Volume 27 Issue 1, January 2020: pp. 193-215 Copyright © 2020 Ius Quia Iustum Law Journal Faculty of Law, Universitas Islam Indonesia.
ISSN 0854-8498 l e-ISSN: 2527-502X. Open access at: http://jurnal.uii.ac.id/indek.php/IUSTUM

The "Divine Light" of the Constitutional Court under Arief Hidayat (2015–2017)

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Received: 6 September 2019; Accepted: 5 April 2020; Published: 29 June 2020

DOI: 10.20885/iustum.vol27.iss1.art10

Abstract

Almost every Chief Justice of the Constitutional Court has introduced his own terminology during his term. Arief Hidayat, during his time in leadership, often deployed the phrase "divine light", which has close ties to the Pancasila, Indonesia's state ideology. It is reasonable to assume that such a choice of words might have a strategic value. Especially in the context of the classically problematic relationship between religion and the state. However, there has been no academic study addressing Arief Hidayat's intent in using this phrase. This paper intends to fill in the gap through normative research methods and legal comparisons. The discussion in this article is divided into three parts: First, it reviews the normative and theoretical side of the relationship between religion and constitutionalism; Secondly, it looks to Arief Hidayat's background to seek meaning of the phrase; The last part of this paper examines the Decisions of the Constitutional Court that contain the phrase in search of an official interpretation of Arief Hidayat's thoughts about a divine light.

Keywords: Constitutional court; divine light; Pancasila; religion

Background

To date, the Constitutional Court of the Republic of Indonesia (The Court) has had six Chief Justices (Chiefs).[1] Each has possessed his own characteristics as a leader, influenced by his personality and perspective. Few studies have been conducted into how such influences have coloured the output of The Court.[2] As well as the young age of The Court itself, the short lengths of term served by the Chief Justices also contribute. A study conducted by Stefanus Hendrianto has begun to compile a history of the changes undergone by The Court through its changing leadership.[3] However, the aforementioned review places more emphasis on the leadership styles of the individuals that have filled the position. Hendrianto concluded that a Chief with strong leadership skills was needed to maintain the identity of The Court.[4] Changes under each Chief to the regulations that govern The Court are another

[1] Chief Justices of The Court: 1) Jimly Asshiddiqie, 2003–08; 2) Mahfud MD, 2008–13; 3) M. Akhil Mochtar, April–October 2013; 4) Hamdan Zoelva, 2013–15; 5) Arief Hidayat, 2015–18; 6) Anwar Usman, 2018–Present.
[2] One book that can form a basis for this approach is Sebastian Pompe's *The Indonesian Supreme Court: A Study of Institutional Collapse*, which looks at the influence of several Chief Supreme Court Justices on the institution of the Supreme Court. Meanwhile, Stefanus Hendrianto's *Law and Politics of the Constitutional Court: Indonesia and the Search for Judicial Heroes* (Routledge, New York, 2018) provides reference for a similar study with a focus on the Constitutional Court.
[3] Stefanus Hendrianto, *The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia* (*Washington International Law Journal*, 25, 2016, page 489–563)
[4] *Ibid.,* page 562

point of consideration.[5] The length of term of office determines the extent to which a Chief is able or likely to impact upon the image of The Court while in office.

It has proven common for the Chief Justice to introduce new terminology during his time in office, usually resonating with the times and representing a particular paradigm that the Chief wishes to introduce or highlight to the public consciousness.

Jimly Asshiddiqui, being in charge at the birth of The Court, campaigned for constitutional awareness. Mahfud MD made frequent use of the phrase 'substantive justice'.[6] Similarly, during Arif Hidayat's term as Chief[7], he often asserted, in court hearings, official speeches and lectures, that the law and justice should be based upon "divine light".[8] These terms and phrases used by the Chiefs reflect their respective paradigms and indicate the vision each implemented during his time in office.

Arif Hidayat was not the first to use the phrase, "divine light". It was used long before by Mohammad Hatta. Nurcholish Madjid quotes Hatta as follows:

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[5] Act 24/2003 regulated that the term of office for the Chief Justice of The Court be 3 years [Article 4, Paragraph (3)]. This was later amended by Act 8/2011, which shortened the term to 2 and a half years with the possibility for reelection for a second term.

[6] The 2009 Annual Report from the Constitutional Court carried the title *Leading Democracy and Upholding Substantive Justice.* In the report, it was written, "Though the aforementioned Act does not conflict with provisions regulated in the Constitution, it does threaten to undermine the unwritten basic values of the Constitution. As such, The Court is advised to uphold the substantive justice, not merely act as the mouth of the law." Constitutional Court Annual Report 2009 (MKRI 2010) page 10 <https://mkri.id/public/content/infoumum/laporantahunan/pdf/Laporan%20Tahunan%20MK%202009_Mengawal%20Demokrasi%20Menegakkan%20Keadilan%20Substantif. pdf> accessed on 23 August 2018.

