

**RELIGIOUS FREEDOM IN INDONESIA AND MALAYSIA
IN THE CONSTITUTIONAL COMPARATIVE PERSPECTIVE:
THE CASES OF JUDICIAL REVIEW IN BLASPHEMOUS OFFENCES**

Bani Syarif Maula

STAIN Purwokerto

Jl. Jend. Ahmad Yani No. 40A Purwokerto

Email: banisyarifm@yahoo.com

Abstrak

Makalah ini membahas jaminan kebebasan beragama dalam konstitusi dua negara, yaitu Indonesia dan Malaysia, dan apakah judicial review bisa menjadi mekanisme terbaik untuk melindungi hak konstitusional warganegara dari kedua negara tersebut. Makalah ini berkesimpulan bahwa Indonesia dan Malaysia memiliki karakteristik konstitusi yang berbeda dalam hal ketentuan-ketentuan perlindungan kebebasan beragama. Namun demikian, judicial review di kedua negara tersebut bisa menjadi perlindungan bagi hak-hak agama minoritas, meskipun dalam prakteknya tidak selalu demikian, seperti dalam kasus judicial review undang-undang anti penodaan agama di Indonesia. Memang idealnya, judicial review merupakan cara yang paling efektif dalam menguji undang-undang yang merugikan kaum minoritas, dan juga judicial review seharusnya diletakkan sebagai faktor penting untuk melindungi hak asasi manusia.

Abstract

This paper will examine the entrenchment of religious freedom in the constitutions of two countries, Indonesia and Malaysia, and whether the judicial review as one of the best mechanisms to protect constitutional rights of its citizens. It can be concluded that Indonesia and Malaysia have different characteristics of constitutional provisions on the protection of religious liberty. However in both countries the judicial review of executive acts and legislative power is very likely to be able to protect religious minority rights, except in anti-blasphemy law in Indonesia. Ideally, the judicial review serves as an important means of legal examination against tyranny of majority, and it should be put to be a substantial factor in protection of human rights.

Kata kunci: *Kebebasan beragama, HAM, Konstitusi, Indonesia, Malaysia*

A. Introduction

In today's world, religious freedom can be considered one of the most fundamental of human rights, because this right is one of the manifestations of personal liberty which comes from the most inner part of humans. In this way, interference with the freedom of religion and belief will often be experienced as grave violations. Thus, everyone must

have the freedom to observe and to practice their faith without fear of, or interference from, others. The general idea of preserving the rights of religious freedom lies in the history of protecting religious minorities, and, even though the right of religious freedom is considered as the foundation of Western human rights ideology, it is universally acceptable as one of the foundations of a democratic

society. In Muslim majority countries, such as Indonesia and Malaysia with an official state religion, ideally, freedom of religion is considered as to mean that the government allows religious practices of religious minorities or other sects besides the state religion, and does not persecute believers in other faiths. However, in practice, religious minorities in both Muslim countries suffer from restrictions on this right.

In Indonesia, for example, there is an anti-blasphemy law (Law No. 1/1965) and a ministerial decree ordering the Ahmadiyya community to "stop spreading interpretations and activities which deviate from the principal teachings of Islam," including "the spreading of the belief that there is another prophet with his own teachings after Prophet Mohammed." Violations of the decree are subject to up to five years of imprisonment. Human rights groups have jumped to the defense of Ahmadiyah, encouraging the group to file a judicial review of the 1965 law with the Constitutional Court and the decree with the Supreme Court. Similarly, the Malaysian Government banned what it considered "deviant" interpretations of Islam, maintaining that "deviant" groups' views, which included Ahmadiyya, Islamailah, Shi'a, and Baha'i teachings, endanger national security and could divide the Muslim community. Moreover, the Internal Security Ministry issued a directive to the Catholic Church to stop using the word "Allah" in its weekly publication, the Catholic Herald.

This paper will examine the entrenchment of religious freedom in the constitutions of both countries and whether the judicial review as one of the best mechanisms to protect constitutional rights of citizens can be a concrete way to deal with human rights protection by challenging the state through the courts. The paper will be divided into three parts. The first one will elaborate religious freedom as the foundation of a democratic society by examining human rights

provisions in Indonesia's and Malaysia's constitutions. The second part will discuss some restrictions on religious freedom in Indonesia and Malaysia. The third part of the paper focuses on judicial reviews on the restrictions of religious freedom in Indonesia and Malaysia and it analyzes how the judicial review plays a role in protecting religious freedom due to some restrictions from the governments of both countries.

B. Religious Freedom as the Foundations of a Democratic Society

Indonesia and Malaysia were admitted as members of the United Nations following their independence. As member states, Indonesia and Malaysia are governed by the United Nations Charter. The General Assembly of the United Nations considered that the UN Charter obliged member states to promote human rights and condemned those who violated such rights.¹ It is important to observe that the UN Charter recognized the entitlement of human beings to rights by reason of their humanity alone. It means that the dominant approach to the normative foundations of international human rights standards regards human rights as moral entitlements that all human beings possess by virtue of their common humanity.²

