is also coupled with the weakness of procedural law. The Constitutional Court opens the space for strengthening populism in influencing the Constitutional Court decisions. Second, the fading independence of the Constitutional Court may pose a danger to democracy, including to the human rights of minority communities and may eliminate the implementation of plural constitutionalism. Also, various international literature in the last five years shows us the Constitutional Courts have tendencies to challenge the rising of Populist Movement policies made by the Government through judicial review cases. Compared to the other countries, populist movement in Indonesia became a unique phenomenon due to the high influence of Islamic identity in the judges. Not only that, but the recent cases also show the institution more favoring the populist policies made by the government than protecting minority rights.

Keywords: *Democracy, Islamic Populism, Judiciary Independence.*

INTRODUCTION

"Populism" defined in neutral terms,[1] is a political movement that considers society to be separated into two homogeneous and antagonistic groups, namely the pure people versus the corrupt elite, and they argue that politics should be an expression of the majority interests (general will).[2]

Four recent research reveal that the issue of the Populist Movement and Constitutional Court independence aren't novel at all. However, continuation and research development of such issues is important, as they are parts of the core elements of today's democracy.[3] In modern era, the Constitutional Court holds a role as counter majoritarian or anti-populist institution which places the constitutional judges as "obstruction of general will institution to protect minority rights".[4]

Interestingly, the pattern of the Indonesian Populist Movement would be 180 degrees with the trends of the Populist Movement mentioned above. Mohammad Ibrahim's research shows that constitutional judges tend to agree on discriminative acts made by populist majoritarian muslim governments. This happened in the judicial review of the Administration Population Act that is deemed unable to protect the rights of indigenous peoples' beliefs and testing the Marriage Law which does not allow interfaith marriages.[5] Mohammad Ibrahim's research findings show that Indonesian

[1] Bojan Bugaric divided populism into two kinds based on its tendency toward constitutional democracy, which is "the authoritarian populism" and "emancipatory populism". Papas argues that the former has more tendency to attack the core elements of constitutional democracy such as independent courts, free media, civil rights, and fair electoral rules. Vice versa on the other side. See Bojan Bugaric, "Could Populism Be Good for Constitutional Democracy?," *Annual Review of Law and Social Science* 15, no. 1 (October 13, 2019): 41–58, https://doi.org/10.1146/annurev-lawsocsci-101518-042927; See Also Takis S. Pappas, "Populists in Power," *Journal of Democracy* 30, no. 2 (2019): 70–84, https://doi.org/10.1353/jod.2019.0026.

[2] Cas Mudde and Cristóbal Rovira Kaltwasser, "Studying Populism in Comparative Perspective: Reflections on the Contemporary and Future Research Agenda," *Comparative Political Studies* 51, no. 13 (November 2018): 1667–93, https://doi.org/10.1177/0010414018789490.

[3] Bugaric, "Could Populism Be Good for Constitutional Democracy?," 252–53.

[4] Zoltán Szente and Fruzsina Gárdos-Orosz, "The Impact of Populism on Constitutional Interpretation in the Eu Member States," *The International Journal of Human Rights* 26, no. 7 (August 9, 2022): 1141–59, https://doi.org/10.1080/13642987.2022.2106221.

[5] Mohammad Ibrahim, "The Judicialization of Discrimination in the Indonesian Constitutional Court," *International Journal of Discrimination and the Law* 22, no. 2 (June 2022): 125–51, https://doi.org/10.1177/13582291221094923.

Constitutional Court judges don't follow the trends in Continental European countries that protect minority's basic human rights.[6]

The primary reason for the choice of topic discussed in this study is to analyze the correlation between the populist movement in Indonesia and Constitutional Court cannot be separated from the uniqueness Indonesia embraces. As a multicultural, and multi-religions and beliefs nation imply the diversity of Indonesia. However, the biggest challenge or might even be considered as a threat is how majoritarian or populism derogates the minority's pluralism which triggers academic debates of the populist movement in Indonesia.

The recent studies of the populist movement in Indonesia would be categorized into 5 (five) types of populism, which are i) secular-nationalist populism,[7] ii) anti-foreign sentiment,[8] iii) anti-communism paradigm,[9] iv) autocrat-leaning populist,[10] until that most rooted is v) Islamic populism.[11] The populist movement is an important issue that needs to be discussed in Indonesia as it occurs nationally, both in the executive and judicial realms.

In the executive realm, Baidhowa said that in the last 10 years, there has been a trend of democratic regression, one of which is marked by the rise of identity politics.[12] This

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[6] Ibrahim.

[7] Vedi R Hadiz and Richard Robison, "Competing Populisms in Post-Authoritarian Indonesia," *International Political Science Review* 38, no. 4 (September 2017): 488, https://doi.org/10.1177/0192512117697475; See also Alwi Dahlan Ritonga, "Mencermati Populisme Prabowo Sebagai Bentuk Gaya Diskursif Saat Kampanye Politik Pada Pemilihan Presiden 2019," *Politeia: Jurnal Ilmu Politik* 12, no. 1 (January 30, 2020): 1–13, https://doi.org/10.32734/politeia.v12i1.3170; See also David M. Bourchier, "Two Decades of Ideological Contestation in Indonesia: From Democratic Cosmopolitanism to Religious Nationalism," *Journal of Contemporary Asia*, April 8, 2019, 713–33, https://doi.org/10.1080/00472336.2019.1590620.

[8] Defbry Margiansyah, "Populisme Di Indonesia Kontemporer: Transformasi Persaingan Populisme Dan Konsekuensinya Dalam Dinamika Kontestasi Politik Menjelang Pemilu 2019," *Jurnal Penelitian Politik* 16, no. 1 (June 28, 2019): 47–68, https://doi.org/10.14203/jpp.v16i1.783; See also Bachtiar Nur Budiman et al., "Populisme: Konsekuensi Dari Stagnasi Politik Dan Demokrasi Di Indonesia," *Jurnal PolGov* 4, no. 1 (July 6, 2022): 211, https://doi.org/10.22146/polgov.v4i1.3916.

