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National Unity in Indonesia: The Indonesian Constitutional Court's Role in Balancing the Conflicting Legal Demands of a Pluralistic Society

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Abstract

With the dawn of the *Reformasi* era, the Indonesian nation cast off 35 years of authoritarian rule to become one of the world's largest democracies. The processes of democratization and decentralization changed, and continues to change, the constitutional landscape of the Indonesian State. With the emergence of a much more complex constitutional landscape, the relations between center and periphery need to be (re)balanced for a rational and equitable development and sustainable management of Indonesian cultural, natural, and social heritage.

This paper analyzes the foundational role of the Indonesian Constitutional Court in moderating and balancing the distribution and exercise of powers between the central and the regional and between the regions themselves, within a political, legal and religious pluralistic context in order to utilize the cultural, natural, and social resources of the Indonesian archipelago in the interest of national unity.

The paper examines the contribution of the Court as the peak judicial authority in endeavoring to create harmonious relations within the complex constitutional framework via a corpus of jurisprudence aimed at the progressive realization of *Bhinneka Tunggal Ika* ('unity in diversity') in the pluralistic Indonesian Nation. It does so by analyzing selected crucial decisions of the Court in three areas key to the Court's role in balancing the conflicting legal demands of a pluralistic society, namely, regional autonomy, religious pluralism, and social justice and economic democracy.

Keywords: Constitutional Court, legal pluralism, pluralistic society, decentralization

1 Introduction

After 35 years of authoritarian rule, Indonesia has become one of the world's largest emergent democracies. The defining element of the Indonesian constitutional order in the post-authoritarian period is decentralization of political power via regional autonomy. Initiated in 2001, regional autonomy transferred much of the central government's authority to the regions and transformed an authoritarian centralistic constitutional system into a highly decentralized one (Haug & Rössler, 2016).

In this novel political landscape, the Indonesian State faces the challenge of binding its various distant regions and diverse peoples into a well-functioning, interdependent whole for a rational and equitable development and sustainable management of Indonesian cultural, natural and social heritage in accordance with the national motto *Bhinneka Tunggal Ika* [Unity in Diversity].

This paper starts from the premise that the *Pancasila,* included in the Preamble of the 1945 National Constitution, is the core around which Indonesia's constitutional unity is being built and maintained. The paper argues that the Indonesian Constitutional Court is a crucial element in securing that unity against political, cultural, and legal localism and particularism.

To substantiate the argument, the paper analyses the foundational role of the Court in securing State constitutional unity within the *Pancasila* framework. In so doing, the paper expounds the changing geometry of the constitutional order consequential to the democratization and decentralization process (Belov, 2018, chap. 2). Against that theoretical background, it examines the Court's contribution as the peak judicial authority in endeavoring to create harmonious relations across Indonesian society as a whole, within the *Pancasila* principles by analyzing key decisions in three crucial areas, namely: (a) regional autonomy, (b) religious pluralism, and (c) social justice and economic democracy. To conclude, this paper discusses the 'consequential' role of the Court in the process towards national unity.

Methodologically, the paper carves out a theoretical and doctrinal exploratory space within which to discuss certain exemplary Court determinations which have made a substantial contribution to the unfolding dialectical process to balance the conflicting demands of Indonesia's pluralistic society. Within that methodological framework, the paper argues that the Court becomes defined by its performance *within* the pluralistic society in which it has needed to both confront and embrace the conflicting imperatives between centralism and regionalism in the pursuit of national unity in diversity, as opposed to unity through uniformity and standardization.

2 Decentralization and the Changing Constitutional Geometry of the Indonesian State

1. Indonesia Democratic Decentralization

Decentralization has been defined as the process whereby a central government relinquishes some of its powers and management responsibilities to local governments, local leaders or community institutions (Blair, 2000; Ribot, 2004, p. 8; Rondinelli, 1999, p. 20; Schneider, 2003; Smith, 1985).

The *ratio essendi* of decentralization varies both in time and space. In the political scenario of nation states, there are instances in which the phenomenon of decentralization is not necessarily grounded in democratic liberal principles of governance such as the rule of law, separation of powers, and respect for fundamental rights and freedoms.

Based on the analytical framework offered by Rondinelli (1981), which identifies many facets of the decentralization process, three major types of decentralization can be identified:

- De-concentration/delegation, or administrative decentralization, which involves the shift and/or transfer of administrative authority and responsibility to regional or district offices. Power is thus transferred from local offices of central government agencies to appointed district officers or local offices of line ministries. As such, administrative decentralization brings government decision makers closer to the people they serve in order to better understand and address local needs; however, it does not empower local people, but rather represents an extension of central government into the local arena (pp. 133–145).
- Devolution, or democratic decentralization, which is defined by the establishment or reinforcement of subnational units of government. It involves transfer of powers to elected local authorities, where such transfer is instrumental in enable local people to make decisions for themselves through their representative local authorities. So characterized, democratic decentralization is *a priori* anti-authoritarian, since it is defined in principle by the distribution of central government powers. It serves to counterbalance and contain the potential concentration and monopoly of power of the national executive branch.
- Privatization, consisting of the transfer of responsibility to the voluntary or private sectors (Rondinelli, 1981, p. 145; Ozman, 2014, pp. 416–419).

Indonesia's *Reformasi* political context is defined by democratic decentralization, which has aimed at removing the administrative divide that existed in the authoritarian era between the central government and the population that it was meant to serve. Locally accountable political structures of governance have been established in order to encourage individual and community participation, and to counterbalance the former democratic deficit in peripheral geographical areas by bringing the decision-making process closer to the people (Shivakoti et al., 2017).

