

*The Role of The Indonesian Constitutional Court
in Protecting the Constitutional Rights
and Freedom of Citizens (Liberty)*

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THE ROLE OF THE INDONESIAN CONSTITUTIONAL COURT IN PROTECTING THE CONSTITUTIONAL RIGHTS AND FREEDOM OF CITIZENS (LIBERTY)

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The Constitutional Court of the Republic of Indonesia was established on August 13, 2003, as a result of the third amendment to the 1945 Indonesian Constitution. This cannot be separated from the unity of the process of changing political culture and shifting from authoritarian power to constitutional democracy. The establishment of the Constitutional Court was in line with the momentum of constitutional amendments in the Reformation era. The initiative for establishing the Constitutional Court was adopted in the amendment of the 1945 Constitution Article 24 paragraph (2) and Article 24C. The Constitutional Court, as a judicial institution, one of whose authority is to examine the judicial review of law and regulation against the 1945 Constitution, certainly has a big task in upholding and maintaining the protection of citizen's constitutional rights. This is the task carried out by the Constitutional Court as the guardian of constitution, the guardian of democracy, the sole interpreter of constitution, the protector of citizen's constitutional rights, and the protector of human rights protection.² The decision of the Constitutional Court is the "crown" that can represent the realization of the implementation of the tasks mentioned above. In connection with the theme of the International Symposium of the Constitutional Court of Thailand "Constitutional Court on the Protection of Rights and Liberty", this paper will describe the perspective of Indonesian national law and best practices of the Indonesian Constitutional Court in guaranteeing the constitutional rights of citizens related to freedom of opinion and religion.

Freedom of opinion and expression is one of the essential criteria in a democratic state. The realization of democratic values can be seen from guaranteeing protection for freedom of assembly, expression, and freedom to conduct open discussions.³ In a democratic state of law, the freedom to express thoughts and opinions in accordance with one's conscience is an essential human right, and is very important to be safeguarded in order to uphold justice, promote public welfare, and educate the nation's life.⁴ Furthermore, freedom of expression requires the guarantee of protection of constitutional rights in obtaining information and public information disclosure. This can have implications for the freedom for the public to express opinions on information that is generally available in the mass communication media.⁵

Universally, the Universal Declaration of Human Rights Article 19 states that "everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference, and to seek, receive, impart information and opinions by any means without limitation." In the context of Indonesian national law, the matter of freedom of opinion and expression is enshrined in Article 28E paragraph (3) which states "everyone has the right to freedom of association, assembly and expression". Concerning communication, Article 28F further states "everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels."

¹ Justice at the Constitutional Court of the Republic of Indonesia

² The five function of the Constitutional Court are the derivation of its authority as stipulated in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution.

³ Charles Tilly, *Democracy*, New York: Cambridge University Press, 2007, p. 8.

⁴ General Comment No.34 Para 2, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

⁵ *Ibid*, p.4

This paper will describe some Constitutional Court Decisions that can realize the protection of freedom of expressing opinion in public, as follows:

1. Constitutional Court Decision Number 50/PUU-VI/2008 on the judicial review of Press Law

In this decision, the Court stated that the legal regulation and restriction is not limited to the real world but also includes people's behavior in cyberspace. Regulations and restrictions by law are stipulated because every person has obligations to his/her community and in the exercise of his/her rights and powers every person can only be limited by law solely to ensure proper recognition and respect for the rights and freedoms of others. The Court is faced with two legal interests, namely between protecting freedom of speech, expressing opinions orally and in writing, and freedom of communication and obtaining information as constitutional rights of citizens, dealing with basic rights for the protection of the dignity and others' credential.

The provisions in Article 27 paragraph (3) of the ITE Law are in line with the provisions of Article 28G paragraph (1) and paragraph (2) of the 1945 Constitution, namely the protection of human honor and dignity, freedom from treatment that degrades human dignity, and in accordance with the provisions of Article 31 paragraph (3) of the 1945 Constitution, namely education for a society that increases faith, piety, and noble character.