Even though the concept of human rights plays an important role in international level, in practice international factors actually have little or even no effect on domestic respect for human rights. Camp Keith, for example, argues that there is no statistical correlation between ratification of the International Covenant for Civil and Political Rights and increased respect for human rights.³ Similarly, Hathaway's study of various international human rights treaties, confirms these findings. Hathaway concludes that treaty ratification is not only ineffective, but at times can actually produce negative results: "treaty ratification is not infrequently associated with worse, rather than better, human rights ratings than

would otherwise be expected".⁴ Landman also comes to question the true effectiveness of international human rights covenants. Specifically, he finds that the effect of signing or ratifying these covenants on domestic respect for human rights is not quite strong which may impart optimism about the future effectiveness of international human rights covenants.⁵ The lack of effectiveness of the ratification of human rights treaties may be because, as Hathaway points out, the covenants are simply complementing the effect of simultaneous domestic processes of democratization, increasing wealth, and growing interdependence.⁶

The lack of the effectiveness of some human rights treaties implementation is more visible in Muslim countries. This may be because religious liberty supposedly burdens some Muslim states with a competence to protect indigenous religions of the majority by the prohibition of apostasy and proselytizing any other religions. As a result, the impact of this policy may influence religious minority groups' rights in practicing their religion and belief. However, in a democratic country, where a constitution is regarded as the highest law, people can do a constitutional complaint in order to challenge the state's violation of their rights. Constitutional complaints and judicial review are perhaps the most powerful among the mechanisms for the legal protection of constitutional rights.⁷

According to Ján Klucka, most modern constitutions contain a bill of fundamental rights and freedom which are directly applicable and not mere declarations of goodwill.⁸ Most legal systems let constitutional provisions prevail over any other law, and will also allow for some form of judicial review. Nevertheless, in some countries, such as in Indonesia and Malaysia, judicial remedy of a constitutional complaint is not always applicable. Therefore, legal perspectives of the state of religious human rights in the constitutional systems of the world require

special emphasis of particular juridical mechanisms for the regulation of human rights with a religious base or substance. The constitutional mechanism devised to this end will evidently differ in accordance with the premises of their founders as to the function of the state and the purport of the law in relation to religious belief and activity and concerning the institutional church.⁹

C. Restrictions on Religious Freedom in Indonesia and Malaysia

According to Stahnke and Blitt, there are four categories of countries which have majority Muslim population. The first is countries which declare themselves as an Islamic-State; the second category is countries stating Islam as the official religion of the state; the third is countries declaring themselves as secular-state; and the fourth category is countries which have not made any constitutional declaration concerning the Islamic or secular nature of the state, and have not made Islam the official state religion.¹⁰ Indonesia is part of the last category, while Malaysia is accounted for the second category.

Stahnke and Blitt say that under international human rights standards, a state can adopt a particular relationship with a religion of the majority of the population, including establishing a state religion, provided that such a relationship does not result in violations of the civil and political rights of, or discrimination against, adherents of other religions or non-believers.¹¹ However, many human rights violations happen in Muslim countries whatever their constitutional recognition of a state religion. Indonesia and Malaysia are among Muslim countries which remain restricting the rights to freedom of thought, conscience, and religion or belief, even though both countries have constitutional provisions regarding human rights protection.

1. Indonesia

Indonesia is a predominantly Muslim country with secular state. The absence of

any reference to Islam in the 1945 Constitution shows that Indonesia is open to all religions besides Islam. This is in accordance with international human rights norms which stipulate, among other things, that the government is not only prohibited from limiting religious freedom, it is also unacceptable, according to International standards of democracy, to endorse a particular religion.

The Constitution of Indonesia provides for freedom of religion, and the government generally respected this right in practice, particularly since the amendment to the Indonesian Constitution in 2000. Freedom of religion is a mandate of the Indonesian Constitution (*The 1945 Constitution*), of which article 29(2) declares that "the State guarantees the freedom of every citizen to embrace their religion and to worship according to their religion and conviction". This is reinforced with article 28E, introduced by an amendment to the 1945 Constitution, which states that "every person shall be free to embrace and to practice the religion of his or her choice", and "every person shall have the right to the freedom to hold beliefs, and to express his or her views and thoughts, in accordance with his/her conscience".¹² The constitutional provisions were then reinforced with Indonesia's ratification of the International Covenant on Civil and Political Rights in 2006 and its subsequent incorporation into domestic law.¹³

In addition to the constitutional provision above, Law No 39/1999 on Human Rights states in article 22(1) that "every person is free to profess his/her religion and to worship in accordance with his/her religion and conviction", and also based on article 22(2), the freedom to profess one's religion and to practice one's convictions and beliefs are guaranteed by the state. However, the legal and constitutional guarantees of religious freedom have not been fully borne out in practice. Restrictions continued to exist on some types of religious activity. Moreover,

according to a report released by the U.S. State Department, security forces occasionally tolerated discrimination against and abuse of religious groups by private actors, and the government failed to punish perpetrators.¹⁴

This condition could be caused, among other things, by the government's policy and law which would legally permit tightened restrictions on religious liberty if conditions changed. Gvosdev says that some 'democratic' countries have some strategies by which governments can legally restrict religious freedom. According to Gvosdev, the most obvious method is the insertion of provision of state's interests into the constitution, "which grants to the government the power to proscribe groups and practices deemed to be in conflict with state goals".¹⁵ In Indonesian case, Gvosdev found that the Indonesian government had enacted some rules "redefining 'religious freedom' in a narrower or more restrictive fashion than the general understanding".¹⁶ Hence, the Indonesian government actually has been maintaining a right to define what constitutes a religion in the country, and has ensured through its policies that its citizens follow an acceptable religious faith.¹⁷ Therefore, even though the Indonesian Constitution guarantees freedom of religion to its citizens,¹⁸ the provision should be interpreted as 'freedom of worship', not 'freedom to practice on their beliefs', because the government officially recognizes only six religions, and legal restrictions also still continue on certain types of religious activity, particularly among unrecognized religions and sects of recognized religions considered "deviant".¹⁹