Thus, democratic decentralization marked the end of the authoritarian regime and inaugurated the post-authoritarian system of governance (Alicias & Velasco, 2007, p. 4), with decentralization reforms generally implemented within a threefold strategic framework:

- simplifying the system and structure of governance at the central government level;
- consolidating national unity in diversity by empowering local participation and democracy via local government;
- improving the efficiency and equity of local service delivery (Haug & Rössler, 2016, pp. 29–40).

Likewise, democratic decentralization implies that sub-national authorities have legally defined areas of competence, possess tax-raising and public expenditures autonomy and have discretion or decision-making power for local regulations (Haug & Rössler, 2016; Rondinelli et al., 1989). In this system, local governments have clear geographically defined jurisdictional boundaries over which they exercise authority and within which they perform public functions, being only accountable to the central government.

Decentralization and local self-government are thus major institutional safeguards for individual liberty and protection against authoritarianism. Accordingly, decentralization in the Indonesian constitutional order is leading "toward vertical power-sharing among multiple layers of government" (Schneider, 2003, p. 38). As Zeigenhain (2016) notes:

> *The high significance of decentralization lies in the dissolution of the centralist power monopoly and in causing social and political power diffusion. Regional and local grievances are now addressed to the local government and not, as previously, to the central government. The local level thus has taken the role of a shock absorber. Consequently, the whole political system became more flexible and at the same time more stable. (p. 39)*

However, within the vast and diverse Indonesian archipelago, implementation of democratic decentralization, both at the policy and praxis levels, could threaten and greatly hinder the progressive realization of national unity if it privileges localism and particularism over national unity in diversity. (Seymour & Turner, 2002, p. 48).

2. Constitutional Geometry of the Indonesian State

The processes of democratic decentralization have changed, and continue to change, the constitutional geometry of the Indonesian State. Belov (2018) defines 'constitutional geometry' as an explanatory paradigm that exemplifies the main structural features of the nation-state constitutional order by using geometric metaphors. Its intellectual traditions can be sourced to monarchical absolutism and the emergence of the territorial Westphalian nation state, as rationalized and justified by modern political philosophy (pp. 13–14)[1] with "the roots of some of the main schemes, shapes and forms for visual geometric representation of power spread as far as early Modernity" (p. 20). Belov further posits that "the modern constitutions are the first systematic, rational and written attempts at establishing durable power schemes and long-lasting patterns' of constitutional geometry in the forms of hierarchy, pyramid, rectangle and triangle." Thus, constitutional geometry emerged from "the pathos of Western Modernity to rationalize, systematize and construct socio-political relations and the realm of public power":

> *As a modern concept, it has emerged in the context of modern Westphalia constitutionalism, in order to represent figuratively the shapes and the forms in which the people are supposed to conceive the constitutional reality and some of the central phenomena of the constitutional discourse. (p. 21)*

The taxonomy of the sources of law, structure of power and authority, territorial organization of the state, and the system of state institutions and inter-institutional relations are rationalized by constitutional theory and configured by the political community in the shape of constitutional geometry. With that background in mind, it is pertinent to consider that Indonesia's constitutional geometry can be visually represented in the authoritarian era as structured in a hierarchical pyramid, which reinforced the centralized political domination and rational government in different aspects.

1 See also Alexander, 1998; Garvey et al., 2004; Hegel & Forbes, 1975; Kant, 1998; Kelsen, 1945/2017; Locke, 1690/2005; Paine, 1791/2017; Robson, 1991.

Under Soekarno's *Orde Lama* and Suharto's *Orde Baru*, the Indonesian constitutional system was hierarchical, visually represented by a single pyramid with a very wide base. The hierarchy was used both normatively and analytically as the power matrix and the exclusive code for structuring power relations (Anderson, 2001; Aspinall & Fealy, 2010; Mortimer, 2006).

The establishment of both the Soekarno and Suharto authoritarian regimes over alternative models for organizing power, the necessity for providing a conceptual model for legitimizing public authority and the need to justify public coercion, identified the hierarchy as the main shape of the Indonesia pre-*Reformasi* constitutional order. Additionally, the *Ordo Baru* authoritarian constitutionalism reinforced the hierarchy as an instrument for national unification, centralized political dominion and rational government. The establishment of efficient authoritarian central government required the hierarchy as an ordering model and the pyramid as a key matrix for the rational visualization of the structure of the authoritarian public order (Vatikiotis, 1999).

The *Reformasi* era, defined by uncontested (at least theoretically) constitutional pluralism (both political, religious and legal), set off a process of change to the pyramidal scheme of the *Ordo Baru* by adding networks in order to visually represent the relationship between central government and the new regional polities on the one hand, and the relationship between the regional polities themselves on the other hand (Cribb, 1999; 2010; Muradi, 2014, chap. 1; Nyman, 2006). As such, constitutionalism in the *Reformasi* era can be represented asymmetrically by combining the hierarchical paradigm with a networked constitutional geometry.

The hierarchy and pyramid have retained their significance as the foundational ordering schemes of the central government's constitutional design, as they organize the principal interrelationships between central government and regional polities, with the central government holding exclusive control of security and defense, foreign policy, justice, and religious affairs. Likewise, the network is the appropriate geometric forms for visualizing a twofold constitutional inter-relationship, namely:

- the relationship between the central government and the regional polities, while the former performs controlling functions within the principles of subsidiarity;
- the horizontal relationship between the regions themselves to explain territorial, jurisdictional and competence boundaries.

Hence, to paraphrase Belov (2018), the vision of an 'Indonesia of hierarchies' is complemented (and sometimes challenged), by the pluralist vision of an 'Indonesia of networks' (p. 21).