The formulation of Article 27 paragraph (3) of the ITE Law is to maintain a balance between the freedom and protection of individuals, families, honor, and dignity, with the freedom of others to speak, express, express opinions and thoughts as well as seek, obtain, own, store, process and convey information in a democratic society. This balance is needed to avoid the occurrence of "jungle law" in cyberspace because many violations cannot be resolved because there is no law governing it. The rule of Article 27 paragraph (3) of the ITE Law, according to the Court, is not contrary to the 1945 Constitution because despite the provisions of Article 28F of the 1945 Constitution which reads, "Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, own, store, process, and convey information by using all available channels", but in practice, press freedom is not free. In other words, the state may and is justified in limiting press freedom so as not to violate the rights of others as stipulated in Article 28G paragraphs (1) and (2) which provide for the right to personal protection and the right to be free from degrading treatment.⁶

2. The Constitutional Court Decision Number 5/PUU-VIII/2010 concerning the judicial review of Information and Electronic Transaction Law regarding norms governing wiretapping

In this decision's legal reasoning, the Court granted the petition and stated that although wiretapping was included in the rights that could be restricted, due to the absence of clear regulations on the form of law, the Court considered that wiretapping is a violation of the protection of human rights.

⁶ Further explanation on this issued could be retrived from The Constitutional Court of the Republic Indonesia Research "*Pengaturan Hak Kebebasan Berpendapat dalam Konstitusi*" (The Regulation of Freedom of Expression in Constitution)
https://www.mkri.id/public/content/infoumum/penelitian/pdf/hasilpenelitian_145_Laporan%20Penelitian%20Kebebasan%20Berpendapat.pdf

3. The Constitutional Court Decision Number 36/PUU-XX/2022 and Decision Number 76/PUU-XV/2017 on the judicial review of Information and Electronic Transaction Law

In fact, the Constitutional Court rejected the petitions on both cases. However, the essence of the substance in the consideration of the decision explains concretely how the Court maintains the values in the constitution to ensure the protection of citizens' rights to freedom of opinion and expression. The Constitutional Court is of the opinion that regarding the phrase "inter-faction" the characteristics of a pluralistic society can also be relatively identified in Indonesian society. Therefore, the principle "*Bhinneka Tunggal Ika*" which is embedded as the identity of the Indonesian nation-state is not a choice without reason. The philosophical meaning contained in the principle is none other than the recognition and mutual awareness that the nation and state of Indonesia are built on a variety of diversity and through that diversity to build a solid unity as one nation on solid territorial integrity. It is because of this diversity that a sense of unity as one nation arises because of the common fate that unites in the territory of the archipelago. *Bhinneka* certainly does not only refer to the diversity of tribes, races and ethnicities. Given that the origin of *Bhinneka Tunggal Ika* emerged in an archipelagic country, *Bhinneka* rationally refers also to various other differences, such as region (place of residence), occupation (livelihood), and so on. The choice of the term *Bhinneka Tunggal Ika* as the state principle, when the Indonesian state was formed, shows that the Indonesian people together with the founding fathers reaffirmed the recognition of diversity in various fields, but not limited to the economic, political, social and cultural fields. As can then be seen in the 1945 Constitution which includes various statements that can be read as recognition of diversity and constitutional protection against it, among others in Article 18B paragraph (1) and paragraph (2), Article 25A, Article 26 paragraph (1) and paragraph (2), Article 28E paragraph (1), Article 28I paragraph (3), and Article 36A of the 1945 Constitution. Thus it can be said that diversity for the Indonesian nation-state is a framework that gives the basic form or foundation that becomes the main starting point. It is important for the Court to explain that the term "inter-faction" seems to be a harmful or bad thing, one of which is because of its application which is feared to be arbitrary.