[9] Margiansyah, "Populisme Di Indonesia Kontemporer: Transformasi Persaingan Populisme Dan Konsekuensinya Dalam Dinamika Kontestasi Politik Menjelang Pemilu 2019."

[10] Joshua Kurlantzick, "Democratic Backsliding and the Reach of ISIS in Southeast Asia," *Current History* 115, no. 782 (September 1, 2016): 226–32, https://doi.org/10.1525/curh.2016.115.782.226.

[11] Diego Fossati and Marcus Mietzner, "Analyzing Indonesia's Populist Electorate," *Asian Survey* 59, no. 5 (October 1, 2019): 769–94, https://doi.org/10.1525/as.2019.59.5.769.

[12] Adfin Rochmad Baidhowa, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding," *Constitutional Review* 7, no. 1 (May 31, 2021): 124–52, https://doi.org/10.31078/consrev715; Ni'matul Huda, Dodik Setiawan Nur Heriyanto, and Allan Fatchan Gani Wardhana, "The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia," *Heliyon* 7, no. 9 (September 2021): 2, https://doi.org/10.1016/j.heliyon.2021.e07886.

happened, for example, in the case of dissolving an Islamic populist civil society organization, Hizbut Tahrir Indonesia without a judicial process.[13] It is interesting to look closely at the phenomenon where the majority of Constitutional Court judges are muslim backed by their Islamic educational background from an Islamic university, these judges are judges Wahiduddin Adams, Suhartoyo, Mahfud MD, Anwar Usman, and Ahmad Fadlil Sumadi. Their educational background appears to be indirectly influencing their judgment on the judicial reviews.

Steven Gerphaum believes that the identity of judges and ideas of Islamic populism have the potential to affect the independence of judges in deciding cases.[14] Hence, this study is interested in evaluating the work of Indonesian Constitutional Courts as it has been operating for two decades, and whether or not the muslim majoritarian Constitutional Court able to maintain their independence and impartiality in the decision-making process.

METHODOLOGY

This research addresses 2 (two) problems, first, the significance of the Indonesian Constitutional Court in considering the content of Islamic Populist Movement against the national law through judicial review procedure within the last two decades, and *second*, how dangerous is the decisions of Indonesian Constitutional Court that favoring the Islamic Populist to the maintenance of the basic rights of the minority and pluralist constitution of Indonesia?

Normative legal research is applied to this study with statutory and case-based approaches. In order to analyze both problems, this study conducts: first, determination of the variable of religious populist substances and which populism policies (acts) that fulfill the variables itself by analyzing 7 (seven) Constitutional Court decision which contain a substance that potentially decreases religious minority

[13] Baidhowa, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding."

[14] Stephen Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?," *Columbia Journal of Transnational Law*, no. 53 (January 20, 2015): 285–320.

rights; second, classification of every act that fulfills the variable and does it have any judicial reviews by the Constitutional Court; third, analyze the pattern of Constitutional Court decisions to pass judgment in religious populist policies cases; fourth, conclude how much religious populist movement policies influence the Constitutional Court decisions with its various patterns; fifth, shows academic theoretical debate about the correlation between Constitutional Court, democracy, and populist religious movement; sixth, projecting the harms of the religious populist movement which was favored by the Constitutional Court in the last 20 years based on academic theoretical debate.

RESULT AND DISCUSSION

Constitutional Court Judicial Independents on Prophetic Law Perspective in the Middle of Populism

The independence of judicial power in the Constitutional Court has essentially been highly respected since its establishment in 2003. On 17 October 2005, the Constitutional Court issued regulations on the code of ethics and behavior of constitutional judges known as the *Sapta Karsa Hutama* of the Constitutional Court which were then stipulated through Constitutional Court Regulation Number 07/PMK/ 2005 concerning the Implementation of the Declaration of the Code of Ethics and Behavior of Constitutional Judges.[15]

Sapta Karsa Hutama Constitutional Judges is essentially an embodiment of the MKRI to immediately adopt "The Bangalore Principles of Judicial Conduct 2002" (Bangalore Principles) which have been accepted by both countries that adhere to the "Civil Law" and "Common Law" systems, adapted to the Indonesian legal system and justice and the ethics of national life as contained in the People Consultative Assembly Decree

[15] Bagus Anwar, "Rekonstruksi Pengawasan Etik Hakim Mahkamah Konstitusi Dalam Perspektif Hukum Administrasi Negara," *Staatsrecht: Jurnal Hukum Kenegaraan Dan Politik Islam* 1, no. 1 (November 10, 2021): 39–51, https://doi.org/10.14421/staatsrecht.v1i1.2374.

Number VI/MPR/2001 concerning Ethics of National Life which still remains in effect.[16]

The Bangalore Principles of Judicial Conduct 2002 establishes the principles of independence, impartiality, integrity, propriety, equality, competence and diligence, as well as the values that live in Indonesian society, namely the principles of wisdom as a code of ethics for constitutional judges and their application, used as a reference and benchmark in assessing the behavior of constitutional judges, in order to prioritize honesty, trustworthiness, exemplary, chivalry, sportsmanship, discipline, hard work, independence, responsibility, honor, and dignity as a constitutional judge.[17]

The implementation of the values of independence in *Sapta Karsa Hutama* unfortunately did not go very well. Since the arrangement was made in 2003 and last changed in 2023, the issue of independence has always haunted the institution of the Constitutional Court. In 2023, the chief of constitutional judges was found to have violated the principle of independence which is exhibited in the table of violations of judges' ethics during 2023 below.

decision	Law Consideration	Verdict
01/MKMK/T/02/2023	Judge Guntur Hamzah had essentially violated the *Sapta Karsa Hutama's* principle of integrity	A written warning on Guntur Hamzah
02/MKMK/L/11/2023	Judge Anwar Usman has essentially violated the principles of neutrality, integrity, competence and equality, independence, appropriateness	Dismissal from the position of Chief Justice of the Constitutional Court

[16] Judicial Integrity Group, "Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (the Implementation Measures)," International Standard (Lusaka, Gambia: United Nations Office on Drugs and Crime, January 20, 2020), https://www.unodc.org/ji/resdb/data/_220_/measures_for_the_effective_implementation_of_the_bangalore_principles_of_judicial_conduct.html?lng=en; Dejo Olowu, "Quest for Universal Standards of Judicial Integrity: Some Reflections on the Bangalore Principles," *India Quarterly: A Journal of International Affairs* 69, no. 2 (June 2013): 179–91, https://doi.org/10.1177/0974928413481885.