Only six religions are officially recognized by the government. Therefore, other religions, including religious sects, are discriminated against, particularly in relation to the rights protection and civil registration system which restricts the religious freedom of persons who do not belong to the six recognized faiths. Local

traditional religions (animists), Ahmadis, Baha'is, and members of other small minority faiths found it difficult to register marriages or births.²⁰

Moreover, because the government requires all adult citizens to hold a National Identity Card (ID card) which, among other things, identifies the holder's religion, members of religions not recognized by the government are generally unable to obtain an ID card unless they incorrectly identify themselves as belonging to a recognized religion. Some human rights groups found that some local Civil Registry officials rejected applications submitted by members of unrecognized or minority religions, and others accepted applications, but issued the Identity Card that inaccurately reflected the applicants' religion. Some animists received ID cards that listed their religion as Islam. Many Sikhs registered as Hindu on their ID cards and marriage certificates because the Government did not officially recognize their religion.²¹

According to Salim, the discrimination against citizen with unrecognized religions actually stems from the misinterpretation of a Soekarno-era presidential decree No. 1/1965 on the Prevention of Abuse and Disrespect of Religion.²² The elucidation to this decree listed the six religions to which most Indonesian people adhere: Islam, Catholicism, Protestantism, Hinduism, Buddhism and Confucianism. In 1967, under Presidential Instruction No. 14/1967, President Soeharto dropped Confucianism from the list of recognized religions because of its allegedly strong relationship with communism. Salim argues that both decrees were not meant to imply that those religions were the only religions that were officially acknowledged, but since 1974 (after the enactment of Marriage Act No. 1/1974), religion has become a decisive factor in validating marriages, and the term 'religion' has been interpreted based on previous regulations, i.e. on the last decree in particular.²³ Moreover, regulations on

identity cards require their holders to indicate their religion, which result in discrimination against citizens who subscribe to religions other than any of the six major religions.²⁴ Fortunately, in 2001, President Abdurrahman Wahid annulled that instruction, allowing Confucianism to once again become a recognized religion in Indonesia. However, other minority religions still do not enjoy the same rights and protection from the government.

Not only related to the issuance of ID cards for people with unrecognized religions, the construction and expansion of houses of worship are also restricted. The Indonesian government continued to restrict the construction and expansion of houses of worship by issuing Joint Ministerial Regulation (No. 9/2006 of the Minister of Religion and No. 8/2006 of the Minister of Home Affairs) on the Establishment of Places of Worship,²⁵ and it also maintained a ban on the use of private homes for worship unless the local community approved and a regional office of the home affairs ministry provided a license.²⁶ Christians in Indonesia feel increasingly uneasy, especially after some Islamists forced several unlicensed churches to shut down.²⁷ Besides sealing several churches across Indonesia, some Islamists have also damaged mosques and other facilities belonging to the Ahmadiyya group.²⁸

That is because the new decree stipulates that any attempt to set up a house of worship must take into account the religious composition of the district where it is expected to stand. If authorities find a request fits the composition, applicants need to show at least 90 people in the area will use the facility and that at least 60 other residents from other religions approve of having it in their neighborhood.²⁹

Furthermore, regarding the freedom of religious sects to practice on their beliefs, the Indonesian government continued to restrict the religious freedom of groups associated with forms of Islam

viewed as outside the mainstream. In 2005, an Islamic religious leader in East Java, Mohammad Yusman Roy, was prosecuted and jailed for promoting the use of Indonesian language prayer. He was charged with "despoiling an organized religion", a crime that carries a maximum punishment of 5 years in jail.³⁰

Moreover, on June 9, 2008, the Indonesian government by Religious Affairs Minister, Home Minister, and Attorney General issued a decree tightening restrictions on the minority Ahmadiya community.³¹ The decree orders the Ahmadiya to "stop spreading interpretations and activities which deviate from the principal teachings of Islam," including "the spreading of the belief that there is another prophet with his own teachings after Prophet Mohammed". Violations of the decree are subject to up to five years of imprisonment.³²

2. Malaysia

With a genuine ethnic and religious plurality, Malaysian community is remarkably diverse and heterogeneous society, but it is one of the world's most religiously diverse Islamic states because of the cultural hegemony of its population. However, Malaysia can be regarded as an example of multicultural success. The majority of Malays are Muslims, the Chinese are predominantly followers of Buddhism, Taoism or Christians, the Indians are mostly Hindus, Sikhs or Christians, and the Ceylonese are predominantly Hindus. Christianity is also practiced by the *orang asli* of Sabah and Sarawak. Malaysia's Muslims are predominantly of the Sunni Islamic stream and are governed equally by the Federation's laws as well as Islamic law.³³ In a society like Malaysian, it is important to all religious groups, particularly the religious minorities, to feel that their religious rights are safeguarded. For the religious individuals, the right to believe leads inevitably to the rights to assemble, speak, worship, proselytize, educate, parent, or travel in the basis of one's

beliefs.³⁴ Accordingly, to ignore religious rights is to overlook the conceptual, if not historical, source of many other individual and association rights.³⁵ These rights includes the right to exist, the rights to corporate property, collective worship, organized, charity, parochial education, freedom of press and autonomy of governance.³⁶

