

**FREEDOM OF RELIGION AND BELIEF UNDER
SUPREME COURT VERDICT STUDY CASE ON
SUPREME COURT DECISION
NUMBER 17/P/HUM/2021**

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Abstract

Freedom of religion or belief (FoRB) is one of the human rights stated in the 1945 Constitution. Article 29 paragraphs (1) and (2) of the 1945 Constitution. The recognition of religion guarantees the independence of each of its inhabitants to embrace their respective religions and to worship according to their religion or beliefs. The state guarantee on FoRB consists of assurance for the internal and external forums. Freedom to embrace religion or belief is an internal forum for everyone, an absolute right as regulated in ICCPR that Indonesia has also ratified. In fact, this provision is also regulated in Article 28 I paragraph (1) of the 1945 Constitution. The fulfillment of the right to FoRB is frequently discriminated against in Indonesia. The issue of forcing to wear school

uniforms with hijab for non-Muslim female students is still common in many public schools in Indonesia. The State has issued a joint decree (SKB) of 3 ministers to normalize the discriminatory status quo. However, the attempt to return it to its normal position was thwarted by the LKMM, which carried out the SKB test. Unfortunately, the Supreme Court (SC) canceled the SKB because schools have the right to carry out religious education and instilled values. The judges ratio decidendi made by the SC Justices were very dry from the perspective of freedom of religion or belief in canceling the 3 Ministerial Decrees. The judge saw the issue of forcing to wear hijab on non-Muslim students from the perspective of the majority religious thought without noticing that Indonesian society is very diverse. Therefore, the protection of the right to FoRB should also safeguard the religious minorities rights. This paper will examine decision made by judiciary power in term protecting the FoRB right. This verdict will be reviewing toward to justice consideration (ratio decedendi) and legal archictecture in filling the norm FoRB. Moreover, it will also appraise to judicial behavior based on breakfasting theory.

Keywords: E-FoRB; Supreme Court; Verdict.

Background

"Guarantee the freedom of religion and belief in Indonesia still faces at least three levels of challenges: Conceptual, social and legal." The remark by Alamsyah M Dja'far, Asfinawati, Muhammad Isnur, and others is a reality and illustration (zoom out) of the subject of ensuring Indonesians' right to freedom of religion and belief.¹ The objective of Indonesian independence, as stated in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia, is to defend the entire nation and its citizens. ² a very basic and philosophical meaning in terms of the foundation of the Indonesian nation's creation, namely to provide protection for the law and freedom that every human being possesses. Adopting the existing law in society to integrate and coordinate the interests of all members of society is

¹ Alamsyah M Dja'far et al., *Hak Atas Kebebasan Beragama Atau Berkeyakinan Di Indonesia* (Jakarta: Wahid Foundation, 2016).

² Further on *Pembukaan Undang-Undang Dasar NRI 1945*

called legal protection. According to Satjipto Rahardjo, these interests should be regulated by a compromise between granting people freedom and preserving society's interests.³

Indonesia is not a country based on religion; however, Indonesia protects religion and guarantees the independence of its population to embrace and carry out worship inherent in that religion as set forth in Article 29, paragraphs (1) and (2) of the 1945 Constitution.³ This assurance conveys an interpretation that the Indonesian people's right to exercise their faith in the context of the internal forum⁴, as well as expressing it in external forums.⁵

The design of the constitution in Article a quo is literally a demonstration of the state's obligation in fulfilling the right to freedom of variety and belief within the limits of recognizing and safeguarding this freedom from the activities of other parties who attempt to disrupt it. The state, as a player in the idea of a welfare state, must obviously play a role in mitigating the consequences of abuses of the right to religious freedom. The task to uphold human rights lies with the legislative, executive, and judicial branches of government. Each of these pillars of authority has a crucial function in ensuring the right to freedom of religion and belief.

Discrimination and intimidation to wear the hijab in public schools for non-Muslim pupils is not a new practice. Indonesia, which is dominated by a Muslim population, is frequently ensnared in the construction of policies based on the power of the dominant religion. The truth of the dominant religion appears to have co-opted religious freedom. It appears that Jeremy Bentham's notion of justice is that justice and truth are always seen statistically (the greatest happiness for the greatest numbers). As a consequence, in sites of Indonesia where

³ Siti Aminah and Uli Parulian Sihombing, *Buku Saku Untuk Kebebasan Beragama Mehamami Kebijakan Rumah Ibadah* (Jakarta: The Indonesia Legal Resource Center, 2010) p. 3

⁴ Forum internal is an individual's right to have/embrace their religion/belief based on their choice. The nature of this forum is absolute and protected and cannot be limited

⁵ The external forum is the right to manifest one's religion/belief, including this right to worship, practice religion/belief, celebrate religion and teach religion. its nature can be limited as long as the limitation meets the specified parameters.

Muslims constitute the majority of the population, Islam frequently obtains special treatment in national and governmental affairs.

This status quo is a kind of indirect and systemic discrimination. The current norms and structure of society, whilst purporting to treat everyone equally but without protest on the surface, tacitly reflect the majority's position in fulfilling the Objectives.⁶ Besides indirect discrimination is defined as “*Indirect discrimination is when there’s a **practice, policy or rule** which applies to everyone in the same way, but it has a worse effect on some people than others.*”⁷ It was also claimed that this indirect discrimination takes the sort of practices, regulations, and norms, both explicit and colloquial, that are made yet deliberately discriminate against the fulfillment of particular groups' rights.