[17] Bogdan David, "Ethics and Judicial Integrity under the Bangalore Principles," *Rais: Journal for Social Sciences* 7, no. 2 (November 20, 2023): 50–54, https://doi.org/10.5281/ZENODO.10161415; Stefanie Ricarda Roos and Cristi Danileţ, *Principiile De La Bangalore Privind Conduita Judiciară: Comentariu Asupra Principiilor De La Bangalore Privind Conduita Judiciară* (Bucureşti: C. H. Beck : Konrad-Adenauer-Stiftung, 2010). see also Ellydar Chaidir and Suparto, "Perlunya Pengawasan terhadap Kode Etik dan Perilaku Hakim Konstitusi dalam Rangka Menjaga Martabat dan Kehormatannya (The Need for Supervision on Constitutional Court Judges' Code of Ethics & Behavior in Order to Uphold Their Dignity and Honor)," *UIR Law Review* 1, no. 2 (October 2017): 111–26.

	and decency in the *Sapta Karsa Hutama*	
03/MKMK/L/11/2023	Judge Saldi Isra along with the other 8 judges did not maintain the confidentiality of the judge's deliberation meeting, thereby violating the Principles of Appropriateness and Politeness of *Sapta Karsa Hutama*	A collective verbal warning sanctions on the judges
04/MKMK/L/11/2023	Judge Arief Hidayat was proven to have violated *Sapta Karsa Hutama*'s the principles of Appropriateness and Politeness.	A collective verbal warning sanctions on the judge.
05/MKMK/L/11/2023	Judge Manahan MP Sitompul, Judge Enny Nurbaningsih, Judge Suhartoyo, Judge Wahidudin Adams, Judge Daniel Yusmic P.F, and Judge M. Guntur Hamzah allowed the practice of violating the Code of Ethics and Behavior of the Constitutional Judges to occur without seriousness in reminding each other, including the leadership, because "*ewuh pekewuh*" (trouble and unpleasant feelings) work culture	A collective verbal warning sanctions on the judges.

Therefore, the making of laws and their implementation cannot be separated from how humans control their interests which are stated in the rules with the substance of rights, obligations and ethics that apply in society. If it is related to the independence of judges as law enforcers, judges are considered the main actors in the law enforcement. Hence, they must acquire praiseworthy qualities with a spirit that make this person ethical and fair, especially when resolving a case.

The prophetic law perspective teaches how a law enforcer must be wise and prudent to act fair and independent without being influenced by any group. The prophetic law clearly states in the Quran, Surah An-nisa verse 58 which encourage to provide justice to anyone. In fact, justice should not be used to discriminate against certain groups as stated in Surah Al Hujurat verse 13 which states that only God can judge the glory

of humans, based on their piety. Therefore, the judge's obligations are to provide a fair decision without discriminating against any of the parties.[18]

The Stance of Indonesian Constitutional Court in The Dynamics of Judicial Review of Laws Containing Islamic Populist Movement Substances

The establishment of a Constitutional Court in deciding cases that contain Islamic populist movements is inseparable from the relationship between the state and religion. The relationship between religion and the state according to Marzuki Wahid and Rumadi consists of three types:[19] First, integralists or unified paradigm, in which the state is based on the sovereignty of God and the state is an institution that combines politics and religion. Second, the symbiotic paradigm in which there is an interrelated symbiosis between religion and state. On the one hand, religion requires the state to develop its message and the state requires religion as a moral guide for the state. Third, secularistic understanding where this view separates religion from religion.

The theory of the relationship between religion and the state then developed which, and according to Ahmed Dawood, currently, the pattern of the relationship between religion and the state has developed into 5 (five) patterns.[20] First, countries with strong secularism secularity). A country that adheres to this view essentially recognizes a person's freedom to have a religion, but the expression of religion in the life of the state is prohibited. Second, countries that adhere to weak secularism. Countries that adhere to this ideology usually make the relationship between religion and the administration of the state neutral. Third, countries that accommodate pluralism. The state with this understanding carries out the neutrality of the relationship between religion and the state, not by withdrawing from the support or legitimacy of any religion. Fourth, countries that give formal recognition to certain religions. The country in its constitution recognizes the existence of certain religions explicitly in its

[18] "Al-Qur'an" (n.d.) An-Nisa Verse 58; and in Al-Qur'an Al-Hujurat Verse 13.

[19] Marzuki Wahid, *Fiqh Madzhab Negara: Kritik atas Politik Hukum Islam di Indonesia*, 1st ed. (Yogyakarta: LKIS Yogyakarta, 2001), 23–33.

[20] Dawood Ahmed, *Religion–State Relations: International IDEA Constitution-Building Primer 8*, 2nd ed. (Sweden: International Institute for Democracy and Electoral Assistance (International IDEA), 2017), 8.

constitution. Fifth, recognition and/or support for religion/or religious understanding founded by the country.