[7] Arief Hidayat was appointed Chief Justice for two terms, the first from 14 January 2015 to 14 July 2017. He was then reelected to complete a second term from 14 July 2017 to 27 March 2018. On 27 March 2018, was sworn in by the President of the Republic of Indonesia to sit for a third term as Chief for the period from 2018 to 2023. However, a consultative assembly of justices was held on 28 March 2018, where it was decided that The Court would conduct an election, whereupon Arif Hidayat was determined no longer eligible for reelection.

[8] "*Ketua MK: Hukum Indonesia Seharusnya Dibangun dengan Sinar Ketuhanan*", *Berita MK*, Wednesday 20 May 2015, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=10903#> accessed on 23 August 2018; "*Sidang Kriminalisasi LGBT dan Pandangan Sinar Ketuhanan Sang Ketua MK*", *Detiknews*, Sunday 28 August 2016, <http://news.detik.com/berita/3285405/sidang-kriminalisasi-lgbt-dan- pandangan-sinar-ketuhanan-sang-ketua-mk> accessed on 24 August 2018.

"…all acts of statecraft should be conducted under the divine light of Almighty God, such that this first principle shall shine a light upon the remaining four principles of the Pancasila. Thus, our statecraft has its basis in the metaphysical, ensuring total commitment born of the recognition that all human acts are meaningful and will be accounted for before God."[9]

Nevertheless, when deployed by a Chief Constitutional Justice, this phrase takes on a different, more strategic meaning, in light of the relationship between religion and the Constitution. As the head of an institution in possession of the authority to interpret the Constitution, Arif Hidayat's use of such a phrase implies commentary on the place of religion in the implementation of constitutionalism. Debate on this issue in Indonesia is ongoing, such that Arif Hidayat's choice of words, and the potential of hidden meanings it carries, injected new life into the conversation.

This paper intends to examine the meaning of the phrase, "divine light" as used by Arif Hidayat during his time as Chief. It is hoped that this analysis of the phrase will shed light on its influence and contribution to the aforementioned debate.

This discussion is divided into three parts. The phrase, "divine light" is clearly and inextricably related to religion. Therefore, the first part of this paper must examine the relationship between religion and the Constitution. The second part will look to Arif Hidayat's background, in particular his legal approach and his time as a law professor, in an attempt to determine the meaning of the phrase. This will provide valuable context and help to identify a relationship between this background and the vision that was carried out in the name of "divine light". The third part will trace the realisation of the vision as seen in Decisions made by The Court under the tutelage of Arif Hidayat, who took several opportunities to include his vision of "divine light" as part of his legal considerations when

[9] Nurcholish Madjid, *Indonesia Kita*, Gramedia Main Library, Jakarta, 2004, page 109.

contributing to Court Decisions.This part will also discuss the trends and views regarding the role of religion as a valid instrument in legal Decisions.

Problem

The problem at the heart of this research is, first, the meaning of the phrase, “divine light” as used by Arif Hidayat during his time as Chief Justice of the Constitutional Court, and secondly, the contribution of his vision to the development of constitutionalism in Indonesia.

Objective

This research is intended to ascertain the limits and meaning of the phrase and the vision of “divine light”. This research is further intended to measure the contribution the vision has made to the development of constitutionalism in Indonesia.

Method

This discussion will be presented in three parts. The first part will take a theoretical view of the relationship between religion and constitutionalism using a doctrinal approach combined with a comparative legal approach with reference to an example from India. The second part of the discussion will be concerned with the life experience of Arif Hidayat as a foundation for ascertaining the thought behind the phrase, “divine light”. To this end, the research will collect and compile relevant data and information from a number of sources. Additionally, research will be conducted into the Decisions of The Court during the relevant time that include the phrase, “divine light”. These examples will be presented as the primary legal material to demonstrate the realisation of the ideas behind the phrase. The Decisions analysed in this part are Decision No. 140/PUU-VII/2009.[10] and Decision No. 46/PUU-XIV/2016.[11] These Decisions will be used to observe how the vision of “divine light” has

[10] Review of Act 1/PNPS/1965 on Prevention of Abuse and/or Desecration of Religion against the 1945 Constitution of the Republic of Indonesia.
[11] Review of Act 1/1946 (The Penal Code Act) *juncto* Act 73/1958 on the Ratification of Penal Code Act against the 1945 Constitution of the Republic of Indonesia.

contributed to the development of constitutionalism in Indonesia. This approach can be found in the domain of Judicial Behvaiour, where Lee Epstein has described it as a combination of theoretical and empirical research with respect to the choices justices must make in deciding upon cases.[12] Ultimately, if these conflicts lead to dispute, they will end up in front of a judge.