Indonesia has approximately 297,000 state schools with a composition of kindergarten education (85,000), elementary schools (147,000), junior high schools (37,000), senior high schools (12,000).⁸ Along with the development of the uniform period at various levels, the school has transformed towards religion from time to time. Starting from student pants/skirts that used to be short pants/skirts to long pants/skirts. As well as short-sleeved uniforms to become long-sleeved followed by the use of the hijab for female students. Based on the data reported, this phenomenon occurs in at least 24 provinces with a predominantly Muslim population.⁹ The rejection of changing school uniforms in Indonesia did not receive objections from male students, but on the contrary, some female students objected to this provision, especially for those who are Christians because this is certainly contrary to their beliefs.

This incident has often occurred in several places such as: Denpasar, Maumere, Banyuwangi, Yogyakarta, Bukittinggi, Semarang

⁶ Heiner Bielefeldt, *Menelisk Kebebasan Beragama: Prinsip-Prinsip Dan Kontroversinya* (Bandung: Mizan, 2021) p. 119

⁷ <https://www.citizensadvice.org.uk/law-and-courts/discrimination/what-are-the-different-types-of-discrimination/indirect-discrimination/> opened on 28 January 2023

⁸ Human Rights Watch, *I Wanted to Run Away* (USA: Human Rights Watch, 2021).

⁹ *ibid*

and finally in Padang.¹⁰ This chaos was noisy in the center of the incident but did not receive much attention at the level of state administrators so that it became viral when the parents of Christian students at SMKN 2 Padang protested to the school. Then the Minister of Education and Culture, Nadiem Makarim, responded by issuing a Joint Decree (SKB) of 3 ministers namely the Minister of Religion, Minister of Home Affairs and Minister of Cultural Education Number 021/KB/2021, Number 025-199, juncto Number 219 concerning uniform rules school.

The central government through the relevant ministries, namely the Ministry of Education and Culture, has tried to neutralize and rehabilitate this pendulum of discrimination against religious freedom. This, in fact, is a manifestation of the government carrying out its responsibility in protecting the rights of religious freedom (religion making), but unfortunately this state power does not share the same understanding in providing protection for religious freedom with other branches of state power. Evidenced by the cancellation of the Ministerial Decree on school uniforms by the Supreme Court during a material review of the a quo provision. The actions of the executive power to rehabilitate the damage to the rights of religious freedom were not actually strengthened and strengthened by the judiciary but instead returned to the starting point. Regardless of the ratio decidendi given by the Supreme Court Justices from the perspective of the formation of laws and regulations which are considered negligent and flawed by the government in the process of forming rules (law making process), the fact is that the decision is completely dry from the aspect of fulfilling and protecting FORB which should also be the institution's obligations. judiciary to comply. The dryness of the FORB aspect in the judge's consideration is fully illustrated by the construction which does not touch on issues of discrimination, intolerance and coercion experienced by minority female student groups in terms of wearing uniforms. In fact,

¹⁰ Sulistyowati Irianto, Sulistyowati Irianto, and Sulistyowati Irianto, *Laporan Eksaminasi Publik Putusan Mahkamah Agung No 17 P/HUM/2021 Terkait Permohonan Uji Materi Surat Keputusan Bersama 021/KB/L2021 Nomor 025-199 TAHUN 2021 Dan Nomor 219 TAHUN 2021 Dari Kementerian Pendidikan Dan Kebudayaan, Kementerian Dalam Negeri Dan Kementerian Agama Tentang Penggunaan Pakaian Seragam Dan Atribut Bagi Peserta Didik, Pendidik, Dan Tenaga Kependidikan Di Lingkungan Sekolah Yang Diselenggarakan Pemerintah Daerah Pada Jenjang Pendidikan Dasar Dan Menengah* (Jakarta: Komnas Perempuan, 2021).

the Court perpetuates and legalizes these discriminatory acts on the basis of educational interests, instilling morals and culture that tends to be biased towards the exclusive attitude of certain religious groups.

Judicial Power is an independent power to administer justice in order to uphold law and justice. The purpose of judicial power is explicitly stated in Article 24 paragraph (1) of the 1945 Constitution. Upholding law and justice has a broad meaning, namely ensuring that the practice of people's lives is always in line with all applicable laws and can fulfill a sense of justice for those seeking it (justiciabellen).¹¹

Even though the court is obliged to fulfill the protection of human rights through a decision as the crown of the judiciary. In various cases relating to the fulfillment of freedom of religion and belief, courts in Indonesia have shown positive sentiments. For example the Constitutional Court Decision Number 97/PUU-XIV/2016 which provides space not only for 6 state-recognized religions that can be recorded on KTPs but also for adherents of belief systems. This decision is a landmark decision in the protection of FORB which is carried out by Constitutional Justices as a court of law. Vis versa, the protection of religious freedom is still something that has not been realized in the Supreme Court.

The Decision on the SKB Material Test regarding school uniforms contained in the Supreme Court Decision Number 17/P/HUM/2021 signals degradation in fulfilling FORB rights. This decision started with a review of the Joint Decree of 3 ministers on uniforms. The SKB was tested materially by the Minangkabau Natural Density Institute (LKAAM) and Bundo Kandang West Sumatra.