Although Malaysia theoretically is a secular state, Islam is Malaysia's official religion pursuant to article 3 of the federal Constitution, which also recognizes that "other religions may be practiced in peace and harmony in any part of the Federation". Based on this provision, the Malaysian constitution claims tolerance for other forms of belief and worship, because the nomination of Islam as the official religion would not in any way affect the civil rights of the non-Muslims.³⁷ This is reflected in article 3(4) of the Federation Constitution that proclaims that nothing in article 3 "derogates from any other provision of the Constitution", that is the provisions guaranteeing the fundamental liberties and civil rights of the non-Malays. Therefore, although Islam was declared as the official religion of the state, it is not considered the religion of the state, which implies that Malaysia is not an Islamic state wherein Islamic legal system is the constitutional basis of the state and its legislation.³⁸

The guarantee for religious freedom is stipulated in article 11(1) of the Federal Constitution which allows "every person to profess and practice his religion"; however, it is subject to article 11(4) which states that "Federal law may control or restrict the propagation of any religious doctrine or belief amongst persons professing the religion of Islam". In addition, article 11(3) recognizes the right of every religious group "to manage its own religious affairs, to establish and maintain institutions for religious and charitable purposes, and to acquire and own property and hold and administer it in accordance with law". Moreover, article

11(5) of the Federal Constitution provides that the constitutional guarantee of religious freedom “does not authorize any act contrary to any general law relating to public order, public health or morality”. This limitation is not unreasonable and mirrors article 18(3) of the ICCPR that allows for a limitation of these rights “as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedom of others”. A similar limitation is expressed in article 14 of the ICESCR. Accordingly, the primary intent of article 11(5) is not to restrict religious freedom although it may be used to prohibit the open proselytizing of religious groups in the interests of preserving public order.³⁹

Additionally, religious freedom is also protected during a state of emergency. Articles 149 (dealing with preventive detention) and 150(6A) of the Federal Constitution both limit the ordinarily expansive powers of the emergency government by providing that during an emergency the government may not interfere with freedom of religion, and may not interfere with the legislative powers of the state with regard to Islamic law.⁴⁰ However, these provisions are interpretable and do not specify when a state of emergency can happen. The government may claim a situation of emergency by its own interpretation and then prohibit certain activities of religious group.

Based on abovementioned provisions, the religious rights of Malaysia’s minorities should be constitutionally protected in accordance with the standards recommended by the international instruments. However, there are some restrictions on religious freedom in practice, especially on proselytizing and in cases of conversion from Islam. Article 11(4) limits the proselytizing of religion amongst Muslims and allows the Federal and State legislatures “to control or restrict the propagation of any religious doctrine or belief among persons professing the

religion of Islam”. While article 11(4) applies to all Muslims, it greatly affects all Malays, who must, by definition, be a Muslim pursuant to article 160(2) of the federal Constitution. However, the practice of Islamic beliefs other than Sunni was significantly restricted, and those deviating from accepted Sunni beliefs could be subjected to rehabilitation.⁴¹

The attempts to strictly enforce the prohibition on proselytizing as much as possible have limited the religious practices of some non-Muslims groups, in which evangelism and proselytizing are at the core of the religious groups. According to the 2008 Annual Report on Religious Freedom, the Malaysian government restricts the distribution of Malay language translations of the Bible. Since 2005 a policy initiated by the Prime Minister requires that Malay-language Bibles must have the words “Not for Muslims” printed on the cover and may be distributed only in churches and Christian bookshops. The government has also forbidden the distribution of Christian tapes and other similarly printed religious materials in Malay language. Moreover, in February 2008, the Internal Security Ministry issued a directive to the Catholic Church to stop using the word “Allah” in its weekly publication, the *Catholic Herald*. The Deputy Prime Minister defended the action and denied that it undermined tolerance among the country’s religious communities. The de facto minister for Islamic affairs claimed the word “Allah” in Christian literature could confuse the country’s Muslims and draw them to Christianity.⁴²

Another likely cause of irritation is that any Muslim authorized to teach Islam is able to proselytize to non-Muslims. This creates an inequality between Muslims and non-Muslims with respect to proselytizing which can be viewed as unfavorable by those non-Muslims whose religious practices encourage proselytizing.

Article 18 of the UDHR considers religious freedom to include the freedom

of change one's religion or belief. Moreover, article 29 of the UDHR, which sets out the limit of rights and freedoms guaranteed by the UDHR, which would include religious freedom, observes that "in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of other and of meeting the just requirements of morality, public order and the general welfare in a democratic society".⁴³ Therefore, the restriction on proselytizing falls outside the ambit of article 29 of the UDHR and article 27 of the ICCPR.