3 National Unity, *Pancasila*, and the Constitutional Court

With the emergence of this more complex constitutional landscape, relations between the central and the regional and between the various regions themselves must be (re)balanced in order to utilize the cultural, natural and social resources of the Indonesian archipelago in the interests of national unity in diversity.

The Indonesian State faces the challenge of binding its various distant regions and diverse peoples into a well-functioning, interdependent whole. To this end, Pancasila offers one core upon which national unity can be built (Sudjito & Hariyanti, 2018, pp. 1–8). Within that core, the Constitutional Court is a crucial element in securing, preserving, and guarding the constitutional unity of the State against political, cultural, and legal localism, particularism, and even separatism (Vatikiotis, 2003).

1. *Pancasila*

Pancasila—literally, 'The Five Principles'—is the founding philosophical pillar of the Indonesian constitutional State (Darmodiharjo, 1995; Intan, 2006; Mubyarto, 1993; Ramage, 1995; Sterkens et al., 2009; Suryadinata, 2018). It was included in the Preamble of the 1945 Constitution, and strategically embodied Soekarno's effort to identify and articulate a common ideological denominator for the diverse (and competing) nationalist leaders' ideologies that aspired to ground the new State. These included, *inter alia*, socialism, fascism, liberal democracy, as well as Islamic ideology (Lindsay & Butt, 2013, p. 13; Ward, 2010, pp. 4–8). Pancasila consists of the following (Const., pmbl. [Indonesia]):

1. *Ketuhanan Yang Maha Esa* [Belief in Almighty God]
2. *Kamanusiaan Yang Adil dan Beradab* [Just and Civilized Humanity]
3. *Persatuan Indonesia* [The Unity of Indonesia)
4. *Demokrasi* [Guided by Deliberations among Representatives]
5. *Keadilan Sosial* [Social Justice]

These five principles embody Indonesia's rich diversity and pluralism. In their own respective fashion, they underpin and bind the Indonesian constitutional order into a structural whole. As an organic corpus, the principles are functional in fulfilling the overriding goal to which the constitutional order is geared: directing and maintaining the decentralization process in tune with national unity. The principles collectively provide the theoretical framework within which the constitutional order operates. It is crucial to note that these principles are not completely discrete; rather, they operate within the Republic's motto *Bhinneka Tunggal Ika* to reinforce each other (Abdulkarim et al., 2020; Farisi, 2014, pp. 49–50).

2. The Indonesian Constitutional Court and the Power of Judicial Review

Indonesia's Constitutional Court was formed by the Third Amendment in 2001 and officially established on August 13, 2003. The Court was created to uphold constitutional values, strengthen check-and-balance mechanisms, create a good and clean government and protect citizens' human rights (Harman, 2007).

Articles 24C(1) and 24C(2) of the Constitution, and article 10 of Law No. 24/2003 on the Constitutional Court identify the Court's main functions: to resolve disputes between state institutions regarding jurisdiction, political parties' dissolution, and general election results, and to engage in judicial review, thereby ensuring that national statutes are not inconsistent with, and do not breach, the Constitution (Asshiddiqie, 2006; Butt, 2018). Article 57(1) of the 2003 *Constitutional Court Law* states that if the Court declares that statutory provisions breach the Constitution then those provisions have no binding legal force.

4 The Constitutional Court and National Unity

For the purposes of this paper, the most important function of the Constitutional Court is its power of judicial review of laws and their constitutionality. Through the exercise of this power, the Court has played a pivotal role in endeavoring to implement unity-in diversity within a societal and constitutional context defined by political, legal, and religious pluralism (Butt, 2015; Harman, 2007). This is demonstrated, *inter alia*, by the Court's jurisprudence in three major arenas of constitutional controversy, namely: (1) regional autonomy, (2) religious pluralism, and (3) social justice and economic democracy (Faiz & Kasim, 2010).

1. On Regional Government and Autonomy

Indonesia's regional autonomy is contemplated in the Constitution in Chapter VI on "Pemerintah Daerah" [Regional Authorities]:

> ***Article 18***
> *(1) The Unitary State of the Republic of Indonesia is divided into provinces and those provinces are divided into regencies and municipalities, each of which has regional authorities which are regulated by law.*
> *(2) The regional authorities of the provinces, regencies and municipalities shall administer and manage their own affairs according to the principles of regional autonomy and the duty of assistance.*
> *(3) The authorities of the provinces, regencies and municipalities include for each a Regional Representative Assembly whose members shall be elected through general elections.*
> *(4) Governors, Regents and Mayors, respectively as head of regional government of the provinces, regencies and municipalities, must be elected democratically.*
> *(5) The regional authorities exercise wide-ranging autonomy, except in matters specified by law to be the affairs of the central government.*
> *(6) The regional authorities have the authority to adopt regional regulations and other regulations to implement autonomy and the duty of assistance.*
> *(7) The structure and administrative mechanisms of regional authorities is regulated by law.*
>
> ***Article 18A***
> *(1) The authority relations between the central government and the regional authorities of the provinces, regencies and municipalities, or between a province and its regencies and municipalities, are regulated by law having regard to the particularities and diversity of each region.*
> *(2) The relations between the central government and regional authorities in finances, public services, and the use of natural and other resources are regulated and administered with justice and equity according to law.*

> ***Article 18B***
> *(1) The State recognizes and respects units of regional authorities that are special and distinct, which are regulated by law.*
> *(2) The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia and are regulated by law.*

Articles 18, 18A and 18B have been given substantial content by statute, particularly by Law 32/2004 on "Pemerintahan Daerah" [Local Government], and defined by the Constitutional Court. Law No. 32/2004 provides for new regions to be established by merging or dividing pre-existing regions (art. 5, § 3), subject to endorsement by statute (art. 4, § 1; art. 7, § 1). According to Article 4(2), the statute must stipulate the region's name, geographic area, capital city, jurisdiction, region heads and People's Representative Assembly membership, and provide for the transfer of personnel and funding.