The a quo decision granted the applicant's request by canceling the SKB on uniforms made by 3 Ministries to untangle the tangled threads in discriminatory practices and the forced use of the hijab for non-Muslim students in public schools. The considerations of the judges formed in the a quo decision are first, the formation of the SKB is considered problematic from the point of view of science and theory of legislation. Second, schools have the role of education and instilling morals and morals, so that the use of the hijab becomes legal as a form of character building for students. The legal logic developed by the Supreme Court justices in interpreting the protection of religious

¹¹ Asshiddiqie J, *Komentar Atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Jakarta: Sinar Grafika, 2009).

freedom is interesting to study when it is linked to a number of legal instruments that judges should use in making decisions, such as: the 1945 Constitution, the Human Rights Law, the National Education System Law, the ICCPR Ratification, etc. Rules for using the hijab for non-Muslim students are a form of coercive and discriminatory action. In line with the thoughts of Prof. Sulistyowati Irianto in his article entitled *Interpreting the Judge's Decision from a Socio-Legal Perspective*, he criticizes the a quo Supreme Court Decision and marks it as a failure in the world of justice in understanding the concept of the right to religious freedom which needs to be protected within the framework of Indonesia's diversity by the judiciary.¹² This paper will review the responsibility of the judiciary in fulfilling the right to freedom of religion. Judicial power is referred to as the least dangerous branch. Although it is considered a state institution that is less prestigious than the two state powers based on the theory of separation of state powers by Montesquieu. The judicial power has an equally important role in protecting human rights through its decisions. As stated by J. Hart Walsh "The constitution is what the judge says it is".¹³

In other words, Walsh's doctrine can be interpreted that judges have great power in fulfilling and protecting human rights through their decisions. So that in making decisions (verdict making process) judges must always have a holistic, comprehensive and inclusive understanding, not confined to the logic of majoritarian truth or personality identity bias, regardless of the root of the problem.

This paper will review the Arrangement of the Right to Religious Freedom in the laws and regulations in force in Indonesia and examine the Obligation to Fulfill the Right to Freedom of Religion and Belief in the Supreme Court Decision Number 17/P/HUM/2021.

This paper uses a normative juridical method that is based on written law. The approach used in this paper is the statutory approach, the concept approach to freedom of religion and belief (conceptual approach). These 2 approaches are used to answer the first problem formulation and the Supreme Court Decision No. 17/P/HUM/2021 approach (case approach) is used to answer the second problem

¹²<https://www.kompas.id/baca/opini/2021/06/04/memaknai-putusan-hakim-dari-perspektif-sosio-legal/> opened on 19 January 2023

¹³ Feri Amsari, *Perubahan Undang-Undang Dasar Melalui Putusan Pengadilan*, Jakarta (Jakarta: Rajawali Press, 2011) p. 1

formulation. The type of data used is secondary data in the form of primary legal materials, secondary legal materials and tertiary legal materials. Data collection techniques were carried out through a literature review (literature review). And the analysis in this paper is prescriptive in nature by providing an overview of the responsibility of the judiciary in fulfilling the FORB and examining and providing notes on the Supreme Court decision.

Literature Review

a) FORB's perspective on non-discrimination on the basis of religion

Human rights are indivisible, interdependent and interrelated. Therefore, discrimination cannot be seen as a partial action.¹⁴ In other words, discrimination against a human right will have an impact on the fulfillment of other human rights that are inherent and owned by every human being.

Discrimination in the field of freedom of religion and belief often occurs when the government places the state religion, the majority religion or other traditional religions having a special position, because at the same time the government is placing religion or other beliefs at a disadvantage.¹⁵

The standard norms and regulations issued by Komnas HAM construct non-discrimination in 2 (two) ways, namely as a principle and as a right. The principle of non-discrimination prohibits discrimination either directly (direct discrimination) or indirectly (indirect discrimination). Direct discrimination is an act that is different or inferior to someone compared to other people in comparable situations on the basis of something that cannot be justified. Indirect discrimination is a custom, rule or condition that appears to be neutral but has a disproportionate impact on certain groups without any legitimate justification.

As a right, non-discrimination originates from provisions that affirm the right to equality, such as equality before the law, equal legal

¹⁴ Standar Norma dan Pengaturan Nomor 1 tentang Penghapusan Diskriminasi Ras dan Etnis.

¹⁵ Manfred Nowak dan Tanja Vospernik, "Pembatasan-Pembatasan yang diperbolehkan terhadap kebebasan beragama dan berkeyakinan, dalam buku sumber kebebasan beragama dan berkeyakinan p. 129

protection and protection from discrimination. Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law. Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against discriminatory treatment. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that every citizen has the same status before law and government and is obliged to uphold that law and government without exception. Furthermore, Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates that every citizen has the right to obtain equal opportunities in government.

Something will be considered as a violation of the principles of equality and non-discrimination if there is:

- a) Differences in treatment of the same thing;
- b) Without any rational justification;
- c) Proportionality between the goals to be achieved and the instruments used.

The three parameters above can be used to determine whether a policy/action can be considered as a form of discrimination or not. John Rawls interprets the same basic freedom as the equal liberty of principle within the framework of political liberalism. According to him, the principle of justice is ordered lexically and therefore freedom can only be limited for the sake of freedom itself. Therefore the state may not intervene in the private sphere of religion. The state may not force its citizens to adhere to or to carry out the religious rituals of one religion/belief, which is considered true or the majority religion. Therefore, the state should be neutral and have the character of the rule of law. Neutrality becomes a benchmark for the state in carrying out its functions as a result of a social contract from the original position. So everyone should get the same treatment. Forms of unequal treatment whether carried out by state institutions or society must be returned to their original position by the state through the tools and instruments it has.¹⁶ Therefore, there are differences in the treatment of religious rights

¹⁶ John Rawls, 2006, *Teori Keadilan: Dasar-Dasar Filsafat Politik untuk mewujudkan Kesejahteraan Sosial dalam Negara*, diterjemahkan oleh Uzair Fauzan dan Heru Prasetyo, (Yogyakarta: Pustaka Pelajar) p. 72

in practicing belief, in this case the coercion of wearing the hijab for non-Muslim students has injured the religious rights of these non-Muslim students. Where they should be treated equally and have the freedom to practice their religion.

In addition the obligation to use the hijab for non-Muslim students is followed by irrational reasons. As stated in the case at SMKN 2 Padang, that the obligation to wear the hijab for all female students at school is due to the formation of student morals and character.¹⁷ The basic question is, what are the standards that are then used to say that students who wear the hijab are better than those who don't wear the hijab? of course this is very biased as a reason. Because morality should not be formed in the form of formality but build character and personality and instill good values in students. Moreover, this reason also lies in the state of Minangkabau culture which is seen as religious, so this regulation on the use of the hijab must be implemented.