From the two theories of the relationship between religion and the state above, according to Hasyim Asy'ari, Indonesia uses religion as the spirit of the state, but the state does not adhere to a particular religion so the state provides support to all religions living in society.[21] In Mahfud MD's theory, the relationship between the state and religion adhered to by Indonesia itself is a "religious nationalist state".[22] Indonesia cannot be said to be a religious country, but Indonesia is a country that has the principle of God. Mahfud's view refers to President Soekarno's speech which stated that Indonesian citizens must have a god and Indonesia is a country that has a god.[23]

Based on these claims, of course, the Constitutional Court's decision has a very close attachment to religious values. This attachment is a justification for including religious values in decisions, which are mainly the values of the Islamic religion itself. Moreover, as already mentioned in the background, the majority of constitutional judges in Indonesia are Muslims. Based on Arjana Llano's statement that the individual judge's personal attitude can determine the value of the independence of a decision.[24]

Then there is a hypothesis from the author that constitutional judges cannot be separated from Islamic populism. So, can this hypothesis be justified? This needs to be further analyzed in the Constitutional Court decision table which contains testing norms that have religious values. The search for decisions that are the object of research is based on an analysis of secondary data, namely journal articles by Wicaksono et al with the title "Mapping Patterns of Applications and Decisions in Testing Laws with the Substance of Islamic Law". Considering that there is a difference in the author's focus, the decision cited by Wicaksono regarding the

[21] Hasyim Asy'ari, "Relasi Negara dan Agama di Indonesia," *Jurnal Rechtsvinding*, n.d., 1–7.

[22] Moh Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi*, 1st ed. (Jakarta: Rajawali Pers, 2011), 6.

[23] Dian Agung Wicaksono, Faiz Rahman, and Khotibul Umam, "Pemetaan Pola Permohonan Dan Putusan Dalam Pengujian Undang-Undang Dengan Substansi Hukum Islam," *Jurnal Konstitusi* 18, no. 3 (February 15, 2022): 504, https://doi.org/10.31078/jk1832.

[24] Arjana Llano, "The Independence of the Judiciary," (2013) 3. No. 2, JT, PL 109 – 115. https://www.tribunajuridica.eu/arhiva/An3v2/7%20Llano.pdf

Constitutional Court's considerations in questioning administrative matters or whether it does not intersect with the Islamic populism movement is not the domain of this article. Regarding curated decisions, the author also traces the dynamics of the Constitutional Court's decisions after the secondary data was available so that several decisions were found which will be analyzed in the following table.

Table 1 Analysis of the Dynamics of Islamic Populism the Constitutional Court tendency in Challenging Cases with Islamic Law Nuances

Verdict, Result, and Issues Discussed	Consideration
Decision 12/PUU-V/2007 concerning Review of Law Number 1 of 1974 against the 1945 Constitution of the Republic of Indonesia. (Rejection of Application) According to the applicant, the provisions of Law 1/1974 are considered contrary to the constitution because it limits the applicant's right to freedom of religion to polygamy.	1. The Constitutional Court consideration based on a historical perspective that the purpose of Islam exists is to regulate the arbitrariness of men in polygamy. Before Islam existed, it was easier for men to treat women arbitrarily; 2. The Constitutional Court consideration is based on the Qur'an Surah Arum verse 21; an-nisa verse 1; an-nisa verse 3; the expert of Quraish Syihab and expert Huzaemah Yanggo that the purpose of marriage is to get *sakinah* (calm heart), *mawaddah* (love without reward), and *warohmah*. The wife's approval when the husband will engage in polygamy, as the applicant is concerned about, is basically following the principle sakinah*;* 3. The Constitutional Court considered that a fair interpretation as a condition for polygamy implies dividing *(al-qisth)* related to the ability to provide maintenance for the wife and/or prospective wife and children who are and who will be born; 4. The Constitutional Court considered that the state has the right to intervene because based on the fiqh principles cited "the government (state) takes care of its people in accordance with their benefit"; 5. The Constitutional Court considered that the petitioner's argument stating that polygamy is useful in preventing divorce due to infidelity is not true. This is based on the results of research from related

	parties that the reasons for divorce due to polygamy are the most numerous compared to the others.
Decision 19/PUU-VI/2008 concerning Review of Law Number 7 of 1989 concerning Religious Courts against the 1945 Constitution of the Republic of Indonesia. (Rejection of Application) According to the applicant, the provisions of Law 7/1989 are considered to be contrary to the constitution because it limits applicants from fully implementing Islamic law in their absence *jinayat.*	1. The Constitutional Court considered that it has no authority to increase the authority of the religious court because it is not a positive *legislator*; 2. The Constitutional Court considered that Indonesia is neither a religious nor secular state, Islamic law is a source of national law in addition to customary law, western law, and state law.
Decision Number 24/PUU-XX/2022 concerning Testing Law Number 1 of 1974 concerning Marriage (Rejection of application) According to the applicant, the provisions of Law 1/1974 are considered to be contrary to the constitution because it limits the Petitioners regarding the validity of interfaith marriages.	1. The Constitutional Court considered that the legality of marriage is the domain of religion through religious institutions or organizations that are authorized or have the authority to provide religious interpretations. The role of the state follows up on the results of the interpretation given by the religious institution or organization; 2. The Constitutional Court considered that in the construction of Article 28 paragraph (1), marriage is not placed as a right but as a prerequisite for the exercise of the right to form a family and continue offspring so that there is a fundamental difference with the UDHR which places marriage as a right. By using the rule of law "anything that is a condition for an obligation, the law becomes obligatory *(ma laa yatiimmu alwajibu illa bihi fahuwa obligatory*)", then a valid marriage is also a constitutional right that must be protected; 3. The Constitutional Court considered that marriage is categorized as an external forum in which the state can intervene, as is the case with the management of zakat and the management of the pilgrimage. The role of the state is not intended to limit one's beliefs, but rather so that religious