Nevertheless, in Malaysia religious practices of non-Muslims are recognized and freedom of religion is generally not curtailed, apart from the restriction on proselytizing. However, non-Muslim minorities question the conditions imposed on them when similar limitations are not imposed on Muslims. This creates unnecessary inter-religious sensitivities, even though inter-religious conflict is not prevalent in Malaysia. Religious minorities are likely to feel threatened by legislation which can potentially be used to restrict religious freedom. The government's reliance on the Internal Security Act (ISA) fuels concerns over the ability of the government to severely curtail religious freedom through detention when the circumstances may not warrant such action. The ISA is seen and considered by many civil society groups as "a draconian and obnoxious law which undermines the rule of law and fundamental principles of human rights".⁴⁴

From the explanation above, it can be seen that despite the availability of significant legal documents acknowledging international principles and standards of human rights, human rights violations, particularly religious restrictions, in Indonesia and Malaysia are not likely to come to a rapid end. In both countries where the states take upon themselves the function and power to enforce religious

scruples, religious freedom finds itself under particular stress.

Many rights are already guaranteed in the Indonesian and Malaysian Constitutions, which rights include freedom of expression, freedom of religion, the right to information, freedom of assembly and association, etc. These rights may only be abrogated by the special procedures laid down for constitutional amendment. Ideally, a law which limits civil rights should never threaten the freedom of thought, conscience and religion, or impose limitations to those rights solely on the grounds of religious, political or other views, or in a racially or sexually discriminatory manner. Such a law should not exceed its desired aim, but if a limitation would be applied, it should only be made for particularly important reasons. Therefore, all citizens would be treated equally and they would have the rights to freedom from legislation limiting civil rights solely on grounds of political, religious or other belief, and freedom from legislation which discriminates against anyone on racial, ethnic or sexual grounds.

If the notion of protecting rights is as such, then the question arises is what mechanism can protect human rights as constitutional rights of citizens? According to Danie Brand, the best legal mechanism to deal with human rights protection is to challenge the state and constitutional issues through the courts.⁴⁵ The judicial review before the Constitutional Court can be one of the best mechanism in this context.

D. The Role of the Judicial Reviews in Protecting Religious Rights in Indonesia and Malaysia

Judicial review is the process by which the courts exercise and annul the acts of the executive and the legislative authorities in the field of public law where it finds them incompatible with a higher norm.⁴⁶ Judicial review is performed either by a specialized constitutional court or by

a court with more general jurisdiction, typically a supreme court.⁴⁷ Judicial review is an example of the functioning of separation of powers in a modern governmental system (where the judiciary is one of several branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.

Governmental structure greatly determines the form of the judicial review system.⁴⁸ The governmental structure of both Indonesia and Malaysia falls under the separation of powers. This allows the basic potential for creating the rule of law, at least in form. However, once the executive, the parliament, and the Supreme Court are separated and are placed at the same level structurally, the court is only granted power to review legal norms below the rank of a law in Indonesia; while legal norms made by parliament could be reviewed by the Constitutional Court. In Malaysia, in contrast, the court has jurisdiction to review legal norms both from the acts of the executive or the legislative powers, where the court finds them inconsistent with any higher legal norm, including the constitutional provisions.⁴⁹

There are strong arguments that judicial review will serve as an important check against tyranny of majority. Ideally, the constitutional framework which guarantees basic human rights can prohibit governments from enacting into law policies which restrict people's freedom.⁵⁰ Concerning this matter, there are two basic principles which are common to all constitutions which ensure basic human rights protected. The first principle is "consistency" or "fairness". This principle guarantees a basic equality in how individuals are treated by their governments over time and across different communities. Governments should treat

their communities equally and similar in weight and significance to the kinds of interests which have supported similar constraints of other people's freedom in the past.⁵¹

The second principle is ways governments use to pursue their objectives. This principle guarantees governments to respect a basic equality in the interest and capacity of all people to organize their own lives in a different way. Therefore, this principle prohibits law makers from drafting laws which limit people's freedom, and which are either over or under inclusive, including limiting the benefits of a legislative scheme to a particular group of individuals.⁵²

With those two principle, the concept of judicial review which serve as an important check against tyranny of majority will be realized as a tool to the protection of individual rights. However, empirically, the expectation that the courts exercising the power of judicial review would serve as guarantors of individual human rights has not materialized as predicted.

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

As mentioned above that there are some provisions in the Indonesian Constitution that guarantees religious rights, and there is no particular religion mentioned in the Constitution. However, the Constitution is not neutral towards religion in the sense that it prefers and

supports a theistic worldview rather than a non-theistic worldview. It can be indicated from article 28E(1) of the Constitution which give the citizens the right to adhere a religion, but it does not include to be an atheistic. The neutrality of the Indonesian constitution regarding religious freedom is on the theistic view, which it prefers the most. Moreover, even though the constitution does not mention the rights to change one's religion, there is no prohibition or punishment from the government for those who convert from or to Islam. According to Hosen, mentioning the right to change one's religion in the Constitution is not appropriate in the Indonesian context, in which Muslim is the biggest population that condemns apostasy.⁵³

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

In the case of Ahmadiyya, the Ahmadi group could bring forward judicial review on the Joint Ministerial Decree which limits their rights to the freedom of religion or belief to the Supreme Court. Also, they could file the law which becomes the basis of the decree directly to the Constitutional Court, i.e. the Law No. 1/PNPS/1965 on the Prevention of Blasphemy and Abuse of Religions, a controversial 45-year-old law, which prohibits "deviant" interpretation of religious teachings.

Another law which becomes the basis of the Joint-Decree of the Ahmadiyya case, and, therefore, it can be challenged in the Constitutional Court is article 156(a) of the Criminal Code, which threatens to jail

people who deliberately in public express hostile, insulting or abusive views towards religions with the purpose of preventing others from adhering to any religion, for a maximum five years.