Therefore, there is no proportionality between the goals to be achieved from the forced use of the hijab for all female students in many public schools and the legal instruments that apply. Therefore, the state as an institution which as stated by John Rawls has the authority to return to the original position of fulfilling this right to religion and belief.¹⁸

The principle of non-discrimination is a universal norm regulated in a number of international and national legal instruments. Article 1 of the Universal Declaration of Human Rights defines this principle as the equal rights of every human being without exception. In other words, no one should be denied their rights or treated differently.

The principle of non-discrimination also means that it prohibits everyone, including the state, from forcing someone to do or not to do something that is impersonal. This kind of freedom without coercion is very important in the era of democracy because everyone is given sovereignty and the will to choose what is best for him. So that a person cannot be punished for his freedom to choose the clothes and uniforms he wants to use, including in the implementation of education in

¹⁷ Vide Supreme Court Judge's consideration on Decision Number 17/P/HUM/2021

¹⁸ Ibid John Rawls

schools. So that it becomes unfair and violates human rights when someone is forced to wear a uniform that is contrary to their beliefs.

In the architecture of the constitution building, the principle of non-discrimination is also regulated as stated in Article 28 I paragraph (2) of the 1945 Constitution in full which reads: "Every person has the right to be free from discriminatory treatment on any basis and is entitled to protection against discriminatory treatment. The construction of this article actually contains 2 meanings which are to guarantee and protect against discriminatory actions. In line with the guarantee of the principle of non-discrimination regulated in many legal instruments under the 1945 Constitution. As stated in Article 1 number 3 of Law No. 39 of 1999 concerning Human Rights.

"Discrimination is any direct or indirect restriction, harassment, or exclusion based on human differentiation on the basis of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, which results in reduction, deviation of human rights and basic freedoms in life both individually and collectively in the political, economic, legal, social, cultural and other aspects of life".

The provisions of the Human Rights Law conclude that discrimination through acts of restriction, harassment or exclusion is based on a number of differences that exist in humans so that it impacts on the reduction and deviation of various aspects of basic freedoms that individuals have.

b) FORB's perspective on the prohibition of coercion (coercive)

One of the elements in the freedom of religion and belief as regulated in Article 18 of the Covenant on Civil and Political Rights is the prohibition of coercion in fulfilling the right to religion and belief. Because religious freedom lays the basis of its argument on individual freedom, namely positive freedom for everyone to use religious symbols such as the hijab as a free choice and every human being has the determinant authority to make decisions based on religion and belief. On the other hand, the negative freedom not to "forcedly" use the religious symbol must also be guaranteed by the state.¹⁹ Everyone's

¹⁹ Muhammad Hafiz, *Penggunaan Dan Penunjukan Simbol Dan Atribut Keagamaan, Dalam Buku Sumber Hak Kebebasan Beragama Dan Berkeyakinan* (Jakarta: Wahid Foundation, 2016), p.221

right to get an education should not be hindered or hindered by rules that prohibit or require someone to use religious symbols. Often victims of compulsion to use religious symbols that conflict with their religion or beliefs experience various discriminatory treatments ranging from ostracism by school members, tendencies to evaluate subjective learning achievement and other sanctions. Whereas FORB rights prohibit forced use of religious symbols. The use of the hijab as a school uniform should be interpreted as an effort to force the beliefs (forum internum) of non-Muslim groups to follow certain religious beliefs which place the position of covering the genitals by using the hijab.

It was proven that in the case of using the hijab at SMKN 2 Padang, it was stated that at first they were quite uncomfortable wearing the hijab at school because it contradicted their beliefs, but this inconvenience was dismissed only to fulfill the wishes of the school. This situation shows that these non-Muslim students have personal fears to express their beliefs in the midst of having to comply with school regulations regarding the use of the hijab.²⁰ Even though the guarantee of freedom of religion and belief, especially the forum internum element, is an absolute right that cannot be reduced under any circumstances (non derogable rights) as set forth in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Unfortunately efforts to understand the importance of guaranteeing the right to religion and belief tarnished by reasons of formal school rules that want to create a school atmosphere that is characterized by a certain religious education.

c) Responsibilities of the Judicial Power in fulfilling the FORB

The responsibility of the state in fulfilling FORB can be understood from the provisions of Article 69 paragraph (2) of Law Number 39 of 1999 concerning Human Rights. In full it reads: "Every human right of a person raises a basic obligation and responsibility to

²⁰ <https://www.timesindonesia.co.id/read/news/323396/pengakuan-siswi-non-muslim-smkn-2-padang-kami-tak-pernah-dipaksa-menggunakan-jilbab-lebih-lanjut-baca> <https://sumbar.suara.com/read/2021/01/25/110203/kronologi-lengkap-kasus-siswi-nonmuslim-smkn-2-padang-dipaksa-berjilbab> opened on 2 December 2022

respect the human rights of others reciprocally and it is the duty of the Government to respect, protect, uphold, and promote them".

As for what is meant by the phrase basic human obligations are a set of obligations which, if not implemented, do not allow the implementation and upholding of human rights. Meanwhile, the manifestation of this obligation is realized through the attitude of the state which refrains from interfering in individual and religious matters. if the government intervenes then the essence of the right itself is damaged.²¹ Therefore, the nature of the state in fulfilling and protecting religious freedom rights is passive and mediates when conflicts occur in society. In its neutral and passive role, state administrators must be impartial and not biased by certain interests. The government's duties consist of respecting, protecting, upholding and promoting religious freedom.