The significance of Law No. 32/2004 lies in the diminution of the central state monopoly on territorial power, which in turn determines the diffusion of social and political power from the center to the periphery. However, the law also includes a potential danger since its implementation could be oligarchically driven to achieve the political, ideological and personal objectives of a few local and national stakeholders, instead of being grounded in and guided by communities' democratic consultative processes (Ziegenhain, 2016, p. 39).

Such anti-democratic tendencies have been counterbalanced by the leading role assumed by the Constitutional Court in preserving constitutional unity while fleshing out regional governmental power in light of *Bhinneka Tunggal Ika* (Asshiddiqie, 2009). In this regard, the Court's jurisprudence on regional government and autonomy seems to swing between two dialectical movements while trying to advance and maintain national unity:

- on the one hand, the Court is navigating between regional cohesiveness and regional localism as demonstrated by the *Tambrauw* case;
- on the other hand, it is conciliating particularistic regional political and economic perspectives in the interests of national unity, as demonstrated by *the West Sulawesi* case.

The Tambrauw case

In the *Tambrauw* case, the Court considered the creation of a proposed new regency in West Papua. Heads of several ethnic groups and *adat* chiefs in Manokwari, West Papua, had advocated for its establishment. Through consultative community *adat* processes, it had been agreed that 10 pre-existing districts—four from Manokwari Regency and six from Sorong Regency–would comprise Tambrauw. The executive government and the Regional People's Representative Assemblies of Sorong, Manokwari, and West Papua agreed to this plan without consultation. The Governor of West Papua and the Regent for Sorong withdrew their support, deciding that Tambrauw should consist of only six districts from Sorong. The Regional Representative Assembly enacted Law No. 56/2008 to that effect.

The Court held that the political or other considerations underlying Law No. 56/2008 should not displace the aspirations to create Tambrauw: the *adat* communities of Sorong and Manokwari had the constitutional right to establish a regency consisting of ten districts. The Court's decision was rationalized and justified with reference to the Constitution, which states in effect that "every person has the right to promote themselves and push for collective rights to develop the community, nation and state" (Const., art. 20, § 92) and "every person has the right to legal recognition, guarantees, protection and certainty that is just and to equal treatment before the Law" (Const., art. 28D, § 1). The Court ruled that disregarding the *adat* community political aspirations infringed Article 28I(3) which provides that cultural identity and community rights must be respected where they are consistent with the 'time' and 'civilization' (*Const. Court Decision, 127/PUU-VII/2009*). The Court stated that Law No. 56/2008 would be unconstitutional and thus invalid if the four districts from Manokwari were not included as part of Tambrauw. The Court further noted that:

> *Regions are created to improve the efficacy… of government and services to improve community welfare. Determination of the boundaries of a region and choosing a capital city is, therefore, something that should be left to the community that wishes to come together in the new region. The role of existing districts and provincial governments is to agree to hand over part of the region, assets and personnel and to be prepared to help initially fund the new region. (para. 68)*

The West Sulawesi case

In the *West Sulawesi* case, the Constitutional Court reviewed Law No. 26/2004 on the establishment of the Province of West Sulawesi. In this case, the Governor of the Province of South Sulawesi sought a review of the law, which split South Sulawesi into two new provinces—South and West Sulawesi. The law also required South Sulawesi to pay the new West Sulawesi at least Rp16 billion over its first two years of existence and to then make further allocations in the future (UU. No. 26/2004, art. 16, § 7). If payments were not made, the central government could withhold funds it would otherwise have made to the South Sulawesi government (art. 15, § 9). The Governor claimed that the law was discriminatory since the People's Representative Assembly had not required other provinces to financially support similar 'offshoot' provinces (*Const. Court Decision, 070/PUU-II/2004*).

The Court dismissed the claim, on the grounds that the central government's differential treatment of regional government was not unconstitutional; rather, it was justified in light of the foundational principle of substantial equality. The Court also emphasized that "in the spirit of the Unitary Republic of Indonesia, which is based upon Pancasila, all regional governments should feel bound by a feeling of togetherness to help each other" (para. 46).

2. On Religious Pluralism

Religious freedom is a fundamental human right (Law & Versteeg, 2011, p. 1167; 1200). The right has a twofold complementary dimension, being defined, on the one hand, by rights belonging to the *forum internum* (conscience-based rights to hold or not hold a religious belief) and on the other hand, by rights belonging to the *forum externum* (external manifestation of religious beliefs through publication, communal worship, teaching, preaching and evangelism) (Leyla Şahin v. Turkey, 2005, para. 39). Within secular liberal constitutions, grounded on the dogma of the sacredness of individual autonomy, religious freedom is defined by subjective elaborations of religious identity. Profession of religion is safeguarded as an absolute freedom, while religious practice is qualified by reference to public good (Chang et al., 2014).

In the case of Indonesia, state-religion relationships shape the scope of religious liberty and the treatment, accommodation and cooperation with religious minorities (Hosen, 2005, p. 424; Intan, 2006). Article 29 of the Constitution provides that "The state shall be based upon the belief in the One and Only God."

Indonesia has the world's largest Muslim population, comprising of at least 80 percent of its estimated 267 million citizens. However, Indonesia is not an Islamic state in a constitutional sense, even if it endorses some Islamic legal norms (Chang et al., 2014). While the Constitution's Preamble refers to belief in God in the first *sila* (principle), it does not establish Islam as the basis of the State. This was confirmed by the Constitutional Court in the *Religious Courts* and the *Blasphemy* cases, which directly addressed the question of the place of Islamic law in the Indonesian republican democracy (Butt, 2010, pp. 223–224; 234–240; Crouch, 2016, p. 15).