Outcome

Religion and Constitutionalism

Ran Hirschl, in his book, *Constitutional Theocracy*, attempts to analyse the interplay between two phenomena that have become particularly relevant in the 21st Century, the rise of constitutionalism in various countries and the return of religion to the political arena.[13]

Hirschl writes,

"...the assumption that constitutionalism and religion are diametrically opposed domains, or at best unrelated to each other, is often unquestioned. But these two domains are in many respects analogous symbolic systems that vie to establish, maintain, or enhance their hegemony, worldviews, and preferences vis-a-vis each other."[14]

The intersection between religion and the constitution cannot be avoided in efforts to develop a culture of constitutionalism. One study attempted to create a classification of the various types of relationship between religion and the state.[15] If these conflicts lead to dispute, they ultimately end up in front of the constitutional justices. Thus, the view that constitutionalism and religion exist in two separate, non-overlapping realms, such that there can never be conflict between the two, is an outdated one. Even in countries that declare themselves secular states.

[12] Lee Epstein, "*Some Thoughts on the Study of Judicial Behaviour",* 57 *William & Mary Law Review 2,* 2017, page 2022.
[13] Ran Hirschl, *Constitutional Theocracy*, Harvard University Press, 2010, page 239
[14] *Ibid.*, page 249
[15] Gabor Halmai, *"Religion and Constitutionalism" 2015/5 MTA Law Working Papers*, pages 11–28

One example is India. The Preamble to India's Constitution refers to India as a secular state. Nevertheless, in the regulation of freedom of religion and religious practices, the Indian Constitution includes regulations that deviate from what might be expected of a secular text. In Article 25, Paragraph (2)a, the Indian Constitution introduces an exception.

India's Supreme Court regularly deploys religious principles when deciding on cases, with particular reference to Hindu teachings. In the case of Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi vs. State of Uttar Pradesh[16], the Indian Supreme Court took into consideration the claim that Sri Adi Visheshwara was a reincarnation of Dewa Shiwa, a Hindu deity. Sri Adi Visheshwara, who was not a person, much less a legal entity, but rather a reincarnated deity, was nonetheless treated as a legal subject by the Supreme Court. Consequently, it was determined that Vishwanath Temple, a shrine to the Sri Adi Visheshwara must be guarded and protected because it had the rights and obligations of a person or legal institution that constitutes a legal entity. Indeed, there are very complex circumstances at play in India, where numerous Decisions attributing legal personage to Hindu deities have been accepted as legally valid. However, the theoretical basis for this is less than clear, a result of the presence of two legal systems competing for supremacy, namely, Hindu Law and Common Law.[17]

In Indonesia, the debate over religion and the constitution is framed in the implementation of the state ideology, the Pancasila. From the beginning, the Pancasila was established as the foundation of the state at the constituent plenary session towards the end of 1957. The debate gave rise to 3 pillars: the Pancasila, Islam and Social Economy.[18]

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[16] Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi, vs State of UP (1997) 4 SCC 606

[17] Kartick Maheshwari and Vishnu Vardhan Shankar, "*Stone Gods and Earthly Interests: The Jural Relations and Consequence of Atributing Legal Personality to Hindu Idols", 16th Student Bar Review*, 2004, page 66

[18] Ari Budiyanto, *et al*, "*Memaknai Kembali Perdebatan Islam dan Pancasila*" in Erwien Kusuma and Khairul (eds.), *Pancasila dan Islam: Perdebatan antar Parpol dalam Penyusunan Dasar Negara di Dewan Konstituante*, BAUR Publishing, Jakarta, 2008, pages xix–xxi

Issues of secularism and religion are at the heart of this debate. Ultimately, the debate amongst the members of the Constituent Council reached a dead end,[19] and the matter was handed over to the incumbent government to settle.

Interpretation of the place of Islam in the Pancasila as well as in the Constitution depend upon the approach taken by the government. The *Orde Baru* (New Order Government) were considered successful in engendering a more religious embodiment of the the Pancasila than the *Orde Lama* (Old Order).[20] An example of this is the issuance of the Religious Court Act. However, the accommodative approach taken by the *Orde Baru* was a political response to the Islamic community's reaction to the marginalisation of "Islamic politics" implemented in the early days of the Soeharto regime.[21]

In the reformation era, the debate returned to the fore. In particular with regard to the hegemony of religious influence over the law. Formally speaking, laws and regulations governing the legislative hierarchy, both past and current, place the Pancasila as the supreme source of all state laws.[22] However, the religion's influence over religion has far from waned. For an example, we can look to the increased number of regional regulations carrying nuances of Sharia since the reformation era. These laws have been pushed by a conservative movement amongst the muslim community and the growth of symbolic politics. Furthermore, the existence of these Shariah-influenced regional regulations indicate a changing trend in the accumulation of power and a rise in political corruption at the regional

