

# **The Conundrum to Wear Religious Uniform in Indonesia: International Human Rights Law and Islamic Law Perspective**

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## **Abstract**

This study aims to analyze the annulment of the Joint 3 (three) Ministerial Decree concerning School Uniforms for Students, Educators, and School Personnel by the Indonesian Supreme Court and to examine the Supreme Court's decision under international human rights law and Islamic law. In the annulment of the Joint 3 (Three) Ministerial Decree on School Uniforms for Students, Educators, and School Personnel by the Indonesian Supreme Court, the legal reasoning follows a meticulous analysis rooted in normative legal research. The study employs statutory, conceptual, and comparative approach to unravel the complexities surrounding the decree. Through the descriptive analysis, it is established that the decree runs afoul of the educational values enshrined in the National Education System Act, particularly the imperative to foster religious spiritual strength in students. Moreover, the National Education System Act also mandated that the Indonesian National Education must also be rooted in religious values. The Supreme Court's decision to annul the Joint 3 (Three) Ministerial Decrees grounded in the rationale that the decree conflicts

with the higher law, specifically the National Education System Act. The annulment also aligns with international human rights law and the values of Islamic law. Indonesia has a margin of appreciation in the regulation of religious freedom as practiced in the European Court of Human Rights, adjusting to the condition that Indonesia is not a secular country but also not a religious country. Indonesia is based on Belief in the one and only God and upholds pluralism.

**KEYWORDS** *Freedom of religion, religious uniform, joint 3 (three) ministerial decrees, Islamic law, international human rights law*

## Introduction

Religion has become one of the most delicate matters to regulate by the national laws of many countries, including Indonesia and has attracted a lot of controversy in recent decades. This has shaped the narrative and jurisprudence of religious freedom which is recognized as one of the *non-derogable* rights in international human rights law.<sup>1</sup> Cases related to claims of religious freedom are more complex today due to the influence of globalization, a more heterogeneous society, the emergence of new beliefs other than traditional, institutionalized religions, amplification of the migration phenomenon, identity claims of certain individuals and also the increasing role of religion and other matters related to socio-political discourse.<sup>2</sup>

One issue of religious freedom that often invites public attention is the use of religious symbols, whether worn as clothing, head coverings, face coverings, brooches, or installed in public places. In 2010 France became the first country in Europe to ban the full-face veil in public. Violation of this prohibition is subject to a fine of USD 170. France is a country with the most extreme restrictions on the freedom of expression in public space. Furthermore in 2014 the country passed a law prohibiting all schoolchildren from wearing religious symbols, including the sign of the cross and the Jewish cap, the hijab,

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<sup>1</sup> Office of the High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," *Refworld*, accessed May 29, 2023, <https://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>2</sup> Mihaela Adriana Oprescu, "Freedom of Religion, in the Jurisprudence of the European Court of Human Rights," *Online Journal Modelling the New Europe*, no. 19 (2016): 29–45.

and the niqab. Muslim women are also prohibited from wearing the burkini on the beach because it is contrary to France's secularist constitution.<sup>3</sup>

In Germany, wearing uniform that cover the whole intimate part (*aurat*) in public spaces is also prohibited because it is considered a religious expression that violates the norms of neutrality. Likewise, the Swiss city of Tessin has banned women from wearing the burqa since 2013. Violation of this rule is subject to a fine of £8,000. At that time a referendum was held on the dress code in public spaces. The result is that 65 percent of Tessin residents forbid the use of the burqa and clothing that symbolizes a particular religion because it is against the traditions of the country.<sup>4</sup> Muslim women wearing headscarves in Turkey have to deal with a secular Muslim regime that prohibits the wearing of headscarves in public spaces.<sup>5</sup>

Chad, a country on the east side of the African continent, also banned the use of the *niqab* and burqa after the Boko Haram militant suicide bombing that killed 33 people in June 2015.<sup>6</sup> Chad's policy is also to be imitated by Nigeria's President Muhammadu Buhari who proposed banning the hijab for Muslim women in their country, to avoid the risk of suicide bombings.<sup>7</sup> However, the president's proposal sparked the anger of the Muslim majority community. They stated that if the government wants to ban the wearing of the hijab, it is better that kaftans, abgadas or babaigas, the same loose-fitting outfit, that can hide explosives should also be banned. Furthermore, the Latvian government prohibits Muslim women from wearing the *niqab* or loose-fitting uniform to protect their country's traditions from foreign influences, such as the Islamic teachings. In addition, this prohibition is also to protect the country from refugees entering Europe.<sup>8</sup> On the other side, in the Xinjiang region, home to the Muslim-majority Uighurs, the Chinese government is currently running a program to improve security by campaigning

<sup>3</sup> John Witte and Andrea Pin, "Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts," *Emory Law Journal* 70, no. 3 (2021): 587–661, <https://scholarlycommons.law.emory.edu/elj/vol70/iss3/2>.

<sup>4</sup> Muhammad Radityo, "5 Negara Ini Terapkan Aturan Diskriminatif Pada Wanita Berhijab," *Merdeka*, August 27, 2016, <https://www.merdeka.com/dunia/5-negara-ini-terapkan-aturan-diskriminatif-pada-wanita-berhijab.html>.

<sup>5</sup> Ku Hok Bun, "Body, Dress and Cultural Exclusion: Experiences of Pakistani Women in 'Global' Hong Kong," *Asian Ethnicity* 7, no. 3 (October 2006): 285–302, <https://doi.org/10.1080/14631360600926980>.

<sup>6</sup> Heather Marie Akou, "The Politics of Covering the Face: From the 'Burqa Ban' to the Facekini," *Fashion Theory* 25, no. 1 (2018): 5–30, <https://doi.org/10.1080/1362704X.2018.1546491>.