Religious Courts case

In the *Religious Courts* case, Suryani, a young madrasah graduate from Banten, challenged the constitutionality of Article 49(1) of Law No. 7/1989 on the religious courts (i.e. Indonesia's Shari'ah courts). Article 49(1) identifies and defines the areas of Islamic law over which the courts have jurisdiction: personal law matters: marriage, succession; gifts, bequests, ritual payments of alms, charitable gifts, gifts to the needy, and Shari'ah economy.

Suryani argued that Islam requires Muslims to follow Islamic law holistically in all dimensions of living, rather than in the limited area identified in Article 49(1). Muslims should be subject to the full scope of Islamic criminal law, including for example, hand amputation for theft. He posited that restrictions on the application of Islamic law imposed upon Indonesia's religious courts infringed not only his fundamental right to religious freedom under Articles 28 and 29 of the Constitution but also the rights of the Indonesian Muslim community.

In the course of the hearings, Judge Muhammad Alim stated that:

> *You must understand that in this Republic of Indonesia, the highest law is the 1945 constitution, not the Qur'an. As Muslims, we consider the Qur'an to be the highest law but… the national consensus is in the constitutional is the highest law.*
> *(Const. Court Decision, 16/PUU-VI/2008, para. 7)*

The Court, in rejecting the applicant's argument, held that:

> *The Applicant's argument does not accord with the understanding of the relationship between religion and the state [in Indonesia]. Indonesia is not a religious state that is based only on one religion; but Indonesia is also not a secular state that does not consider religion at all. It does not hand over all religious affairs entirely to individuals and community. Indonesia is a state that is based on almighty God. The state protects [the right of] all religious adherents to carry out the teachings of their respective religions… If the issue [in contention is whether] Islamic law is … a source of law, it can be said that Islamic law is indeed a source of national law. But it is not the only source of national law, because in addition to Islamic law, customary law, western law and other sources of legal traditors are sources of national law. Therefore, Islamic law can be one of the sources of material for law as part of formal government laws. Islamic law, as a source of law, can be used together with other sources of law, and, in this way, can be the material for the creation of government laws that are in force as national law. (para. 318)*

Blasphemy Law case

Presidential Decree No. 1/PNPS/1965, generally known as the *Blasphemy Law*, was enacted during President Soekarno's 'Guided Democracy' era, before various constitutional amendments strengthened human rights protection by incorporating various international norms into Chapter XA (Human Rights) of the Constitution (Crouch, 2016). Section 1 of the decree states that:

> *Every person is prohibited from deliberately speaking in public, recommending in public, or garnering public support, for the purposes of interpreting any religion that is adhered to in Indonesia or conducting religious activities that are similar to the activities of the religions adhered to in Indonesia, if the interpretation and activity deviate from the central teachings of that religion.*

The Elucidation to Article 1 states that:

> *A religion that is adhered to in Indonesia' means Islam, Christianity, Catholicism, Hinduism, Buddhism, or Confucianism. These six religions are the religions that are adhered to by almost all the residents of Indonesia. On top of the protection guaranteed by Article 29(2) of the 1945 Constitution, these six religions are also further protected by Section 1 of the Blasphemy Law.*
>
> *Central teachings of a religion' means religious teachings that could be known by the Ministry of Religious Affairs, which has the tools or means to investigate such teachings. Paragraph 4 of the general explanation of the Blasphemy Law provides that the main objective of the Blasphemy Law is to prevent deviations from religious teachings that are considered as central teachings by the leaders of the respective religions.*

In the *Blasphemy Law* case, the constitutionality of the Law was challenged before the Constitutional Court on the grounds that the Law violated various statutory provisions, including Articles 28E and 29 of the Constitution:

> ***Article 28E***
> *(1) Every person shall be free to choose and to practice the religion of his/her choice…*
> *(2) Every person shall have the right to the freedom to believe his/her faith, and to express his/ her views and thoughts, in accordance with his/her conscience.*
>
> ***Article 29***
> *(1) The State shall be based upon the belief in the One and Only God.*
> *(2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.*

The Applicants also relied on Article 28I(1), which includes freedom of thought and conscience and freedom of religion as "human rights that cannot be limited under any circumstances", which is reiterated in Articles 4 and 22(2) of Law No. 39/1999 on Human Rights.

The Government submitted that the Law must be upheld to avoid subjective interpretation of Islam and Shari'ah normative precepts. It argued that upholding the Law would maintain social harmony and prevent the explosion of new religions. The Court supported this line of reasoning, noting that Pancasila is the foundation of the Indonesian State, and must be accepted by all citizens (*Const. Court Decision, 140/PUU-VII/2009*):

> *Every citizen, whether as an individual or as a nation collectively, should be able to accept the Belief in God Almighty which animates the other principles of just and civilized humanity, unity of Indonesia, democracy guided by the wisdom in deliberation/ representation, and social justice for all Indonesian people. (para. 352)*

> *Indonesia's philosophy, as embodied in the Preamble of the 1945 Constitution … is to 'protect the whole of Indonesia'. This protection can be interpreted as the protection of cultural identity, ethnicity, religion, and uniqueness of Indonesia whether individually or communally. Restrictions do not always have to be interpreted as discrimination. As long as they are in the form of protection of the rights of others and the orderliness of life in society, nation, and state (see Article 28J(1) of the Constitution), then they are a form of protection of the human rights of others as well as a form of fundamental obligation. (para. 299)*

The Court concluded by ruling that repeal of the Blasphemy Law could bring "misuse and contempt of religion and trigger conflict in society" (para. 295).