However, after being filed into the Constitutional Court, the Law No. 1/PNPS/1965 was considered constitutional by the court. The law, as mentioned above, allows the attorney general's office to ban religious groups that "distort", or "misrepresent" official faiths and calls for up to five years in prison for anyone found guilty of heresy.⁵⁴ The court decision mentions that the country still needs an anti-blasphemy law as a general protection and an anticipation rule for religious conflicts, which would happen in the future, among society.⁵⁵

Even though the court decision mentions that the need of an anti-blasphemy law is to prevent harm to others, it is not the one that still permitted by human rights norms, which should contain very restrictive conditions, namely only when it is "...necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others".⁵⁶ Moreover, the restriction should not only be "necessary" in order to prevent harm, but it should also be "proportional" to the goal. Therefore, in my opinion, the Law No. 1/PNPS/1965 has other purpose than preventing harm, which makes it inconsistent with human rights norms.

Malaysia is quite different from Indonesia. The Malaysian Constitution, in a literally-meaning, does not guarantee the rights to religious liberty to all citizens. There are some restrictions in religious rights as above-mentioned in Article 11 of the Malaysian Constitution. It is only Muslims that are very likely to enjoy the freedom, while non-Muslims are not.

Some constitutional provisions regarding the protection of the right to freedom of religion or belief are restricted and subject to other provisions. Article 11(1), for example, states that every person has the right to profess and practice his/her

religion, but this article also allows the state to legislate for the control or restriction of the propagation of any religious doctrine among person professing Islam. Therefore, while safeguarding freedom of religion, the Malaysian government draws a distinction between practice and propagation of religion. It means that the freedom to manifest a religion or belief in Malaysia is limited by constitutional provisions that permit limitations which are not consistent with international standards. The right to manifest a religion in this country then is dependent on provisions of the law which may enable limitations of the right based on the ground of protecting the official religion of the country, i.e. Islam. This condition does not compare favorably with international standard of human rights, wherein no limitations whatsoever are permitted on the freedom to have or to adopt a religion or belief of one's choice. This includes the right to manage its own religious affairs, to establish and maintain institution for religious or charitable purpose, and to acquire and own property and hold and administer it in accordance with the law.

Therefore, even though there are some human rights violations in Malaysia, the Malaysian government may not breach the constitutional provision because Malaysia in fact has constitutional guarantees of the right to freedom of religion or belief on its own face, which of course do not compare favorably with all aspects of international standards. In this case, judicial review would not be the best solution because the constitution itself is not in accordance with the standards of international human rights protection. According to Omar, the manner in which the Malaysian Court exercised its power of judicial review suggests that it did not regard itself as a constitutional court, because in its interpretation of constitutional provisions on citizens' liberties, the Malaysian Court pursued a formal style of interpretation by adopting

the positivistic and literal approach of the Constitution at the expense of the protection of the values sought to be promoted by the Constitution.⁵⁷

The case of the weekly *Catholic Herald* using the word "Allah" is only an example of increasing complaints by religious minorities in 2008 in Malaysia that their rights have been undermined by the government. According to international human rights norms, religious liberty involves rights to corporate property, collective worship, organized charity, parochial education and freedom of religious press,⁵⁸ wherein one of them is breached by the Malaysian government in the case of the *Catholic Herald* for the sake of the so-called keeping national religious harmony. For the same reason, the Malaysian government also opposes what it considers deviant interpretations of Islam, and periodically detains members of what it considers Islamic "deviant sects" without trial or charge under the Internal Security Act (ISA).

E. Conclusion

There are many provisions in the Indonesian and Malaysian Constitutions and in their legal systems which are supportive of human rights. The chapter on fundamental liberties, the provisions for constitutional supremacy and judicial review are meant to achieve a fair balance between the need for freedom and the need for order and stability. However, some provisions on discretionary powers granted to the government have made serious implications for human rights. In a democratic country, the court has the power to examine the "reasonableness" of a law and to hold that a harsh, cruel and oppressive law is unconstitutional. Theoretically, Indonesia with its Constitutional Court has reached that ideal, but this is not so in Malaysia.

Indonesia and Malaysia have different characteristics of constitutional provisions on the protection of religious liberty. The Indonesian Constitution

contains no specific reference to any religions, which means all religions and beliefs have the same status in the Constitution. Any attempt to prohibit certain religious freedom would therefore infringe the constitution. Therefore, the judicial review of executive acts and legislative power is very likely to be able to protect religious minority rights in Indonesia. However, in the case of judicial review of anti-blasphemy law indicated otherwise. The Constitutional Court upheld the law and, therefore, banning religious blasphemy was considered constitutional.

In contrast, Malaysia has different form of constitutional recognition of the protection of religious rights. The constitutional provisions regarding the protection of religious rights are subject to other provisions, which limit the religious liberty of the minority. Therefore, the

freedom to manifest a religion or belief in Malaysia is limited by constitutional provisions, which means it does not guarantee the rights to religious liberty to all citizens but only Muslims that are very likely to enjoy the freedom. If the constitutional provision do not compare favorably with international standard of human rights, then the judicial review as a means to protect freedom of religion is less likely to be relied on. However, in fact, based on the judicial review of the use of word Allah among non-Muslim community, the High Court said that a government ban on non-Muslims using the word was unconstitutional. This decision seemed closer to the international standard of religious freedom than that of Indonesia's constitutional court.