[19] Erwein Kusuma and Khairul, *"Detik-detik Menjelang Bubarnya Konstituante"*, from Erwien Kusuma and Khairul (eds.), *Pancasila dan Islam: Perdebatan antar Parpol dalam Penyusunan Dasar Negara di Dewan Konstituante*, BAUR Publishing, Jakarta, 2008, pages xv–xvi
[20] M. Bambang Pranowo, *"Islam dan Pancasila: Dinamika Politik Islam di Indonesia" 3rd Ulumul Qur'an: Journal of Science and Culture*, 1992, page 7
[21] M. Rusli Karim, *Negara dan Peminggiran Islam Politik*, Tiara Wacan Yogya, 1999, page Xx
[22] The laws and regulations referred to are (1) Provisional People's Consultative Assembly of the Republic of Indonesia Provision No. XX/MPRS/1966 on Memorandum DPR–GR Concerning Rule of Law and the Legislative Hierarchy in the Republic of Indonesia ; (ii) Article 1 Paragraph (3) of People's Consultative Assembly of the Republic of Indonesia Provision No. III/MPR/2000 on Source of Law and LegislativeHierarchy; (iii) Article 2 of Act 10/2004 on Formulation of Legislation; (iv) Article 2 of Act 12/2011 on Formulation of Legislation.

level, especially through the extraction of funds in a rising economy based on Shariah law, such as through *zakat* (tithes) and taxes on entertainment and alcohol.[23]

These cases from India and Indonesia and cases found in other parts of the world demonstrate the challenge of maintaining clear division between religion and constitutionalism. There is a tendency for the majority religion within a population to have a greater influence than the religions observed by minorities. Moreover, religion is considered a system of laws dictated by the deity, the Rule of God, while constitutionalism represents a law based upon human rationality, Rule of Law.[24] Hirschl accurately describes the separation of constitutionalism and religion:

"Constitutionalism and religion may both be forums of principle, but they are also domains of political and economic strife, where various stakeholders and interests fight for recognition, influence, and other profane gains. They operate within particular social, political, and economic contexts and cannot be fully understood in separation from these perspectives."[25]

Finding the line between religion and constitutionalism can be done not only by looking from the angle of dogmatic theory but other variables too, such as economic interests, political association and impacts on other elements of social life. Especially when considering a policy or decision issued by a justice. The tendency for personal preference play a part in such a process is very important.

The developing field of judicial behaviour studies is an area of political science that focuses on what judges do and why they do it.[26] When taking their decisions, a judge's perspective

[23] Michael Buehler, *"The Rise of Shari'a By-Laws in Indonesian Districts: An Indication for Changing Patters of Power Accumulation and Political Corruption" 16th South East Asia Research*, 2008, page 256
[24] *Op. Cit.*, Hirschl, page 16
[25] *ibid.*, page 239
[26] Jeffrey A. Segal, *"Judicial Behaviour"* in Gregory A. Caldiera, *et al.* (eds.), *The Oxford Handbook of Law and Politics*, OUP 2008, page 19

is often coloured by life experiences such as education, religion, status and the social environment. Thus, the judge's acts constitute "…a function of what they want to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."[27]

Judicial Behaviour is a valuable approach to finding the meaning of the phrase "divine light" as used by Arif Hidayat as Chief Justice of the Constitutional Court.

Meaning of" Divine Light" from the Perspective of Arief Hidayat

One important element to reflect upon, according to judicial behaviour studies,[28] is the justice's personal ideology.[29] This approach is also known as the attitudinal model.[30] Two elements that are frequently highlighted on this model are the justice's educational background and institutions affiliated with the justice. These two elements contribute to a construction of the mindset of the justice being studied.

The mapping of the political landscape in Indonesia is not the same as in the US, where there is a clearer divide between Republicans and Democrats. Ahmad Syafii Maarif stated that political identity in Indonesia is more aligned with ethnicity, religion and ideology.[31] However, even these demarcations are often less than clear. As a result, it is not always easy to determine whether an individual Is motivation by nationalism, religion or something else.

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[27] J.L. Gibson, "*From Simplicity to Complexity: the Development of Theory in the Study of Judicial Behaviour"*, *5th Political Behaviour*, 1983, page 7

[28] These studies have been the subject of little discussion thus far amongst Indonesian academia, one possible reason being the different culture and mentality. Judicial Behaviour Studies place a focus on the consequences of the personal lives of judges. In Indonesia, not everybody is so comfortable with their personal lives being examined publicly. Especially a judge, who has a place in the social structure as a state official.