3. On Social Justice and Economic Democracy

The Constitutional Court has jurisdiction to determine a range of social and economic rights, some of which are expressly justiciable and others which are directive principles, and to ensure ordinary legislation does not infringe upon, or hinder the realization of, those fundamental social rights. The Second Amendment to the Constitution in 2002 introduced Chapter XA (Human Rights), which includes the right of a person to:

- "develop him/herself through the fulfilment of his/her basic needs" (art. 28C);
- live in physical and spiritual prosperity;
- have a home and to enjoy a good and healthy environment; and
- have the right to obtain medical care and "the right to social security in order to develop oneself fully as a dignified human being" (art. 28H, § 1; 3).

The Fourth Amendment, in 2004, requires the state to spend a minimum of 20 percent of the state budget to implement national education (art. 31, § 4). Under Article 34, the State is obliged to take care of impoverished persons and abandoned children, to "develop a system of social security for all of the people" and to "provide sufficient medical and public service facilities."

Article 33 of the Constitution on social justice and economic democracy

Article 33 of the Constitution, which regards the national economy and social welfare, remains one of the Constitution's foundational provisions in the pursuit of economic social justice (Butt & Lindsey, 2008):

> ***Article 33***
> *(1) The economy shall be organized as a common endeavor based upon the principles of the family system.*
> *(2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.*
> *(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.*
> *(4) The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.*

A threefold rationale behind Article 33's provisions can be envisaged, namely, that all citizens should benefit from Indonesia's natural resources, that the government should help smaller enterprises in the face of competition, and that all citizens should have access to basic life necessities such as electricity, water, and fuel. It thus seems that Article 33 is geared towards the progressive achievement of social justice through the equal distribution of natural resources. An unequal distribution by central and regional governments could not only contradict the spirit of Article 33, but most importantly could undermine the process towards national unity (Elucidation to Article 33).

On the other hand, Article 33 seems to conflict with a few post-*Reformasi* attempts by the legislative and executive branches of central government to liberalize Indonesia's economy. Accordingly, the Constitutional Court has become the forum of significant political contestation over the foundational ideological ground of the economy in Indonesia's emerging democracy. Its judicial determinations have been rationalized in light of concepts of justice and formal and substantial equality, and its dicta have required the central government to maintain an authoritative and determinant presence in the management of the national economy by maintaining a high level of control over, and protection of, important industries to secure an equitable and fair distribution of natural resources (Butt & Lindsay, 2008).

Promoters of economic liberalism sought the removal of Article 33 to limit State intervention. They posited that the world economic order required Indonesia to liberalize the economy and become a competitive strategic player in global markets. Such requirement was in accord with Indonesia's membership of the World Trade Organization, the main purpose of which was to break down barriers to free trade (Lindsay & Butt, 2013, p. 253).

Notwithstanding these diverse ideological perspectives, the People's Consultative Council decided in 2002 to retain the principle of the 'people's economy' as embodied in Article 33, as it deemed state protectionism to be required to prevent the evils of the free market from harming the people and their prosperity (Butt & Lindsay, 2013, p. 252). According to the Council, protection could take two forms: First, the State must ensure that enterprises (particularly cooperatives and small-medium enterprises) have the opportunity to participate in the economy and the exploitation of natural resources, as well as to share in their spoils. Secondly, the State should protect the economically weak from excessive domestic and international competition (Luthfi, 2002, p. 35).

This protectionist view of 'the people's economy' has prevailed in the Constitutional Court's jurisprudence , with the Court interpreting Article 33 in line with this view.

Article 33 in the jurisprudence of the Constitutional Court

After the demise of Suharto's authoritarian regime, the People's Representative Assembly enacted several laws designed to weaken the State's monopoly over important sectors, such as electricity and water. From 1997 when the Asian economic crisis began to unfold, the International Monetary Fund and other multinational donors made substantial financial bailouts contingent upon Indonesia dismantling State monopolies over natural resources. For that to be achieved, they urged the central government to adopt new policies, ranging from restructuring to allowing private sector competition, and even privatization (Butt & Lindsay, 2012). The Constitutional Court heard several cases in which the applicants objected to many of these reforms, including government attempts to privatize important branches of production and natural resource exploitation and thus allow greater private sector involvement. Applicants argued that the State had, through the impugned statutes, relinquished its 'control' over these sectors and therefore breached Article 33. In those cases, the Court interpreted the scope of the expression 'controlled by the state' as included in Article 33, in the context of attempts to privatize the electricity industry and water resources, with consequent implications for the most disadvantaged sector of the population. It also interpreted the State's responsibilities to guarantee and safeguard minimal standards of living and basic necessities. The rulings of the Court were adopted in light of the *Pancasila* principled framework in order to give further impetus to the multilayered and multidimensional process toward national unity via an equitable distribution of natural resource.

The Electricity Law case

In 2002, the Indonesian legislature enacted Law No. 20/2002, the *Electricity Law*, which sought to deregulate, restructure, and liberalize the electricity sector. Under the *Electricity Law*, the state-owned electricity company would be just another actor in the market with certain areas designated as competition areas to be free of monopolistic practice. The state would remain involved in policymaking and in budgeting subsidies to those unable to afford electricity, and provision was made for a multi-buyer/seller system. The law also stipulated environmental responsibilities for producers.

In the *Electricity Law* case, a group of NGOs, including the State Electricity Company trade union, sought judicial review to challenge the constitutionality of Law No. 20/2002. They argued that the Law breached various constitutional provisions, including Article 33(2), which provides that sectors of production which are important for the country and affect the life of the people shall be under the powers of the State. The Government argued that the State would control a branch of production if it merely regulated it; expert witnesses claimed that control was synonymous with ownership.