	expression does not deviate from the main tenets of the religion adhered to as is also in line with the construction of Article 28J of the 1945 Constitution of the Republic of Indonesia; 4. The Constitutional Court considered that in the event of a difference in interpretation, the individual's religious institution or organization has the authority to resolve it.
Decision 68/PUU-XII/2014 Review of Law Number 1 of 1974 concerning Marriage. (Rejection of Application) According to the applicant, the provisions in Law 1/1974 are considered contrary to the constitution because it limits the Petitioner regarding the validity of marriage based on religion.	1. The Constitutional Court considered that in exercising rights and freedoms, every citizen is obliged to comply with the restrictions stipulated by law; 2. The Constitutional Court considered religion is the basis of marriage, while the state has an interest in marriage. Religion plays a role as a foundation in the relationship with God Almighty, while the State has a role in providing protection for marriage.
Decision 46/PUU-XIV/2016 concerning Review of Law Number 1 of 1946 concerning Criminal Law Regulations or the Criminal Code *jo.* Law Number 73 of 1958. (Rejection of Application) According to the applicant, provisions in Law 1/1974 or Criminal Code *jo.* Law 73/1958 is deemed to be contrary to the constitution because the construction of adultery which the applicant needs to understand extensively is not only adultery in terms of cheating in marriage.	1. The Constitutional Court considered not to reject the idea of "updating" the Petitioners to extend the meaning of adultery, but the Court is also not of the opinion that the norms in the Criminal Code are complete. In this case, the Court is of the view that this is the domain of legislators (*open legal policy)* through criminal policy. 2. The Constitutional Court considered that in the context of criminal law norms, it is different from the context of conditional decisions by the Constitutional Court outside of criminal law norms, bearing in mind that criminal norms are a form of limiting a person's rights and freedoms in accordance with Article 28J paragraph (2) which is the exclusive authority of legislators.

Decision 140/PUU-VIII/2009 concerning the review of Law 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion. (Rejection of Application) According to the applicant, the provisions in Law 1/PNPS/1965 are deemed to be contrary to the constitution because they pose a risk of discrimination for several religions whose existence has not been recognized in Indonesia.	1. The Constitutional Court considered that the Law on the Prevention of Blasphemy of Religion provides protection and guarantees of legal certainty for every person and adherent of religion in exercising their constitutional rights; 2. The Constitutional Court is of the view that freedom of thought, and interpretation in practicing religion does not mean absolute freedom that is without limits, but can be limited based on laws or laws; 3. The Constitutional Court considered that the annulment of the Law on the Prevention of Blasphemy of Religion would cause the loss of guarantees for general protection so it was feared that people would take judges into their own hands; 4. The Constitutional Court considered that there is no religion that is prohibited in the Law on the Prevention of Blasphemy, what is prohibited is defaming religion.
Decision 46/PUU-VIII/2010 regarding the case of the application for review of Law Number 1 of 1974 concerning Marriage. (Approved partially) According to the applicant, the provisions in Law 1/1974 are considered by the Petitioner to be contrary to the constitution related to the legality of marriage and the civil rights of children outside of marriage.	1. The Constitutional Court considered that marriage registration is not a factor that determines the validity of a marriage, and (ii) record-keeping is an administrative obligation required under laws and regulations. 2. The Constitutional Court considered that the relationship between a child and a man as a father is not solely due to the existence of marital ties, but can also be based on proof of the existence of a blood relationship between the child and the man as the father. Thus, regardless of the matter of the procedure/administration of the marriage, the child born must receive legal protection.

Based on the cases above, there are at least 4 (four) patterns of tendence of how the Constitutional Court relates its considerations in deciding cases to Islamic populism. The four tendence are as follows, i) The Constitutional Court in certain cases only considers evidence put forward by the Islamic populist movement, ii) The Constitutional Court annuls the arguments of applicants who come from minority

religious groups on the grounds of supporting populism, iii) The Constitutional Court does not use or narrow the meaning of right foundation universal in deciding cases such as Pancasila, the 1945 Constitution of the Republic of Indonesia, the UDHR and various international covenants, and iv) the Constitutional Court is not comprehensive in considering all popular schools of thought and tends to side with populism with only one interpretation. Regardless of the variables above, there is one additional symptom in the form that the Constitutional Court does not use Islamic legal sources at all and still pays attention to minority rights or the values of Pancasila. If the patterns of tendence of Islamic populism from the seven rights above are summarized, an overview will be obtained through the following table:

Table 2 Variable Description of The Various Patterns of Constitutional Court Tendence Linking Its Considerations in Deciding Cases with Populism

Decision List	Var. 1	Var. 2	Var. 3	Var 4
Decision 12/PUU-V/2007	V	-	V	V
Decision 19/PUU-VI/2008	-	-	-	-
Decision 140/PUU-VII/2009	V	V	V	-
Decision 46/PUU-VIII/2010	-	-	-	-
Decision 24/PUU-XX/2022	-	-	V	V
Decision 68/PUU-XII/2014	-	-	-	V
Decision 46/PUU-XIV/2016	-	-	-	-
	2	1	3	3

Based on the variable mapping above, it can be concluded that4 of7 cases were decided by considering Islamic populism. The most frequent symptom is the phenomenon of not using or narrowing the meaning of the universal rights foundation and Constitutional Court's tendency to favor populism has only one interpretation in 4 (four) Decisions. The symptom that rarely occurs is the annulment of the argument for minority religion by the Constitutional Court Judges on the grounds of populism. Decision 46/PUU-VIII/2010, Decision 19/PUU-VI/2008, and Decision 46/PUU-XIV/2016 become an interesting case in itself because the judge is

not affected by the Islamic populism variable at all. Nevertheless, the facts still show that there is a tendency to use considerations of Islamic populism, namely 4 of the 7 judges' decisions in deciding cases.

First, the procedural law of the Constitutional Court in the Constitutional Court Regulation Number 2/2021 does not regulate the proportionality of the Constitutional Court in presenting related parties.[25] This provides ample freedom for Constitutional Court judges to determines who needs to be present at trial. The practices in some of the above cases show that the Indonesian Constitutional Court is currently still not proportional in determining religious groups and schools of thought in adjudicating cases.