[29] Diana Kapiszwecki, *"Tactical Balancing: High Court Decision Making on Politically Crucial Cases", Law and Society Review, Vol. 45., Issue 2,* 2011, page 477

[30] Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model*, Cambridge University Press, Cambridge, 1993

[31] Maarif, Ahmad Syafii, *Politik Identitas dan Masa Depan Pluralisme Kita*, Democracy Project, Jakarta, 2012, page 20

And so it is when assessing the background of Arif Hidayat. As an alumnus of the nationalist organisation, Indonesian National Students' Movement (*Gerakan Mahasiswa Nasional Indonesia – GMNI*),[32] Arif Hidayat was closely affiliated with the religious community. A study conducted by Nadirsyah Hoesein into the influence of Islam on the views presented by constitutional court justices from 2003 to 2015 looked at organisations affiliated with justices during this time. However, this study does not contain any data from Arif Hidayat[33] as he did not join any public organisations, institutions or political parties with Islamic leanings.

If we consider education background, Arif Hidayat engaged in legal studies with a strong socio-legal focus. A graduate of Diponegoro University, his perspective often takes a progressive hue in line with the teachings of Satjipto Rahardjo.[34] Several writings from Hidayat have been published, one of which is a modification of his doctoral dissertation from his study at Diponegoro University, titled "*Freedom of Association in Indonesia (Influence of the Changing Political System on Legal Interpretation)*".[35] Aside from this, he has written several books with FX Adjie Samekto.[36] Hidayat also wrote over 30 papers from 2006 to 2009.[37] Examining these written works, we can see that Arief Hidayat holds a view based upon the ideals of Soekarno with regard to the Pancasila and influenced by Satjipto Rahardjo with regard to the law.

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[32] *PA GMNI Bergerak Cepat dan Langsung Gelar Diklat Hukum*, Tuesday 11 August 2015, <https://www.rmol.co/read/2015/08/11/213081/PA-GMNI-Bergerak-Cepat-dan-Langsung-Gelar-Diklat- Hukum->, accessed 28 August 2018

[33] Nadirsyah Hosen, "*The Constitutional Court and* '*Islamic* '*Judges in Indonesia"* 16th Australian Journal of Asian Law, 2016, page 6

[34] Satjipto Rahardjo, *Hukum dan Perilaku*, Kompas, Jakarta, 2009; Myrna Safitri, Awaludin Marwan and Yance Arizona (eds.), *Satjipto Rahardjo dan Hukum Progresif: Urgensi dan Kritik*, Epistema-Huma, Jakarta, 2011

[35] Arief Hidayat, *Kebebasan Berserikat di Indonesia (Suatu Analisis Pengaruh Perubahan Sistem Politik Terhadap Penafsiran Hukum)*, Diponegoro University Press, 2006

[36] Arief Hidayat and FX Adjie Samekto, *Hukum Lingkungan Dalam Perspektif Nasional dan Global*, Diponegoro University Press, 1998; Arief Hidayat and FX Adjie Samekto, *Kajian Kritis Penegakan Hukum Lingkungan Di Era Otonomi Daerah*, Diponegoro University Press, 2007

[37] Arief Hidayat, "*Bernegara itu Tidak Mudah (Dalam Perspektif Politik dan Hukum)*" Professor's Inaugural Speech at the Diponegoro University Open Senate Meeting, pages 51–56, <eprints.undip.ac.id/7828/1/Prof_Arief.pdf>, accessed on 29 August 2018

Satjipto Rahardjo is quoted stating that every nation has a metaphysical dimension with regard to the law, such as the Japan's conscience-based law.[38] The process of judgement, according to Rahardjo, should be based upon values, tradition and public institutions, such that the law cannot be separated from the culture's social roots.[39] Therefore, the Indonesian Constitution likewise cannot be viewed in isolation from the religious character of the people. Faith and religious teachings have been handed down from the earliest generations who settled the archipelago. For example, the Naurus beliefs on Pulau Seram, Tolottang in Sulawesi Selatan, Kejawen in East Java and Sunda Wiwitan in Banten[40] are all extant religions that can be traced back far beyond the nation's history.