The Court rejected these arguments, and determined that in addition to ownership and regulation the State needed to be able to manage the enterprise, for example, by having sufficient shares to control decision and policy making:

> *[T]he provision of the 1945 Constitution that gives authority to the state to control 'vital production branches' is not intended merely for the sake of the state's authority alone, but is intended for the state to be able to fulfill its obligations as mentioned in the Preamble to the 1945 Constitution,'... to protect the entire Indonesian nation and the entire Indonesian motherland, and in order to promote general welfare ...' and also '... creating social justice for all the people of Indonesia'.* (Const. Court Decision, 001-021-022/PUU-I/2003)

Central to the Court's determination was the substantial meaning given to 'control by the state':

> *The expression 'controlled by the state' cannot be interpreted simply as the right to regulate, because it is automatically inherent in the functions of the state without needing specific constitutional mention ... therefore the phrase 'controlled by the state' must be interpreted to include the interpretation of control by the state in the broad sense based on the conception of the sovereignty of the Indonesian people over all of the resources consisting of the 'land and water and natural resources contained therein'. Included in it is the interpretation of the collective public ownership by the people of the resources concerned.*

> *The people collectively through the 1945 Constitution give the mandate to the state to make policy and perform administration, regulation, management and oversight with the purpose of the greatest prosperity of the people. The function of administration by the state is carried out by the government in issuing and revoking permit facilities, licensing, and concession. The state's regulatory function is performed through the legislative authority of the People's Legislative Assembly together with the government, and regulation by the government. The management function is performed through shareholding mechanism and/ or through direct involvement in the management of the State Enterprises as instruments through which the state will exercise its control over the natural resources for the greatest prosperity of the people. The function of oversight by the state is performed by supervising and controlling the vital branches of production (paras. 334–335).*

The Court's ruling thus made it clear that, in addition to ownership and regulation the *condicio sine qua non* was the State's management of the enterprise, such as having share ownership sufficient to control decision- and policy-making. The State would also exercise managerial control if the entity engaged in the sector was a state-owned legal enterprise. Administrative control, including the power to issue and revoke permits, licenses, and concessions for industry participation, was also an essential requisite. Central to the Court's decision was the State's obligation to supervise and monitor the natural resource sector to ensure that the branches of production and natural resources were, in fact, exercised for the common good. The Court, however, clarified that Article 33 does not contain an express prohibition against private sector involvement in vital areas of production. The State may still allow private sector involvement, provided that in so doing it does not extinguish elements of its own control. (para. 336)

The Water Law case

Law No. 7/2004, the *Water Resources Law*, sought to decentralize water management and allow for private sector management of water resources. This was controversial insofar as it was seen as advancing a World Bank agenda of privatization. Under the new legislation, the State was empowered not only to make policy but to determine and manage the water resource management scheme and grant permits for exploiting water at various government levels. Between 2004 and 2005, a number of NGOs and individuals sought judicial review, challenging the constitutionality of the Law for threatening the people's right to water by making it a profit-orientated business. Article 33(3), as the relevant constitutional provision, requires that the economy be organized "as a common endeavor based upon the principles of the family system." The right to water was treated as a human rights issue, though there is no such express constitutional right.

In the *Water Law* case, the Constitutional Court tried to maintain national unity in the management and fair distribution of water supply between the competing interest of the private sector management of water resources and the people's right to water as a *res commune*. In trying to achieve such balance, the Court found that Law No. 7/2004 did not relieve the State of control over the management of water resources but contemplated the possibility of the State granting exploitation rights to the private sector. The State retained exclusive power to adopt policy and regulations, manage water resources and grant permits for water exploitation (Butt & Lindsay, 2012, p. 257).

However, the Court specified that:

> *Considering whereas therefore, except for water use rights, every exploitation of water must be subject to the state's right to control… Considering whereas although the state has the right to control water, due to the existence of human rights aspect with respect to water, the management of water shall be conducted in a transparent manner, namely by including the participation of community, and still respecting the right to water of customary law community, so as to develop democratization in the water resources system management. … [T]he Petitioners argue the WRL contains articles encouraging privatization namely, Articles 9, 10, 26, 45, 46 and 80, which are therefore contradictory to Article 33(3) of the 1945 Constitution. The Court is of the opinion that the WRL regulates the principal matters in the water resources management, and although the WRL opens the opportunities for private participation to obtain Commercial Water Usage Rights and permits for water resource exploitation, the aforementioned matters will not cause the control of water*

> *exploitation to fall into the hands of private parties. The state, in the exercising the right of water exploitation, conducts the following activities: (1) to formulate policies, (2) to conduct acts of administration, (3) to regulate, (4) to manage, (5) to supervise (Const. Court Decision, 058-059-060-063/PUU-II/2004 & 008/PUU-III/2005, paras. 496–499).*

The Tobacco Excise case

In the *Tobacco Excise* case, the Constitutional Court has further developed the meaning of 'economic democracy', and its place in pursuing economic unity, as stated in Article 33(4).

The provincial government of West Nusa Tenggara as applicant sought a review of Law No. 39/2007, of which Article 39 required the allocation of two percent of central government tobacco excise revenue to "tobacco-producing regions". The central government had interpreted "tobacco-producing regions" to be regions in which tobacco products factories were located. The applicant complained that, although West Nusa Tenggara was Indonesia's biggest grower of tobacco, it did not receive part of the excise revenue because it did not have such factories. The applicant thus argued that the Law contravened the principle of 'economic democracy' as embodied in Article 33 of the Constitution.