Second, clarity regarding legal materials for the Constitutional Court's considerations. The Constitutional Court does not clearly regulate material for legal considerations, so this independence sometimes creates legal loopholes to adopt a narrow translation based on the original interpretation of the 1945 Constitution of the Republic of Indonesia only as legal material for court considerations. This more or less derogates HLA Hart's rule of recognition doctrine. Susi Dwi Harijanti interprets that in interpreting the constitution, it is not enough to just stick to the textual constitution, but also needs to interpret extensively by linking it to norms that act as sub-constitutional and extra-constitutional such as Pancasila, ICCPR, UDHR, and others.[26]

[25] Free limited evidence in the context of the procedural law of the Indonesian Constitutional Court means that the burden of proof is on the applicant, the party giving the statement and the related party. The obligation to prove is on the applicant's side, while the other two parties are only required to prove if the Constitutional Court is pleased. Read Farid Kusuma, "Calon Hakim Konstitusi Usulan Presiden Mulai Tes Wawancara," *suarasurabaya.net* (blog), December 11, 2019, https://www.suarasurabaya.net/kelanakota/2019/Calon-Hakim-Konstitusi-Usulan-Presiden-Mulai-Tes-Wawancara/. Maruarar Siahaan was quoted in the testimony of expert Benedict Hestu Cipto Handoyo in the "Judicial Review No. 60 of 2021 of No. 60/PUU-XIX/2021 Constitutional Court of The Republic of Indonesia" (n.d.), 85. Read further "Constitutional Court Regulation No. 2 of 2021 on Procedures in Judicial Review" (n.d.) Art. 5, Par. (1).

[26] Statement of Susi Dwi harijanti on the Judicial Review No. 60 of 2021 of No. 60/PUU-XIX/2021 Constitutional Court of The Republic of Indonesia.

Problems with Populist Movement Substance Loading as a Consideration in Examining Laws Against the Independence of the Constitutional Court

In essence, judicial power in a more moderate view is a form of implementation of "consensus democracy" which is the opposite of "majority democracy".[27] This form is different from a majority democracy which puts forward the majority vote in society, in a consensus democracy the search for agreement is based on a compromise from both parties to agree.[28] In a consensus democracy, the court functions as a policy maker in administering the state which is not based on the development of populism but must be based on strong and convincing legal considerations. It is this kind of role that requires strong independence for the judiciary itself.[29]

In Oemar Seno Adji's view, the independence of the judiciary can be seen in two aspects. First, in the functional sense of judicial power which is interpreted as institutional freedom or referred to as external independence or collective independence. Second, independence in a broad sense includes individual judges. This independence, according to Oemar, is seen from two perspectives, namely: the independence of a judge towards his fellow colleagues or referred to as personal independence, and substantive independence which relates to any power, both when deciding a case and when carrying out his duties and position as a judge.[30]

In addition to Oemar's view, in Gardbaum's view the independence of judicial power can be realized by 2 (two) elements.[31] First, Judicial power must be free from government influence. In this element, the state is often prone to exert pressure when the judicial power performs its functions so that the existence of judicial power is often seen as a political enemy by the government and populists. Second, Judges who exercise judicial power must exercise their authority impartially without involving

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[27] Arend Lijphart, *Patterns of Democracy* (Connecticut: Yale University Press, 2012), 216, http://www.jstor.org/stable/j.ctt32bg23.

[28] Margit Tavits, "The Size of Government in Majoritarian and Consensus Democracies," *Comparative Political Studies* 37, no. 3 (April 2004): 340–59, https://doi.org/10.1177/0010414003262068.

[29] Klaus Armingeon, "The Effects of Negotiation Democracy: A Comparative Analysis," *European Journal of Political Research* 41, no. 1 (January 2002): 81–105, https://doi.org/10.1111/1475-6765.00004. See also Bisariyadi, "Yudisialisasi Politik Dan Sikap Menahan Diri: Peran Mahkamah Konstitusi Dalam Menguji Undang-Undang," *Jurnal Konstitusi* 12, no. 3 (May 20, 2016): 473, https://doi.org/10.31078/jk1233.

[30] Oemar Seno Adji, *Peradilan Bebas Negara Hukum* (Jakarta: Erlangga, 1985), 46.

[31] Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?"

their political will, or the influence of individual interests concerning the background of individual judges, so that what is decided from the judge's personality is truly in accordance with facts and truth which is reinforced by strong legal arguments.[32]

In connection with the second element mentioned by Gardbaum, the presence of impartial judges is a necessary need for an accountable judicial power in carrying out its obligations, according to David Pamintel, the community's hope for a judge is his ability to do "the right thing" which is described by the Pamintel that judges must follow the law and apply legal rules even though "the right thing" is not stated normatively.[33] Pamintel continued that the meaning of "the right thing" is a necessity for a judge not to violate his capability or authority in carrying out his function.[34]

The defeat of the representation of Islamic populism in the 2019 election itself does not de facto mean that Islam has lost its movement in upholding Islamic sharia in Indonesia. This is due to the fact that Prabowo's opponent, namely Joko Widodo, is supported by nationalist populism circles, also supported by other Islamic populists, namely the Nahdlatul Ulama Executive Board (PBNU), as evidenced by the pairing of Joko Widodo with Ma'ruf Amin, who is one of the officials at PBNU. In Hadiz and Robinson's view, the victory of Joko Widodo and Ma'ruf Amin marked that Islamic populism was made into an oligarchic elite to consolidate their interests. Therefore, actually Islamic populism in Indonesia still has the power to put pressure on the government to enforce Islamic law.[35]

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[32] Anja Seibert-Fohr, ed., "Introduction The Challenge of Transition," in *Judicial Independence in Transition*, vol. 233, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012), 1–15, https://doi.org/10.1007/978-3-642-28299-7_1; Ni'matul Huda, Dodik Setiawan Nur Heriyanto, and Allan Fatchan Gani Wardhana, "Legal Status of Ratified International Treaty Under Indonesian Hierarchy of Law," in *Asian Constitutional Law Recent Developments and Trends*, vol. 1 (The 8th International Conference of the Asian Constitutional Law Forum, Hanoi, Vietnam: Vietnam National University Press, Hanoi, 2019), 11, http://hdl.handle.net/123456789/24066.

[33] David Pimentel, "Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity," *Cleveland State Law Review* 57, no. 1 (2009): 13–14, https://engagedscholarship.csuohio.edu/clevstlrev/vol57/iss1/3.

[34] David Pimentel, "Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand," *Pacific Basin Law Journal* 33, no. 2 (2016): 55–57, https://doi.org/10.5070/P8332033161; See also Ibnu Sina Chandranegara, "Defining Judicial Independence and Accountability Post Political Transition," *Constitutional Review* 5, no. 2 (November 18, 2019): 294, https://doi.org/10.31078/consrev525.