The state through the court institution has the responsibility to make remedies for violations of the right to freedom of religion in an affordable and effective manner, besides that the court institution must be able to stop ongoing violations through its decisions, and ensure that violations will not be repeated and the implementation of the decisions.²²

Indonesia pins and claims constitutionally as a constitutional state (*rechtsstaat*). In fact, the idea of a rule of law state was originally only outlined in the explanation of the 1945 Constitution before the amendment which stated that Indonesia is a state based on law (*rechtstaat*) not power (*machstaat*). The affirmation of the concept of a rule of law state is confirmed in the amendment to Article 1 paragraph (3) of the 1945 Constitution.²³ One of the characteristics of a rule of law in both the common law/Anglo Saxon legal system and continental European legal systems is the recognition and guarantee of human rights. That is why a rule of law is interpreted as rule by the law not by men.²⁴ Law becomes commander in chief and supreme supremacy based on the constitution and law. So that one of the basic principles of

²¹ See SNP Komnas HAM

²² General Commentary of Human Right Council Number 31 p. 15

²³ Konstitusi dan Konstitusionalisme Indonesia p. 115

²⁴ Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta: PT Bhuana Ilmu Populer, 2007), p.75

a rule of law is the existence of an independent and impartial judicial power capable of formally and substantially recognizing and protecting fundamental human rights.²⁵

The constitutional design for fulfilling the right to freedom of religion and belief has been enshrined in various provisions in the 1945 Constitution after the amendment. At least with the increased awareness of the post-amendment 1945 Constitution makers, a number of human rights guarantee provisions were born, including the right to freedom of religion and belief. These provisions can be seen from the following provisions:

Article 28 D paragraph (1)

"everyone has the right to recognition, guarantees, protection and legal certainty that is fair and equal treatment before the law"

Article 28 E paragraph (1)

"everyone has the right to embrace a religion and to worship according to his religion, to choose education and teaching, to choose a job, to choose citizenship, to choose a place to live in the territory of the country and leave it, and has the right to return"

Article 28 I paragraph (1)

"The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of a law that applies retroactively are human rights that cannot be reduced under any circumstances.

Article 29 paragraph (2)

"The state guarantees the freedom of every citizen to embrace their own religion and to worship according to their religion and belief"

In general, it can be drawn a common thread that guarantees for the fulfillment and protection of FORB in the constitution are regulated

²⁵ Todung Mulya Lubis, *Recrowning Negara Hukum: A New Challenge*, A New Era (Melbourne: Centre for Indonesian Law, Islam and Society, the University of Melbourne, 2014), p.8

in a number of good Articles and Chapter XA which are a cluster of human rights provisions that were issued after the amendment or in the change in the sound of Article 29 of the 1945 Constitution. Fulfillment and protection of FORB is arranged within the framework of fulfillment and protection in forum internum (embracing religion) and forum externum (worshipping).

Result and Discussion

a. FORB guarantee arrangements based on the Covenant on civil rights and political rights

The guarantee of the right to freedom of religion and belief is explicitly regulated in the provisions of Article 18 paragraphs (1), (2), (3) and (4) of the International Covenant on Civil and Political Rights (ICCPR)²⁶. Specifically relating to the manifestation of freedom of religion is regulated in Article 18 paragraph (1) which reads in full:

“Everyone has the right to freedom of thought, belief and religion. This right includes freedom to determine a religion or belief of one's own choice, and freedom, either individually or together with other people, whether in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.”

The core of all normative ham related to FORB can be simplified as follows:²⁷

- a) Internal freedom;²⁸
- b) External freedom;²⁹
- c) There is no compulsion;³⁰
- d) Non Discrimination;³¹

²⁶ ICCPR approved by UN General Assembly Resolution Number 2200 A (xx) on 16 Desember 1966 and ratified by Indonesia through Laws Number 12 Year 2005

²⁷ p. 125-126

²⁸ The forum internum at this level wants to emphasize that everyone has the right to freedom of thought, belief and religion.

²⁹ Forum externum, this freedom emphasizes that everyone has the freedom individually or in society, publicly to manifest their religion and beliefs in teaching, practice and worship.

³⁰ No one may be coerced which would reduce his freedom to have or to adopt a religion or belief of his choice.

³¹ The state is obliged to respect and guarantee freedom of religion and belief for all individuals within its territory without distinction of ethnicity, religion, belief, race, gender, language, politics, opinion and origin.

- e) Rights of parents and guardians;³²
- f) Institutional freedom and legal status;³³
- g) Permissible restrictions on external freedoms;³⁴
- h) Permissible restrictions on external freedoms.

The eight aspects above are inherent elements in the discussion of freedom of religion and belief. First, internal freedom (*forum internum*) is an area of inner recognition that is very personal from an individual. In this area, individual spiritual beliefs are conclusively known only by the master. No one can be sure but himself.³⁵ **so that this internal freedom is absolute and cannot be changed except** for the master who holds the authority. This freedom is then also guaranteed in the 1945 Constitution. The *intenum forum* includes a domain that is very free from restrictions or coercion that may exist and cause a reduction in individual self-power.

Civil and Political International Covenant which has been ratified by the Indonesian government with Law no. 12 of 2005 provides guarantees for citizens not only in the *intenum forum* but actualization in the private and public spheres. That means, every individual or group is given guarantees through law to realize their religion and/or belief either personally (private) or collectively (public). In the context of religion and/or belief, individual and communal/collective manifestations that occur in the public and private spheres are then referred to as external freedoms (*forum externum*).³⁶

In contrast to the *forum internum*/internal freedom, in implementing this *forum externum* it is not absolute but it is still

³² The state is obliged to respect the freedom of parents and legal guardians to provide religious and moral education for children in harmony with the obligation to protect the right to freedom of religion and belief..

³³ Freedom for religious communities to organize and associate as a community.