This aligns with Soekarno's principle of faith as found in his speech in front of the Investigating Committee for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan – BPUPK*) on 1st June 1945. Soekarno wished for "…all people to adhere to their faith in line with their respective cultures and to display no religious egotism. And the state of Indonesia shall be a nation of God."[41] Soekarno further asserted that "…the fifth principal of our nation shall be a culture of faith, virtue and equality,…The Independent Nation of Indonesia shall be built upon belief in the One and Only God!"[42]

The vision of "Divine Light" as used by Arief Hidayat has close ties with the Pancasila as described by Soekarno. "Divine Light" does not associate explicitly with one single religion, instead it attaches itself to the vision of diversity that lies at the heart of Indonesian society and was held up also by Soekarno himself. Arief Hidayat consistently always used a variety

[38] Satjipto Rahardjo, *Mendudukan Undang-Undang Dasar: Suatu Pembahasan dari Optik Ilmu Hukum Umum*, Diponegoro University Press, 2007, pages 15–17
[39] Satjipto Rahardjo, *Negara Hukum yang Membahagiakan Rakyatnya*, Genta Publishing, 2010, pages 102–105
[40] Yudi Latief, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila*, Gramedia Pustaka Mandiri, Jakarta, 2012, page 58
[41] RM A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945, Edisi Revisi* FHUI Press, page 163
[42] *Ibid.*, page 164

of expressions when greeting his guests and hosts to represent this diversity, including greetings identified with Islam, Christianity and Buddhism as well as greetings in the official national language.[43]

Arif Hidayat's "Divine Light" is also closely related to the authorities of The Court. As the institution authorised to interpret the Constitution, the Court is indirectly task with the guardianship of the nation's ideology. The Values of the Pancasila can be used as a yardstick for the constitutionality of a given law. Aside from its enshrinement in the Preamble to the 1945 Constitution, the Pancasila is also ascribed as the source of all state legislation in the hierarchy of laws. Therefore, The Court is implicitly obliged, according to Hidayat's view, to protect the Pancasila.

Contribution to Indonesia's Constitutionalism by the "Divine Light" Vision

The formulation of Decisions by The Court is heavily influenced by civil law, especially the French system, with Decisions being the collective output of the panel of justices.[44]

Nevertheless, Court Decisions do allow space for justices with dissenting views to express their opinions on the case and for them to be included within the Decision.[45] Unlike court Decisions within the tradition of common law, where each individual judge or justice writes an opinion to be entered into the Decision or at least the majority of the panel agrees with the decision by explicitly cosigning it. The particular model adopted by The Court presents a challenge for those wishing to conduct research requiring the isolation of opinions or views of individual justices. So it is with this paper in its attempts to extract the personal vision of

[43] *Proceedings*, Board of Members Meeting, 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions, Bali, 8–14 August 2016, page 1; *Proceedings*, *International Symposium on the Constitutional Court as the Guardian of Ideology and Democracy in Pluralistic Society*, Solo, 9–10 August 2017, page 9

[44] Heikki E.S. Mattila, "*Cross-references in Court Decisions: A Study in Comparative Legal Linguistics*", Tarja Salmi-Tolonen, Iris Tukianen and Richard Foley (eds.) "*Law and Language in Partnership and Conflict*", (2011) 1st Lapland Law Review (Special Issue), page 99–101. For geographical a mapping where Indonesia is categorised as being influenced by civil law, see George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition,* Springer, 2015, page 301.

[45] Article 45 Paragraph (1) Act 24/2003 on The Constitutional Court, amended by Act 8/2011

Arief HIdayat from Decisions to help illuminate the meaning of “Divine Light”. The only Decision during Arief Hidayat’s term as Chief that contains the phrase “Divine Light” is a Decision on a review of the Penal Code, listed with the Secretariat as Decision No. 46/PUU-XIV/2016, wherein Arief Hidayat was amongst those justices who submitted a dissenting opinion.

The aforementioned review of the Penal Code received a great amount of public attention becuase, substantively speaking, the Petitioner strived to change the formulation of several norms that gave sanctions for certain criminal acts. First, the Petitioner requested that a norm regulating adultery be broadened.[46] Adultery in the Penal Code is limited to cases where the adulterer is bound my marriage. The Petitioner requested that The Court amend the regulation to apply to anybody without the limitation of the requirement for the adulterer to be married, such that the definition of adulterer might apply to anybody be they married or not. Secondly, the petitioner requested the amendment of a norm regulating rape,[47] suggesting that the public understanding of rape had broadened to include not only women who are not married to their rapists as was regulated by the relevant article; males could also be victims of rape.Thirdly, the Petitioner requested that The Court also broaden the

[46] Article 284 of the Penal Code, Paragraphs (1), (2), (3), (4) and (5) regulate, “(1) Sentenced to prison for a maximum of nine months shall be: 1a. any married man who commits adultery with the knowledge that Article 27 of the Civil Code is applicable to him; 1b. any married woman who commits adultery; 2a. any man who willingly takes part in such an act with knowledge that the other offending party is married; 2b. any unmarried woman who willingly takes part in such an act with knowledge that the other offending party is married and that Article 27 of the Civil Code is applicable to him; (2) Prosecution shall be carried out only in the event of complaint by the shamed spouse and, where Article 27 of the Civil Code applies to the spouse, within three months, demand for divorce or severance from board or bed (*scheiding van tafel en bed*) on the grounds of the same transgression; (3) to such a complain, Articles 72, 73 and 75 shall not be applicable; (4) The complaint may be retracted prior to the commencement of the Judicial Investigation; (5) where article 27 of the Civil Code does apply to the spouse, such a complaint shall not be acted upon prior to termination of the marriage by divorce or the verdict by a judge on the pronouncement of severance of bed and board.