Universally when a law is applied arbitrarily, it is bad and harmful. However, this is a matter of application of the law, for which legal remedies are available, so it is not a matter of the norm's constitutionality. The constitutional problem arises when the term "inter-faction" is eliminated, namely the existence of a legal vacuum that leads to legal uncertainty. Article 28E paragraph (3) in conjunction with Article 28G paragraph (1) of the 1945 Constitution explicitly states that everyone has the right to express opinions and be protected in exercising human rights. The phrase "to express an opinion" also includes the dissemination of information either orally or through certain media, including through the means of networked computer technology popularly known as social media. However, such freedom is not without limits. Freedom of expression is limited by the obligation to respect the human rights of others as stipulated in Article 28J paragraph (1) of the 1945 Constitution. According to the Court, Article 28E paragraph (3) in conjunction with Article 28J paragraph (1) of the 1945 Constitution mandates that every opinion must be accompanied by moral and legal responsibility to always present the truth. This is also in line with the meaning of the rule of law and legal

protection stated in Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution.

Furthermore, the Court is of the opinion that the phrase "inter-factions" because it accommodates various entities that have not been regulated by law, then when eliminated / deleted from Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law will negate / eliminate legal protection for various entities outside the three categories of ethnicity, religion and race. The absence of such legal protection has the potential to violate Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution.

Furthermore, in the consideration of Case 36/PUU-XX/2022, the Court remains in its stance and reaffirms the considerations as described above, including the considerations in Decision No. 50/PUU-VI/2008. The Court emphasized that the provision of Article 27 paragraph (3) of the ITE Law is an affirmation of the criminal law norm of insult contained in the Criminal Code into a new legal norm in accordance with the development and cyber world because the Criminal Code cannot reach the offense of insult and defamation committed online with the element of "in public".

It is important to note that even though a Constitutional Court decision has a ruling of rejection or inadmissibility, the substance in the Constitutional Court's consideration has binding force that must be a reference for lawmakers and stake holders who support aspects of the implementation of government duties. In the context of cases related to the guarantee of the right to freedom of opinion and expression, the Constitutional Court's decision is a reference in the issuance of the IITE Law Decree on Implementation Guidelines for certain articles in the ITE Law. This is one of the manifestations of the legal structure that has become a habit in structuring national law in Indonesia to guide the Constitutional Court Decision in the formation of laws and regulations.

Related to freedom of religion as a form of freedom or liberty, the 1945 Indonesian Constitution normatively regulates in Article 28E paragraph (1) which states that "everyone has the right to embrace a religion and worship according to his/her religion..... " and in paragraph (2) stated that everyone has the right to freedom of belief, expression of thoughts and attitudes, in accordance with his/her conscience. Furthermore, Article 28I paragraph (1) states "the right to life, the right to religion, the right to freedom of thought and conscience,..... are human rights that cannot be reduced under any circumstances." Article 29 paragraph (2) adds "the state guarantees the freedom of each resident to embrace his/her respective religion and to worship according to his/her religion and belief. Based on these arrangements, it can be seen that Article 28E paragraphs (1) and (2) regulate the recognition of the right to freedom of religion and belief, while Article 29 paragraph (2) emphasizes the role of the state to guarantee the freedom of every citizen to embrace their respective religions and beliefs in accordance with their beliefs. If placed in a more universal context, the recognition of freedom of religion that exists in the Constitution and regulations in Indonesia has followed the formulation of freedom of religion as stipulated in the Universal Declaration of Human Rights and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) which has been ratified in Law Number 29 of 1999 concerning the Ratification of the International Convention on the Elimination of all Forms of Racial Discrimination and the International Covenant on Civil and Political Rights (ICCPR) which has been ratified in Law Number 12 of 2005 concerning the ratification of the International Covenant on Civil and Political Rights. All of the international treaties mentioned above provide guarantees on freedom of religion or freedom to embrace their beliefs without discrimination. The consequence of the ratification of those international

treaties into Indonesian national law is the obligation for the government to respect, maintain, enforce and guarantee the human rights stipulated in those regulations.

One of the landmark decisions of the Constitutional Court in relation to the protection of the rights and freedoms of citizens to practice religion and belief can be seen in the Constitutional Court Decision No. 97/PUU-XIV/2016 regarding the judicial review of Law No. 23/2006.⁷ The Court granted the petition which paved the way for nonbelievers in Indonesia to get official recognition from the government. The Court argued that by leaving the "religion" column on the ID card blank, the indigenous faiths or nonbeliever will experience difficulties in registering marriages and accessing population administration services. The religion column on the Family Card and ID card for indigenous faiths and nonbeliever currently (after the Constitutional Court's decision) must indicate that they are actually "indigenous faiths" or nonbeliever without details about the information of the faith they follow.