Endnotes:

¹ UN General Assembly Resolution 719 (VII), 1953; and UN General Assembly Resolution 285 (111), 1949.

² Patrick Macklem, "What is International Human Rights Law? Three Applications of a Distributive Account", Bernard and Audre Rapoport Center for Human Rights and Justice University of Texas School of Law, November 19, 2007, retrieved from <http://www.utexas.edu>.

³ Linda Camp Keith, "Judicial Independence and Human Rights Protection around the World." *Judicature*, Vol. 85, No. 4, 2002, pp. 195-200.

⁴ Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" *The Yale Law Journal*, 2002, 111: 1935-2042.

⁵ Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington DC: Georgetown University Press, 2005), p. 73.

⁶ Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" *The Yale Law Journal* 2002, 111: 1935-2042, p. 2016.

⁷ Editors, "Constitutional Complaints: The European Perspective", *International and Comparative Law Quarterly*, vol. 43, 1994, p. 142.

⁸ Ján Klucka, "Suitable Rights for Constitutional Complaint", Workshop on "the Functioning of the Constitutional Court of the Republic of Latvia", European Commission for Democracy through Law, Riga, Latvia, 3-4 July 1997, retrieved from <http://www.venice.coe.int>.

⁹ John Witte, Jr. and D. van der Vyver. (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (The Hague: Martinus Nijhoff Publishers, 1996), p. xviii.

¹⁰ Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries", *Georgetown Journal of International Law*, Vol. 36, 2005, pp. 947-1078.

¹¹ *Ibid.*

¹² Article 28E (1) and (2).

¹³ Asian Human Rights Commission (AHRC), "Indonesia: Ratification of Key Human Rights Instruments Must be Followed by Legal Reform", a Statement by the Asian Human Rights Commission, 2006, retrieved from <http://www.ahrchk.net>.

¹⁴ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Indonesia* (2008), retrieved at 17 November 2008 from <http://www.state.gov>.

¹⁵ Nikolas K. Gvosdev, "Constitutional Doublethink, Managed Pluralism and Freedom of Religion", *Religion, State & Society*, Vol. 29, No. 2, 2001.

¹⁶ *Ibid.*

¹⁷ Rita Smith Kipp & Susan Rodgers, "Introduction: Indonesian Religions in Society", in

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

¹⁸ Article 29(2) of the Indonesian Constitution.

¹⁹ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Indonesia* (2008), retrieved at 17 November 2008 from <http://www.state.gov>.

²⁰ The Tandem Project, United Nations, Human Rights & Freedom of Religion or Belief, 2008, retrieved from <http://www.tandemproject.com>

²¹ *Ibid.*

²² Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era", in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government* (Singapore: ISEAS, 2007), p. 116.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ This decree replaced a 1969 decree that had been blamed for allowing mob action directed to the destruction or closure of a number of illegal places of worship. See Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era", in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government* (Singapore: ISEAS, 2007), p. 116; Melissa Crouch, "Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?", *Singapore Journal of Legal Studies*, 2007, pp. 96-116.

²⁶ Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era", in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government* (Singapore: ISEAS, 2007), p. 116.

²⁷ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Indonesia* (2007), retrieved from <http://www.state.gov>.

²⁸ *Ibid.*

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

³⁰ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual*

Report on International Religious Freedom: Indonesia (2005), retrieved from <http://www.state.gov>.

³¹ Philip Setunga, 2008. "Religious Freedom not Secure in Indonesia", *World Wide Religious News (WWRN): Asia/Pacific-Indonesia/Brunei*, retrieved from <http://www.wwrn.org>.

³² *Ibid.*

³³ S.S. Ahmad, *The Malaysian Legal System* (Petaling Jaya: Longman Malaysia, 1990), p. 16.

³⁴ John Witte, Jr., *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), p. 338.

³⁵ John Witte, Jr., and D. van der Vyver. (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (The Hague: Martinus Nijhoff Publishers, 1996), p. xxxiii.

³⁶ A. Ibrahim, "The Position of Islam in the Constitution", in Tun Mohamed Suffian, H.P. Lee, Franchis A. Trindade, (eds), *The Constitution of Malaysia: Its Development 1957-1977* (Kuala Lumpur: Oxford University Press, 1978), p. 48.

³⁷ Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia", *Journal of Southeast Asian Studies*, 37 (2), pp 249-266 June 2006, p. 251.

³⁸ Olaf Schumann, "Christians and Muslims in Search of Common Ground in Malaysia", *Islam and Christian-Muslim Relations*, Volume 2, Issue 2, pp. 242-268, December 1991, p. 242.

³⁹ Andrew Harding, *Law, Government and the Constitution in Malaysia*, (The Hague: Kluwer Law International, 1996), p. 21.

⁴⁰ Schumann, "Christians," p. 242.

⁴¹ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Malaysia* (2007), retrieve from <http://www.state.gov>.

⁴² U.S. Department of State, Bureau of Democracy, Human Rights and Labour, *Annual Report on International Religious Freedom: Malaysia* (2008), retrieved from <http://www.state.gov>.

⁴³ The UDHR article 29(2).

⁴⁴ Ramdas Tikamdas, "National Security and Constitutional Rights in the Asia Pacific Region: The Malaysian Experience", retrieved from <http://dspace.anu.edu.au>.