³⁴ Freedom to manifest religion and belief can only be limited by law and the interests of protecting public safety and order, public health or decency and the basic rights of others..

³⁵ Yossa A.P Nainggolan, "Hak Atas Kebebasan Beragama Dan/Atau Berkeyakinan: *Forum Internum Dan Forum Eksternum*," *Jurnal Hak Asasi Manusia* 6, no. 6 (August 31, 2021): 68–83.

³⁶ *Ibid*

possible to have restrictions as long as the restrictions are in accordance with legal guidelines and human rights norms. In the issue of using the hijab, the fundamental question is whether the hijab, which is identified as Muslim clothing, is merely a symbol or is it also an obligation in practicing Islam. So that coercion in the use of the hijab in public schools for non-Muslim students becomes a form that should be questioned because on the other hand, of course the compulsion to use the hijab threatens the fulfillment of the internal freedom rights of non-Muslim students. Meanwhile, it is known that the fulfillment of the right to freedom of religion and belief cannot be carried out on the basis of coercion and in line with discrimination.

Even though there is scope for making restrictions on the fulfillment of human rights in the realm of external forums, these restrictions must be made with due observance of the applicable principles and cannot be carried out arbitrarily and without consideration.

b. FORB Guarantee Limitation Principles

The term no law without exception or limitation is a principle that is naturally recognized in the study of legal science without exception in the study of human rights. Restrictions on the one hand are important to protect rights or on the other side of the purpose of the existence of human rights itself.

In the 1945 Constitution, restrictions on the fulfillment of human rights can be imposed on certain human rights. This limitation provision is recognized in Article 28 J paragraph (2) of the 1945 Constitution which states

"In exercising his rights and freedoms, each person is obliged to comply with the restrictions determined by law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society".

Limitation is a constitutional matter and is permissible as long as it is in accordance with the legal provisions above. However, the provisions of Article 28J do not negate the fulfillment of rights that are absolute and cannot be reduced as referred to in 28I paragraph (1) of

the 1945 Constitution. So that these two articles cannot be read as contradictory (non-conflicting article).

The concept of limiting the fulfillment of human rights is also accommodated in Law Number 39 of 1999. However, the concept of limitations stipulated in the law *a quo* has various meanings in several articles, such as Article 70 of the Law on Human Rights providing the following parameters: a) determined by law with the intention of guaranteeing recognition as well as respect for the rights and freedoms of others and to meet just demands in accordance with considerations of morality, security and order in a democratic society. Whereas Article 73 states solely to guarantee the recognition and respect for human rights and the basic freedoms of others, decency, public order and the interests of the nation.

Furthermore, the Covenant on civil and political rights also provides space for restrictions on the fulfillment of certain rights. Restrictions or prohibitions will not be valid if they do not meet all the criteria set out in Article 18 paragraph (3)³⁷ *juncto* Article 19 paragraph (3)³⁸. In fact, the Human Rights Committee in General Comment No. 22 emphasized that the conditions for these restrictions must be applied strictly so that the substance of the provisions in the ICCPR is maintained.³⁹

In Indonesia, there are two main characteristics of the use of the concept of restrictions, particularly those related to restrictions to protect public order, namely (1) characteristics that are often discriminatory in nature because they are used mainly for the interests of the "majority" and (2) justification by the state which relies on more on the law in force, with a constitutional law approach, not on human rights norms. So that it can be concluded that at a more practical level, this is related to the fact that the human rights perspective has not been sufficiently mainstreamed among state administrators without exception for judges. Such a situation is relatively similar to restrictions that are particularistic in nature, similar to the margin of appreciation

³⁷ The criteria for restrictions in Article 18 (3) namely a) are regulated by law, b) restrictions/prohibitions are carried out to achieve legitimate goals, the intended list of legitimate goals is: protecting security, order, health, and morals.

³⁸ The limiting criteria are respecting the rights and reputation of others, maintaining national security or public order, or health, or public dignity.

³⁹ Heiner Bielefeldt, *Politik Kesetaraan: Dimensi-Dimensi Kebebasan Beragama Atau Berkeyakinan* (Bandung: Mizan, 2019), p. 278

approach in Europe, which in fact often benefits the majority and harms the minority.⁴⁰

c. Analysis of Responsibilities of Judicial Power in Fulfillment of FORB in Decision Number 17/P/HUM/2021

The constitutional basis for the fulfillment of human rights by the state is generally mandated in Article 28 I paragraph (4) which states "protection, promotion, upholding and fulfillment of human rights is the responsibility of the state, especially the state) in line with the construction of Article 8 of the Human Rights Law which explicitly imposes responsibilities answer it to the government an sich. Of course, the phrase government does not only refer to government in a narrow sense, but can also be interpreted as government in a broad sense, which includes legislative and executive powers, as explained by Van Vollenhoven in his residue theory postulates. That the government in the narrow sense is only executive power. While the government in a broad sense includes legislative power and judicial power.⁴¹

Before discussing the state's responsibility in protecting the right to freedom of religion and belief, this section will briefly explain the decision to review the SKB 3 Ministers. The material review of the SKB of 3 Ministers was submitted by the Minangkabau Natural Customary Density Institute (LKAAM) of West Sumatra, represented by M.Sayuti, Dt. Rajo Panghulu on March 8 2021. This request questions the Joint Decree of the Minister of Education and Culture, Minister of Home Affairs and Minister of Religion Number 02/KB/2021, Number 025-199 of 2021, juncto Number 219 of 2021 concerning the use of Uniforms and Attributions for Students, educators, and education staff in the School Environment organized by the local government at the primary and secondary education levels.