[47]Article 285 of the Penal Code regulates, “Any person who, through violence or the threat of violence, forces a woman to whom he is not married to engage in sexual intercourse with him shall be guilty of rape and shall be sentenced to a maximum of twelve years in prison.”

definition of “obscene acts”,[48] whose definition in the penal code is limited to acts involving a minor and members of the same sex. The inclusion of the term ‘minor’ limits the definition of obscene acts to acts of paedophilia, whereas the Petitioner asserts that the definition should also encompass all acts of homosecuality. As such, the Petitioner requested that the term “minor” in Article 292 of the Penal Code be removed.

The Petitioner’s main motivations were (1) to uphold traditional family values and (2) to protect religious values.[49] In the context of protecting religious values, the Petitioner asserted that the nation’s founding fathers built the nation on the values of religion. It was never their wish that Indonesia become a secular state.[50] Thus, in the Petitioner’s view, “it follows that the law should be grounded in the morals and values of The One and Only God…”[51] and the religions of Indonesia principally forbid adultery outside of marriage, rape committed against any person and homosexual relations.[52]

In deciding this case, the panel of justices was split five to four, with Arief Hidayat amongst the minority despite being Chief Justice at the time. While this is not common, it is certainly not the only instance of such an occurrence. Jimly Asshiddiqie also did the same in the early days of The Court’s history.[53]

The inclusion of dissenting opinions in Court Decisions serves to maintain a vision of a transparent justice and to increase the legitimacy of the Decision itself.[54] For the Justices in

[48] Article 292 of the Penal Code regulates “Any adult who commits an obscene act with a minor of the same sex, whose minority is known to the adult or should reasonably be presumed, shall be sentenced to a maximum of five years in prison.”
[49] Decision No. 46/PUU-XIV/2016 (Penal Code Decision), page 19–20
[50] *Ibid.*, page 23
[51] *Ibid.*, page 26
[52] *Ibid.*
[53] Decision No. 008/PUU-IV/2006 on Review of Article 85 Paragraph (1) point c Act 22/2003 on the Composition and Standing of the People’s Consultative Assembly, House of Representatives, Regional House of Representatives and the Regional Representative Board and Article 12 point b of Act 31/2002 on Political Parties against the 1945 Constitution, page 66–72
[54] Simon Butt, *“The Function of Judicial Dissent in Indonesia’s Constitutional Court”, 4th Constitutional Review 1*, 2018, page 12

question, the Decision is a manifestation of their responsibility to the public, "… judges are accountable for their Decisions. This is one reason why they have to publicly justify their rulings."[55]

Recording the dissenting opinion grants the justices an element of freedom in the deciding process and an opportunity to elucidate the reasoning behind their decisions. Arief Hidayat expressed with his dissenting opinion in Decision No. 46/PUU-XIV/2016 his reasoning along with the other three dissenters.[56]

The influences behind Hidayat's dissenting opinion quite clear; the phrase, "divine light" can be found in the relevant section 10 times. The first mention of the phrase was in conjunction with a statement that the 145 Constitution is a Godly Constitution, such that this essence should be reflected in every law and decision. In his opinion, he asserted, "…every legal certainty, whether in the form of a legal norm, including laws, or court verdicts and decisions, should consistently embody religious values and emanate the divine light…"[57]

The dissenting opinions entered into the Decision spoke of the place of religion in state legislation, especially with regard to the principle of belief in the One and Only God in the Pancasila and its place in the legislative hierarchy. They stated that, "…Faith in the One and Only God is not a mere matter of one's personal faith but rather a principle shared by a people of mixed faiths."[58]

In their contemplations on adultery, The four dissenting justices suggest that the definition held in the Penal Code is restricting. The concept of forbidden relations in accordance with religious values and the living law is indeed a broader concept amongst the Indonesian

[55] Péter Cserne, "*Policy Arguments Before Courts: Identifying and Evaluating Consequence-Based Judicial Reasoning", 3rd Humanitas Journal of European Studies*, 2009, page 13
[56] The four justices expressing dissenting opinions in Decision No. 46/PUUXIV/2016 were Arief Hidayat, Anwar Usman, Wahiduddin Adams and Aswanto, Penal Code Decision (n 38), page 453–467
[57] *Op. Cit.*, Penal Code Decision, page 456
[58] *Ibid.*, page 455

people, including relations outside of marriage between two separately married individuals—adultery—and those involving unmarried persons—fornication.[59] However, the dissenting opinion referrs only to Islamic norms through a quote from the Qur'an, Surah Al Isa, Verse 32.[60] There was no extra effort made to find similar references in other scriptures as a mark of the plurality of religion in Indonesia, where not all Indonesian people subscribe to the belief that Islam is the sole religion.