The Court agreed, deciding that the provinces in which tobacco was grown should also receive a revenue allocation. This, the Court stated, was required by Article 33(4):

> *From the perspective of the principle of economic democracy and the principle of togetherness, efficiency in justice, balanced advancement and national economic unity as regulated in Article 33(4)… two percent of tobacco excise obtained under Article 66A that is not implemented to include tobacco growing provinces does not accord with the purpose, spirit and ideals of Article 33 of the Constitution. The Court, therefore, believes that Article 66A(1) is unconstitutional if interpreted without including provinces that grow tobacco amongst those who receive the tobacco excise.*
> *(Constitutional Court Decision 54/PUU-VI/2008, para. 59)*

5 The Constitutional Court's 'Consequential' Role in the Process Towards National Unity

The preceding analysis of judicial determinations would suggest that the Constitutional Court, while functioning as the guardian of the Constitution, has played a consequential role in the process of achieving national unity in diversity, by trying to balance the conflicting demands of centralism and regionalism in a societal, political and religious context defined by pluralism (Epstein et al., 2001). The "consequential role of the Court" means that its determinations have some actual effect on the governance of the surrounding society (Kapiszewski et al., 2013). This raises the question of how the Court has become a politically consequential actor in the governance of the Indonesian nation.

It is suggested that a three–dimensional framework can assist in the identification of elements that may shed light on the Court's consequential role in the governance of the Indonesia constitutional order, namely:

- national (as well as international and supranational) institutional and political structures that both expand and constrain the Court;
- contextual political dynamics, that can cause the Court's determination to expand its operative scope and assume a significant functional role in governance and formulation of public policy;
- the Court's internal dialectical process in evaluation the emerging needs of Indonesian society, and (judges) personal beliefs, ideological and philosophical frame of mind (Kapiszewski et al., 2013, pp. 22–30).

In respect to the national institutional and political structures which define the political domain of the Court's operational context, the following features often influence the roles it plays:

- The democratic feature of the new political, unitary system of a dynamic constitutional democracy; the principle of separation of powers, and the fragmentation of political central authority via decentralization.
- The Court's power of judicial review of legislation, the specificity of the Court's empowering provisions, as spelled out in the Constitution, and the Court's high degree of support from a politically active 'legal complex' of the judiciary, lawyers, and legal academics.
- The demands and constraints stemming from international obligations, supranational legal orders, and national political, cultural and economic obligations toward other nation-states (Halliday, 2013; Nardi, 2018).

In respect to contextual political dynamics, short-term political influence can also determine impellent new demands for expanded juridical authority or, conversely for a minimalist approach to the exercise of judicial power. These include such dynamics as:

- Current political leaders' strong support for (or opposition to) the expansion or constraint of the exercise of the Court's judicial power and independence.
- Social and political movements, including media or litigation campaigns, that considerably impact on topical issues, headed by the national legal complex (jurists, legal profession, and the judiciary as a whole).
- Powerful expression of public opinion on politically or morally contentious issues (Kapiszewski et al., 2013, pp. 25–28).

In the Court's internal dialectical process, judges' personal beliefs, ideological and philosophical frames of mind are major determinants in the consequential role of the Court. Meanwhile, the structural features of (national, international and supranational) institutional and political systems, as well as contemporary political dynamics, can generate openings, invitations, and pressures for shifts in judicial roles:

> *However, judges' own incentives, capacities and motivations are crucial to judicial role expansion and contraction. The most significant elements in defining such a role are judicial leadership, evolving values and preferences of judicial majorities and desire to expand their power of judicial review and influence or use judicial power to advance political and policy change.*
> *(Kapiszewski et al., 2013, pp. 28-30)*

6 Conclusion

Alexander Hamilton, a founding father of the United States, considered judicial power to be "the least dangerous to the political rights of the constitution" (Hamilton, 1961). Compared to the legislature, which is the repository of political authority conferred by the people, and the executive which pragmatically implements the many legislative expressions of that authority, the judiciary merely adjudicates cases and clarifies the rules by which duties and rights are accorded. However, in contrast to Hamilton's political and legal rhetoric, the consequential role of constitutional courts in governance has substantially expanded to such a degree that scholars have described this judicial dominance as a 'juristocracy' (Hirschl, 2004, p. 1).

In the Indonesian constitutional order, it seems that, in trying to reconcile democratic decentralization, religious pluralism, and equitable distribution of natural resources, with the overarching goal of national unity, the Constitutional Court's pragmatic considerations identify and define it as a prominent consequential and stabilizing player in national governance dynamics. The sensitive issues raised by the parties in the cases analyzed here could potentially trigger social, political, and legal conflicts. Within such a context, the Court has emerged as a pragmatic, moderating agent, and as a forum for maintaining and safeguarding harmonious relations in the pursuit of unity within the complex constitutional geometry of contemporary Indonesia.

In performing its role as mediator, the Court is drawing on the *Pancasila* principled framework and pragmatically rationalizing decisions within the scope of *Bhinneka Tunggal Ika*. More importantly, the layered stratification of the Court's accumulated jurisprudential choices has had, and is having, deeply distributive and cultural implications that can transform the fabric of society. In the words of Oliver Wendell Holmes (1991/2000), judicial change and the development of the law are the expression of a judge's "instinctive preferences and inarticulate convictions in response to the felt necessities of his time" (p. 36). In light of that, the realized acceptance of the *metamorphic* nature of the Court's adjudicative power in balancing and conciliating the conflicting demands of a pluralistic nation seems to be foundational in keeping the constitutional players on track over the lengthy (multisided, multilayered, and multidimensional) journey toward national unity in diversity, as opposed to unity through uniformity and standardization.

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