[35] Hadiz and Robison, "Competing Populisms in Post-Authoritarian Indonesia."

In theory, populist movements are a danger to democracy itself because these movements can manipulate the constitutional mandate with the views of the majority.[36] The manipulation of the majority essentially offers the idealism of a state in the form of a single unit that cannot be divided and homogeneous and cannot be separated. However, such idealism is an argument that is not in accordance with the principles of the state, bearing in mind that in one unit each group lives side by side to form a plural unity.[37] So that ideally even though there is a majority group there is also a minority that needs attention. If the value of populism is allowed, then the danger that occurs in the life of the state is the implementation of checks and balances mechanisms in the constitution and weakens the implementation of human rights, so that the values of state pluralism, transnational solidarity, and protection of minorities will be considered as marginalized issues by the majority group.[38]

The populist situation will become even more dangerous, when the judicial power follows the trend of populism because, with so much community pressure, the court decides based on the interests of populism in the community which then gives rise to indications of the existence of judicial populism.[39] The practice of judicial populism is indicated when the panel of judges' decisions is not based on the rule of law but rather on the pressure that arises from the interests of the majority of society so that as a result of testing the constitutionality of laws, the court can give wrong interpretations.[40] The panel of judges here tends to speak on behalf of the people or when the Court issues a decision that is adjusted and influenced by the will of the

[36] Bala Raju Nikku and Azlinda Azman, "Populism in the Asia: What Role for Asian Social Work?," *Social Dialogue: The International Association of Schools of Social Work (IASSW)*, September 2017.

[37] Théo Fournier, "From Rhetoric to Action, A Constitutional Analysis of Populism," *German Law Journal* 20, no. 3 (April 2019): 324, https://doi.org/10.1017/glj.2019.22.

[38] Fournier, "From Rhetoric to Action, A Constitutional Analysis of Populism."

[39] Jorge González Jácome, "In Defense of Judicial Populism: Lessons from Colombia," *Verfassungsblog*, May 3, 2017, https://doi.org/10.17176/20170503-112107. See also Rosa Ristawati and Radian Salman, "Judicial Independence Vis-à-Vis Judicial Populism: The Case of Ulayat Rights and Educational Rights," *Constitutional Review* 6, no. 1 (June 2, 2020): 110, https://doi.org/10.31078/consrev614.

[40] Alon Harel, "Courts in a Populist World," *Verfassungsblog: On Matters Constitutional*, April 27, 2017, 1–4, https://doi.org/10.17176/20170428-104853.

majority of the people, even though this is actually outside of justice, impartiality, and the independence of the judiciary.[41]

From the analysis of populism, the authors summarize that if the Constitutional Court decides to review a law based on populism, then there are 2 (two) dangers faced by the state, including (1) Populism decisions can damage the human rights of minority communities; (2) a court decision that favors the majority will eliminate the implementation of plural constitutionalism; Of all these danger variables, when contextualized against the Constitutional Court decisions that have been analyzed, populist Constitutional Court decisions in the context of being a state in Indonesia will pose several dangers, as follows:

First, populist decisions can undermine the human rights of minority communities. As an early example, there are signs that the Constitutional Court is not comprehensive in considering the possibility that the use of evidence such as experts or witnesses from other religions has certain implications for minority groups.[42] This is because the effect of changing the content of a law is not only related to certain religions but can also have an impact on other religions. After analyzing how the Constitutional Court's pattern in building arguments in the last 20 years, the Constitutional Court tends not to consistently present minority religious groups proportionally.[43]

The author noted several constructions of constitutional rights that were harmed by minority groups for the establishment of the Constitutional Court in several decisions, for example: First, the right to form a family and continue offspring through legal

[41] Yasser Kureshi, "Prism: What Is Judicial Populism and How Does It Work in Pakistan?," dawn.com, February 1, 2019, https://www.dawn.com/news/1461194.

[42] "Judicial Review No. 19 of 2008 of No. 19/PUU-V/2008 Constitutional Court of The Republic of Indonesia" (n.d.); "Judicial Review No. 46 of 2010 of No. 46/PUU-VIII/2010 Constitutional Court of The Republic of Indonesia" (n.d.); and "Judicial Review No. 24 of 2022 of No. 24/PUU-X/2022 Constitutional Court of The Republic of Indonesia" (n.d.).

[43] Compare"Judicial Review No. 19 of 2008 of No. 19/PUU-VI/2008 Constitutional Court of The Republic of Indonesia" (n.d.); Judicial Review No. 46 of 2010 of No. 46/PUU-VIII/2010 Constitutional Court of The Republic of Indonesia; "Judicial Review No. 68 of 2014 of No. 68/PUU-XII/2014 Constitutional Court of The Republic of Indonesia" (n.d.); "Judicial Review No. 46 of 2016 of No. 46/PUU-XIV/2016 Constitutional Court of The Republic of Indonesia" (n.d.); and Judicial Review No. 24 of 2022 of No. 24/PUU-X/2022 Constitutional Court of The Republic of Indonesia with the "Judicial Review No. 12 of 2007 of No. 12/PUU-V/2007 Constitutional Court of The Republic of Indonesia" (n.d.) and "Judicial Review No. 140 of 2009 of No. 140/PUU-VII/2009 Constitutional Court of The Republic of Indonesia" (n.d.).

marriage (Article 28 B of the 1945 Constitution of the Republic of Indonesia). In this case, Constitutional Court narrows the right to marry in the construction of universal rights on the basis of the meaning of marriages that are "legal" according to religion and are recorded in accordance with statutory provisions.[44] Problems arise because marriages that are legal according to religion are translated by the Constitutional Court into the domain of institutions or organizations authorized to provide interpretations, while the Constitutional Court does not provide criteria and requirements for the institutions or organizations in question.[45] In practice, this has an impact on meaning by individuals who have different interpretations of meaning by certain institutions or organizations that refer to popular schools of thought.[46]