The argumentation or argument for the request for this review is based on the classic saying of the Minangkabau people *adat basandi*

⁴⁰ Zainal Abidin Bagir et al., *Membatasi Tanpa Melanggar Hak Kebebasan Beragama Dan Berkeyakinan* (Yogyakarta: CRCs, 2019).

⁴¹ Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta : PT Bhuana Ilmu Populer, 2007), p.112

syarak, syarak basandi Kitabullah and *syarak mangato adat mamakai*. These two Minang proverbs characterize the character of Minang people who are religious and close to religion so that the use of everyday clothes including school uniforms must be in accordance with the spirit of society (volkgeist). It is undeniable that the majority of the population of West Sumatra are Muslims, but in the midst of this majority group there are still religious minorities such as Christians, Buddhists, Hindus etc. For this reason, LKAAM as the applicant argued that the birth of the SKB was contrary to Chapter XIII of the 1945 Constitution and Law Number 20 of 2003 concerning the National Education System. Cultural relativity often causes the fulfillment of human rights to become a tendency. As for the objectum litis in question in this material review is the SKB 3 Ministers regarding school uniforms, the points are as follows:⁴²

a) Students, educators and education staff have the right to choose to use uniforms and attributes without specific religious beliefs;

b) Local governments and schools may not require, order, require, encourage or prohibit the use of uniforms and attributes with specific religious characteristics;

c) The local government and/or school principals according to their authority are required to revoke regulations, decisions, instructions, policies or written appeals regarding the use of uniforms and attributes in the school environment issued by regional heads and or school principals that are contrary to this joint decision no later than 30 (thirty) working days from the date this joint decision is stipulated;

d) If there is a violation of this joint decision, sanctions will be given to the violating party;

Meanwhile, the Test Stone used by the Petitioner is Law Number 20 of 2003 concerning the National Education System. Details are as follows:⁴³

a) Article 1 point 2 stipulates that National Education is Education based on Pancasila and the 1945 Constitution of the Republic of Indonesia which is rooted in religious values, Indonesian national culture and responsive to the demands of the Changing Times;

b) Article 3 of the National Education System Law stipulates that national education functions to develop capabilities and shape national

⁴² Further at SKB 3 Menteri tentang seragam sekolah

⁴³ Further at Supreme court decision number 17/P/HUM/2021

character and civilization that are useful in the context of educating the nation's life, aiming at developing the potential of students to become human beings who believe and fear God Almighty, have noble character, are healthy, knowledgeable, capable, creative, independent and become a democratic and responsible citizen;

In his legal considerations, the Supreme Court Justices used Article 1 point 2 whereby national education must be based on Pancasila and the 1945 Constitution which are based on religious values and national culture. However, the judge failed to see that national religious and cultural values could not be segmented on the religious and cultural values of certain groups or the majority and such group.

These religious and cultural values must be binoculars from the factual situation of the multicultural Indonesian people. The phrases of national religious and cultural values that are used as barometers for canceling the SKB 3 Ministers should be viewed from the perspective of other principles of education such as democracy, justice, non-discrimination by upholding human rights and national pluralism. Therefore, the analytical knife used is less comprehensive. Zainail Abidin Bagir further emphasized that the reason for limiting rights cannot be done based on a certain culture and such.

Steven Vertovec and Susane Wesendorf identified five dimensions of using the concept of multiculturalism:⁴⁴

“multiculturalisme can variously be understood as I) a way of describing the actual make up of a society, II) a general vision of the way government and society should orient itself, III) a specific set of policy tools for accommodating minority cultural practice, IV) specially created framework of governance allowing for the representation of immigrant and ethnic minority interest, and V) a variety of support mechanism and funds for assisting ethnic minority communities to celebrate and reproduce their tradition”.

Furthermore, it is said that the five aspects formulated by Wil Kymlicka and Baubock in defining how multiculturalism should be interpreted⁴⁵

⁴⁴ Al Khanif and Dina Tsalist Wildana, *Kebebasan Beragama Atau Berkeyakinan Di Indonesia: Perspektif Filosofis, Hukum Dan Politik* (Malang: Intras Publishing, 2020). P. 15

⁴⁵ Ibid

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“liberal multiculturalism is the view that states should not only uphold the familiar set of common civil, political, and social rights of citizenship that are protected in all constitutional liberal democracies, but also adopt various group specific rights or policies that are intended to recognize and accommodate the distinctive identities and aspiration of etnocultural group”.

This understanding of multiculturalism has actually been debated when the founders of the nation discussed the design of an independent Indonesia. The design of the Indonesian state is inclusive and without discriminating between religions and beliefs and embracing these differences.

As mentioned by Sukardo Wirjopranoto who supports Soepomo's opinion in discussions related to religion. "Dear chairman, what I propose is a justice that I believe will be accepted and respected by all the people, regardless of their religion, justice is stated as brightly as possible, as beautifully as possible. Article 27 of the 1945 Constitution, everyone has the same position and must be treated the same, so there are no class 1, class 2 and class 3 citizens.⁴⁶

That is why then, this country which was built on diversity and diversity must also respect the differences that are an integral part of this country. As stipulated in constitutional politics, especially the preamble which mentions one supreme God to show that the state does not tend to the dominance of one particular religion and religious guarantees in Article 29. “The possibility that both the preamble (Pancasila) and article 29 should be entrenched in their current form to try to resolve the difficult relationship between Islam and the state should therefore be given carefull consideration.⁴⁷

It was this spirit that the Supreme Court Justices failed to capture when drafting considerations in the decision to review the material SKB 3 Ministers. Namely looking at the plurality of the nation from the point of view of the constitution, historical traces and the basis of shared ownership of the nation that is inclusive and not exclusive. The Supreme Court justices failed to see the diversity of the nation and corrected discriminatory regulatory policies against certain religions,

⁴⁶ RM A.B. Kusuma, *Sistem Pemerintahan Pendiri Negara Versus Sistem Presidensial Orde Baru* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2011).