⁴⁵ Danie Brand, "Introduction to Socio-Economic Rights in the South African Constitution", in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2005), pp. 38-39.

⁴⁶ Clive B. Lewis, *Judicial Remedies in Public Law*, 2nd ed., London: Sweet & Maxwell, p. 7.

⁴⁷ Donald L. Horowitz, "Constitutional Courts: A Primer for Decision Makers", *Journal of Democracy*, Vol. 17, No. 4, 2006, pp. 125-137, retrieved from <http://muse.jhu.edu>.

⁴⁸ Y. Zhang, "Comparative Studies on Judicial Review in East and Southeast Asia", IAS Symposium, 31 August-1 September, Leiden, 1995, retrieved from <http://www.ias.nl>.

⁴⁹ *Ibid.*

⁵⁰ David Beatty, "Human Rights and the Rules of Law", in David M. Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (London: Martinus Nijhoff Publishers, 1994), p. 19.

⁵¹ *Ibid.*, p. 20.

⁵² *Ibid.*

⁵³ Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007), p. 120.

⁵⁴ Peter Gelling, "Law Banning Blasphemy is Upheld in Indonesia", *The New York Times*, 19 April 2010, retrieved from <http://www.nytimes.com>.

⁵⁵ Decision of the Indonesia's Constitutional Court on Blasphemy Law (Law No. 1/PNPS/1965), *Putusan Nomor 140/PUU-VII/2009*, paragraph [3.70], p. 304; retrieved from <http://www.mahkamahkonstitusi.go.id>.

⁵⁶ ICCPR article 18(3)

⁵⁷ Imtiaz Omar, *Rights, Emergencies, and Judicial Review* (Boston: Kluwer Law International, 1996), p. 230.

⁵⁸ John Witte, Jr., *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), p. 339.

BIBLIOGRAPHY

Ahmad, S.S.. *The Malaysian Legal System*. Petaling Jaya: Longman Malaysia, 1990.

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

Brand, Danie. "Introduction to Socio-Economic Rights in the South African Constitution", in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South*

Africa. Pretoria: Pretoria University Law Press, 2005.

Crouch, Melissa. "Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?" *Singapore Journal of Legal Studies*, 2007, pp. 96-116.

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

Farug, Shad S., "Human Rights and the Constitution", in Ramdas Tikamdas and S.S. Rachgan (eds), *Human Rights and the National Commission*. Kuala Lumpur: Hakam, 1999.

Fernando, Joseph M. "The Position of Islam in the Constitution of Malaysia." *Journal of Southeast Asian Studies*, 37 (2), pp 249-266 June 2006.

Gyosdev, Nikolas K. "Constitutional Doublethink, Managed Pluralism and Freedom of Religion", *Religion, State & Society*, Vol. 29, No. 2, 2001.

Harding, Andrew. *Law, Government and the Constitution in Malaysia*, The Hague: Kluwer Law International, 1996.

Hathaway, Oona A. "Do Human Rights Treaties Make a Difference?" *The Yale Law Journal* 111: 1935-2042, 2002.

Hosen, Nadirsyah. *Shari'a and Constitutional Reform in Indonesia*, Singapore: ISEAS, 2007.

Ibrahim, A. "The Position of Islam in the Constitution", in Tun Mohamed Suffian, H.P. Lee, Franchis A. Trindade, (eds), *The Constitution of Malaysia: Its Development 1957-1977*. Kuala Lumpur: Oxford University Press, 1978.

Keith, Linda Camp. "Judicial Independence and Human Rights

- “Introduction: Indonesian Religions in Society”, in Rita Smith Kipp & Susan Rodgers (eds), *Indonesian Religions in Transition*. Tucson: University of Arizona Press, 1987, p. 23.
- Landman, Todd.** *Protecting Human Rights: A Comparative Study*. Washington DC: Georgetown University Press, 2005.
- Lewis, Clive B.** *Judicial Remedies in Public Law*, 2nd ed. London: Sweet & Maxwell, n.d.
- Omar, Imtiaz.** *Rights, Emergencies, and Judicial Review*. Boston: Kluwer Law International, 1996.
- Sadurski, Wojciech.** *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*. The Netherlands: Springer, 2005.
- Salim, Arskal.** “Muslim Politics in Indonesia’s Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era”, in Ross H. McLeod and Andrew MacIntyre, *Indonesia: Democracy and the Promise of Good Government*. Singapore: ISEAS, 2007.
- pp. 242-268, December 1991.
- Stahnke, Tad & Robert C. Blitt.** “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries”, *Georgetown Journal of International Law*, Vol. 36, 2005, pp. 947-1078.
- Witte, John, Jr.** *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism*. Cambridge: Cambridge University Press, 2007.
- Witte, John, Jr. and D. van der Vyver** (eds). *Religious Human Rights in Global Perspective: Legal Perspective*. The Hague: Martinus Nijhoff Publishers, 1996.
- Website:**
<http://www.tandemproject.com>.
<http://dspace.anu.edu.au>.
<http://www.state.gov>.
<http://www.iias.nl>.
<http://www.mahkamahkonstitusi.go.id>.
<http://www.nytimes.com>.
<http://www.venice.coe.int>.
<http://www.utexas.edu>.
<http://www.wvrn.org>.
<http://muse.jhu.edu>.