Second, the right to embrace a religion (Article 28E paragraph 1), the right to freedom of belief (Article 28E paragraph 2), a right that cannot be reduced under any circumstances (Article 28 I). Referring to the analysis in the previous discussion, the Constitutional Court is of the opinion that the state can limit i) forum externum for example in the context of testing interfaith marriages, and ii) forum internum for example in the context of testing for blasphemy.[47] Limitation in forum internum was intended by the Constitutional Court to remain in accordance with the main points of religious teachings in cases of testing related to blasphemy. According to the author, this consideration shows a tendency that the Constitutional Court is not comprehensive in considering all schools of thought or interpretation and tends to only focus on popular schools of thought or interpretation. This has implications for the majority of certain religious sects being able to accuse religion of blasphemy on the basis of deviating from "principles of religious teachings". In this case, the author agrees with Marzuki that the Constitutional Court's considerations were in the

[44] "Judicial Review No. 24 of 2022 of No. 24/PUU-XX/2022 Constitutional Court of The Republic of Indonesia" (n.d.).

[45] Judicial Review No. 24 of 2022 of No. 24/PUU-XX/2022 Constitutional Court of The Republic of Indonesia.

[46] Judicial Review No. 24 of 2022 of No. 24/PUU-XX/2022 Constitutional Court of The Republic of Indonesia.

[47] "Judicial Review No. 140 of 2009 of No. 140/PUU-XIX/2022 Constitutional Court of The Republic of Indonesia" (n.d.).

decision a quo clearly considering the socio-political sensitivity of the substance of the test, namely freedom of religion.[48]

This stance is actually incorrect because interpretation and ways of worship need to be understood as the domain of citizens, while the state actually only acts when there is a violation of the rights and freedoms of other people. The Constitutional Court's argument that the state does not intervene, but only acknowledges the internal "agreement" of the respective religions and religious leaders, in the author's view, is the coercion of the majority sect in their respective religions.[49] In this regard, the author agrees with Indarti that it is true in the context of forum internum, the state cannot intervene[50] also including according to the author the restrictions left to the famous sect. Furthermore, he agreed with Marzuki that the Constitutional Court's considerations used Article 18 paragraph (3) of the ICCPR to limit forum internum is inappropriate considering that the phrase "freedom to practice religion…" in that article refers to the dimension of external expression (forum externum), not inner expression or worship in the private realm (forum internum).[51]

On the other hand, state intervention in the context of forum externum needs to be built in the construction of article 28 J of the 1945 Constitution of the Republic of Indonesia which provides justice for minorities. Therefore, restrictions on exercising religious rights in the public sphere need to be understood in terms of an act or expression of religion that has empirically affected the rights and freedoms of others or if it is not in line with considerations of morality, religion, security and public order which accommodate the interests of all citizens. country.

Second, regarding a court decision that favors the majority will eliminate the implementation of plural constitutionalism. This happened along with the emergence of tendence of Islamic populism carried out by the Constitutional Court at the decision

[48] Suparman Marzuki, "Perspektif Mahkamah Konstitusi Tentang Hak Asasi Manusia," *Jurnal Yudisial* 6, no. 3 (November 25, 2013): 205, https://doi.org/10.29123/jy.v6i3.98.

[49] Judicial Review No. 140 of 2009 of No. 140/PUU-XIX/2022 Constitutional Court of The Republic of Indonesia.

[50] Judicial Review No. 140 of 2009 of No. 140/PUU-XIX/2022 Constitutional Court of The Republic of Indonesia.

[51] Marzuki, "Perspektif Mahkamah Konstitusi Tentang Hak Asasi Manusia," 203.

of the matter number 140/PUU-VIII/2009. The narrowing of the meaning of universal human rights contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, the ICCPR, and the UDHR can threaten the integrity of the plurality of society as a result of restrictions on freedom of belief (Article 28E paragraph 2). In addition to the case decision number 140/PUU-VIII/2009, the emphasis on legal considerations which favor the majority as seen in Decision 68/PUU-XII/2014 and Decision 24/PUU-XX/2022 concerning state intervention and the validity of marriage based on religion makes legal products that apply in society can only accommodate the provisions of people who adhere to religion with populist arguments so that minority people who adhere to arguments other than populist ideas are increasingly excluded from social life because of the absence of a legal umbrella protecting their rights.

From that case, the author argued that this is a huge threat to the core elements of the pluralist constitution of Indonesia which Rosa and Salman are trying to picture in prelude research.[52] It's important to note that the pluralist constitution of Indonesia is much dependent on how minority rights are interpreted within the scope of judicial independence and impartiality. The Constitutional Court decision must be based not only on the interest of a particular group only but beyond that for the interest of entire people, including the minority's rights. Fossati and Mietzner argue Islamic Populism which became a trend seeks to change the Indonesian constitution, from pluralist into full or heavily dominant Islamization of politics and society.[53] In 20 years of Indonesian Constitutional Court rules, this is a very threat to consensus democracy itself that must be challenged.

CONCLUSION

From the discussion above, the author of this paper has 2 (two) conclusions, which include: first, the strong relationship between religion and the state in Indonesia has

[52] Ristawati and Salman, "Judicial Independence Vis-à-Vis Judicial Populism: The Case of Ulayat Rights and Educational Rights."

[53] Fossati and Mietzner, "Analyzing Indonesia's Populist Electorate."

made the judicial power, which is mainly the Constitutional Court, inseparable from the influence of Islamic populism in Indonesia. This is proven by the existence of 4 decisions of the Constitutional Court of the 7 decisions analyzed that have fulfilled the variable on the characteristics of populist decisions. Apart from the strong relationship between the state and religion, this is also coupled with the weakness of procedural law. The Constitutional Court opens up space for strengthening populism in influencing the Constitutional Court in deciding cases. Second, the fading independence of the Constitutional Court in deciding populist cases can pose a danger to democracy, in which the dangers include: (1) Populism decisions can damage the human rights of minority communities; (2) a court decision that favors the majority will eliminate the implementation of plural constitutionalism. In 20 years of Indonesian Constitutional Court rules, this is a very threat to consensus democracy itself that must be challenged.

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