In the case regarding nonbeliever citizens rights, the Court considered that the disputed articles did not provide legal certainty and violated the principles of equal justice for all citizens. Furthermore, the Court stated that the articles in the law that require indigenous faiths to leave the religion column in the ID card blank are discriminatory. The articles treat differently things that should be the same, namely citizens who adhere to beliefs recognized according to laws and regulations in accessing public services and citizens of indigenous faiths. According to the Court, the restriction of rights has nothing to do with respect for the rights and freedoms of others and is not related to the fulfillment of fair demands in a democratic society. On the contrary, the restriction of the right actually causes unfair treatment towards citizens of indigenous faiths. Thus, it turns out that the reasons for limiting rights as stipulated in Article 28J paragraph (2) of the 1945 Constitution are not fulfilled so that the different treatment is a discriminatory act. In deciding the case, the Constitutional Court stated that "Article 61 paragraph (2) and Article 64 paragraph (5) of the Civil Registration Law are contrary to the 1945 Constitution and the articles do not have binding legal force."

These are some of the best practices in the implementation of the authority of the Indonesian Constitutional Court in ensuring the protection of the rights and freedoms of citizens or liberty. We hope that forums such as this International Symposium can be a means to exchange ideas, best practices and various experiences in handling cases to be able to support the Court's future tasks in upholding substantive justice.

⁷ The Constitutional Court Decision Number 97/PUU-XIV/2016 was sentenced in 2017, for further reading please retrieved https://www.mkri.id/public/content/persidangan/putusan/97_PUU-XIV_2016.pdf



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THE INDONESIAN CONSTITUTIONAL COURT AND THE PROTECTION OF RIGHTS AND LIBERTY

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The Constitutional Court of the Republic of Indonesia

- Established after the amendment of Indonesia Constitution 1945, August 13 2003
- Its authority is enacted in the Article 24 paragraph (2) and Article 24C :
 1. To conduct judicial review of laws against the 1945 Constitution of the Republic of Indonesia;
 2. To decide upon disputes related to the authority of state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia;
 3. To decide upon the dissolution of political parties; and
 4. To decide upon disputes related to the results of general elections.



Rights to Freedom of Expression & Religious



UNIVERSAL DECLARATION OF HUMAN RIGHTS	INDONESIAN 1945 CONSTITUTIONAL	INDONESIAN NATIONAL LAW
<p>Article 19</p>	<p>Article 28E paragraph (1) "everyone has the right to embrace a religion and worship according to his/her religion..... "</p>	<p>Law Number 19 the Year 2016 concerning Electronic Information and Transactions</p>
<p>"everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference, and to seek, receive, impart information and opinions by any means without limitation "</p>	<p>Article 28E paragraph (3) : "everyone has the right to freedom of association, assembly and expression"</p>	
	<p>Article 28F : "everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels."</p>	
	<p>Article 29 paragraph (2): "the state guarantees the freedom of each resident to embrace his/her respective religion and to worship according to his/her religion and belief."</p>	

THE INDONESIAN CONSTITUTIONAL COURT DECISION

On the Protection of People's Rights to Freedom of Expression:

1. Constitutional Court Decision Number 50/PUU-VI/2008 on the judicial review of Press Law
2. The Constitutional Court Decision Number 5/PUU-VIII/2010 concerning the judicial review of Information and Electronic Transaction Law regarding Norms Governing Wiretapping
3. The Constitutional Court Decision Number 36/PUU-XX/2022 and Constitutional Court Decision Number 76/PUU-XV/2017 on the Judicial Review of Information and Electronic Transaction Law

On the Protection of People's Rights to Freedom of Religion

The Constitutional Court Decision No. 97/PUU-XIV/2016 regarding the judicial review of Law No. 23/2006 concerning Citizenship Administration





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