⁴⁷ Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluatio of Constitutional Making in Transition* (Jakarta: Kompas, 2008).

especially in the case of the use of the hijab in public schools for all female students regardless of the religious background of these students.

Furthermore, Chapter III concerning the Principles of Implementing Education in Article 4 of the National Education System Law clearly states that education is carried out in a democratic and fair manner and is not discriminatory by upholding human rights, religious values, cultural values, and national pluralism. These principles were later neglected by the Judge in making a decision on the review of the 3 Ministerial Decrees on School Uniforms.

The failure to interpret education that is non-discriminatory, upholds human rights, religious values, and national pluralism is felt in the Supreme Court Decision which annulled the SKB 3 Ministers, because the principle of implementing education is not at all used as a basis for standing and thinking (*ratio legis*) in consideration and the verdict. The Supreme Court Judge failed to place himself in a neutral position in fulfilling the right to freedom of religion and religion, which should have been a judge in laying down the basis and impartiality of a position towards certain religions. The SKB 3 Ministers made was an effort by the government to neutralize acts of discrimination in forcing the use of the religious symbol of the hijab for non-Muslims in the educational environment, while through their decisions (religion making), the Supreme Court Justices actually perpetuated discriminatory practices and intolerance towards the diversity of students from different ethnic backgrounds. non-Muslim religions to carry out the religious values they believe in.

There are several possibilities that lead to the non-fulfillment of the responsibility of the judiciary power agency (MA) in the judicial review case of the SKB 3 Ministers. First, the Supreme Court judges are still confined to the procedural examination of material which is based on an analysis of considerations limited to the science of law approach *an sich*. Did not see the broader picture (zoom out) of the SKB 3 Ministerial case. The Ministerial SKB 3 is not only an issue of legal norms that are contrary to laws and regulations against laws (Article 24 A paragraph (1) of the 1945 Constitution). However, it is broader than that, namely problematic issues in fulfilling the essential rights to freedom of religion and belief which are guaranteed in the 1945 Constitution of the Republic of Indonesia.

Second, the judicial review system conducted by the Supreme Court is different from the Constitutional Court. At the Constitutional Court, the trial process for testing laws is carried out openly to the public. So that the parties have the same opportunity to explain the reasons for the request for review, likewise the legislator has the opportunity to explain the legal politics and original intent of the regulation in question. So that the principle of *audi et alteram partem* or impartial listening to both parties can be carried out. Meanwhile in the Supreme Court, the trial process for reviewing the rules was carried out behind closed doors. Therefore there is no holistic dialectic and deliberation between the applicant and the respondent in this SKB examination.

That's why, the Judge made his considerations only limited to the documents submitted to him, without directly hearing the inner mood of the inner spirit that was the background for the issuance of the SKB regulation from the side of the Government as its founder. In the writer's opinion, the open nature of the Constitutional Court trials contributes to the judge's understanding when forming a decision. For example, in the case of reviewing a law relating to the religion column on a KTP, for example, it is undeniable that the facts presented by the applicant in court certainly have an influence on shaping the paradigm of the judge in compiling the basis for consideration in a decision.

Third, the state's obligation to fulfill FORB in the judiciary still leaves a record. The basic considerations that do not pay attention to FORB rights still occur, one of which is in the decision regarding school uniforms contained in the Supreme Court Decision Number 17/P/HUM/2021. so that there is a need for a comprehensive effort to provide an understanding of the fulfillment of religious freedom rights. In accordance with "the breakfast theory of jurisprudence" says that "This is the concept that there has to be more to guide the decision-maker than what he or she had for breakfast, whether they had a good night's sleep, or whatever. What is simply interpreted is that the judge's decision is very dependent on the personality of the judge (judicial behavior) and mysticism or experience experienced. then there is a possibility that the Judge's consideration was empty in seeing the FORB perspective in the issue of canceling the 3 Ministerial SKB influenced

from a psychological perspective and the judge's understanding of this issue. So it needs to be explored further.

Summary

Guarantees for the fulfillment and protection of the right to freedom of religion and belief are regulated in the 1945 Constitution of the Republic of Indonesia and Indonesian laws and regulations. In addition to guaranteeing FORB rights, FORB rights can be limited based on various criteria as long as they are related to external forums, but FORB rights that are forum internum are absolute. Although restrictions are legal in the eyes of human rights law. This must be done carefully and thoughtfully. In addition, the state's responsibility in fulfilling the right to freedom of religion which includes respecting and guaranteeing is passive. The state was present when asked to resolve the issue of the FORB that occurred. This state obligation is carried out simultaneously and in harmony by each state institution, both legislative power, executive power and judicial power.

The responsibility of the judicial power in protecting the rights of religious freedom as stated in the Supreme Court Decision Number 17/P/HUM/2021 is felt to have not achieved the justice that is expected by justice seekers and human rights defenders in the field of freedom of religion and belief. This happens because the first construction considerations used are more oriented towards a theoretical approach and science of legislation. Second, the Supreme Court decision is considered to be dry from the perspective of protecting the rights of FORB which is inclusive but puts forward a human rights perspective that is biased towards human rights justice and is based on justice and truth based on the majority group, aspects of FORB rights for vulnerable and neglected minority groups such as the principle of non-discrimination, the prohibition of coercion and the right to children in FORB. In fact, the Supreme Court's actions in its decision have the impression of correcting legal policies that are already correct from the government's actions to fulfill the right to freedom of religion through the SKB of 3 ministers (religion making) which have so far been violated. Third, the possibility of this happening is due to the judicial review system which is closed in the Supreme Court so that it closes the space for discourse in its settlement, and the limited range

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of understanding of judges regarding the issue of FORB as exemplified
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