In their considerations of the formulation of the laws concerning rape and obscene acts, the phrase "divine light" and invocation of religious values are not as dominant as in the previous section. The discussion on rape focusses more on considerations of sex equality and medical perspectives on rape and victims of rape.

The same is the case for the discussion of the Penal Code's definition of obscene acts; there is no reference made to the religious perspective. On the subject of obscene acts and homosexual acts, the dissenting justices say only, "…clearly, the practice of homosexuality is despicable on an intrinsic, universal and humane level according to religious law, divine light and the living law."[61] However, this claim is substantiated no further, even though this is a significant opportunity for the justices, including Arief Hidayat, to explain the thinking behind their claims and to offer legal reasoning to legitimise the view and fulfil their responsibility to the public.

Long before this Decision was issued, The Court had already considered the same principle of Faith in the One and Only God from the Pancasila as an argument in the legal considerations of another case. In the Decision on the review of a law on blasphemy, Decision No. 140/PUU-VII/2009, the justices wrote their thoughts on their interpretation of the first principle of the Pancasila. At the time of this case, Arief Hidayat was not yet on the

[59] *Ibid.*, page 459
[60] *Ibid.*
[61] *Ibid.*, page 465

panel of justices,[62]though there is something of a foreshadowing of Hidayat's phrase, "divine light" in this interpretation, which contained the panel's opinion that the five principles of the Pancasila are all inextricably interelated, with the first principle providing the core sentiment that the others are born out of.[63]

The first principle of the Pancasila, belief in the One and Only God, is threaded into the tapestry of the nation's statecraft, as can be seen in Article 29 Paragraph (1) of the 1945, which regulates that "the State shall be based upon belief in the One and Only God." This provision constitutes a clear statement that the Indonesian people are a faithful people, not atheistic. One important aspect of statehood is, of course, the implementation of justice. As such, and in order to reflect the constitutional foundation of a nation based on belief in the One and Only God, the header for every court decision must contain the pledge, "in the name of justice under the One and Only God."[64]

Throughout The Court's history, the struggle to find balance between religion and constitutionalism has been ever-present. Decisions issued by the panels of justices representing The Court have been invoked in the discourse on Indonesia's statecraft for the interpretations they have offered of the principle of belief in the One and Only God. Nevertheless, Arief Hidayat, in his capacity as Chief Justice has played an important role in this discourse with his implicit campaign for the phrase "divine light". At the very least, academics and members of the public with an interest in state administration have been given a new thread for the discussion on the search for a balanced relationship between state and religion.

[62] Decision No. 140/PUU-VII/2009 was issued by a panel composed of Moh. Mahfud MD as Chief Justice along with Achmad Sodiki, M. Arsyad Sanusi, Harjono, Maria Farida Indrati, M. Akil Mochtar, Muhammad Alim, Ahmad Fadlil Sumadi and Hamdan Zoelva. In the Decision, Harjono submitted a concurring opinion and Maria Farida submitted a dissenting opinion.
[63] Decision No. 140/PUU-VII/2009, Paragraph [3.34.1]
[64] *Ibid.*, Paragraph 3.43.3]

Closing

One could write entire tomes on the relationship between constitutionalism and religion. There are many matters to be discussed and sides to be taken. And the discussion is only more complex if we wish to have it in the context of Indonesia, where the particular religious plurality of the society and the underpinnings of a constitution explicitly based upon a faith-based state ideology, the Pancasila, adds muliple layers and perspectives to the conversation. It is certainly not easy to unravel this tangled relationship.

The phrase popularised by Arief Hidayat and examined by this paper has clearly made a positive, if limited, contribution to the discourse. The proliferation of the view from “divine light” by Hidayat warrants its own chapter in the book on constitutionalism and religion. This research has shown how Hidayat’s use of the phrase, “divine light” was an effort to bring the relationship between religion and constitutionalism into harmony with the vision of the Pancasila as the state ideology. Especially through use of the phrase when exercising his authority to interpret the Consitution within Decisions of The Court. But this investigation into the meaning of the phrase is incomplete. There are still some areas of understanding to be developed further. It would be very interesting to see this vision completed in further works.

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