<sup>7</sup> Tosin Osasona, "Victims or Vanguards of Terror: Use of Girls as Suicide Bombers by Boko Haram," *Cogent Social Sciences* 8, no. 1 (2022), <https://doi.org/10.1080/23311886.2022.2028956>.

<sup>8</sup> Bouke De Vries and Criminal Law, "The Sociability Argument for the Burqa Ban: A Qualified Defence," 123AD, <https://doi.org/10.1007/s11572-021-09622-4>.

for a ban on headscarves. Not only that, Muslim women who wear headscarves are forced to watch films about the beauty of life without a headscarf.<sup>9</sup>

In Indonesia, with a population of more than 90% Muslim in 2014, it was shocked by the ban on wearing the headscarf by most schools, including public schools, on Bali. The majority of the population in Bali are Hindus, and Muslims are minority.<sup>10</sup> Students who wear headscarves are considered to have violated school rules. On the other hand, in 2021, news was exposed again where one public school in Padang required all students to wear the hijab, including non-Muslims.<sup>11</sup>

Previously, there were also public schools and government offices that recommended Muslim female students and employees to dress in Muslim uniform. Not all Muslim women agree with this recommendation. There are Muslim women who consider this recommendation as coercion in dress and violate human rights. They felt that they are under social pressure, feel judged as "bad" people for not wearing Muslim uniform even though they are Muslim women. Even though according to them the uniform have no relevance to a person's religion, many of their colleagues who wear these uniform follow fashion trends, lifestyles or even political motivations<sup>12</sup>, there are shoplifters in the markets who wear hijab so that they are thought to be religious people and no one is suspicious when they do it. There is also a trend of suspects in court, when the trial process suddenly wearing the hijab. After the trial process was over, they will removed the hijab.<sup>13</sup> Apart from all the motivations behind women appearing in religious uniform in public, the obligation or recommendation or recommendation from the head of the agency, including the principal, who requires or forbids his students to dress in religion, influenced debate in the community.

Responding to the issue that existed in public school in Bali and Padang, Minister of Education, the Minister of Home Affairs and the Minister of

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<sup>9</sup> Radityo, "5 Negara Ini Terapkan Aturan Diskriminatif Pada Wanita Berhijab."

<sup>10</sup> Ahmad Barass, "Komnas HAM: Pelarangan Jilbab Terjadi Hampir Di Seluruh Bali," Republika Online, February 21, 2014, <https://republika.co.id/berita/nasional/daerah/14/02/21/n1c9xr-komnas-ham-pelarangan-jilbab-terjadi-hampir-di-seluruh-bali>.

<sup>11</sup> Perdama Putra, "Siswi Non-Muslim Di Padang Wajib Pakai Jilbab, Kadisdik: Itu Kebijakan Lama," Kompas, January 22, 2021, <https://regional.kompas.com/read/2021/01/22/21431981/siswi-non-muslim-di-padang-wajib-pakai-jilbab-kadisdik-itu-kebijakan-lama?page=all>.

<sup>12</sup> Andreas Harsono and Tempe McMinn, *Aku Ingin Lari Jauh Ketidakadilan Aturan Berpakaian Bagi Perempuan Di Indonesia* (Amerika Serikat: Human Rights Watch, 2021), <http://www.hrw.org>.

<sup>13</sup> Ahmad Suhendra, "Kontestasi Identitas Melalui Pergeseran Interpretasi Hijab Dan Jilbab Dalam Al-Qur'an," *PALASTREN* 6, no. 1 (2013): 1–22, <http://dx.doi.org/10.21043/palastren.v6i1.976>.

Religion to issue a Joint Three Ministerial Decrees (SKB) (hereinafter Decree) which prohibit local governments and public schools from issuing regulations that require or prohibit the use of religious attributes on school uniforms. The province of Aceh is exempt from this regulation, along with its status as a special region.<sup>14</sup> Thus, based on this decree, students, teachers, and administrative staff are allowed to choose uniforms, with or without religious specialties or characteristics; Local governments and schools must facilitate students, teachers and employees to exercise this right and must revoke regulations, decisions, policies, and recommendations that conflict with this decision.<sup>15</sup>

The Decree causing pros and cons. Researchers from Human Rights welcomed the Decree and stated it was an appropriate measure to protect the right of girls and women in choosing uniform without being obliged or forced.<sup>16</sup> As for those who are cons, the decrees is considered to make Indonesia a secular state. It was the *Lembaga Kerapatan Adat Alam Minangkabau* (LKAAM) of West Sumatra that was dissatisfied with the existence of the decrees and then submitted a judicial review to the Supreme Court to ask for its cancellation. In short, the SKB was annulled by the Supreme Court through case decision number 17 P/HUM/2021 dated May 3, 2021. In its ruling, the Supreme Court stated that this decrees was contrary to higher laws and regulations. So that it is declared invalid and has no binding.<sup>17</sup>

This research did a literature review of numerous comparable studies to gain a comprehensive understanding related to the topic. *First*, a study by Kathleen M. Moore<sup>18</sup> which entitled, *Visible through the Veil: The Regulation of Islam in American Law*, Moore analyze the discourse of United States' infamous practice of separation of church and state and the debate on the use of headscarf's protection under First Amendment. This article specifically examines the Indonesia's practice of appreciation on the rights of religious freedom with adjustment towards national state of plurality, heeding their core

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<sup>14</sup> Harsono and McMinn, *Aku Ingin Lari Jauh Ketidakadilan Aturan Berpakaian Bagi Perempuan Di Indonesia*.

<sup>15</sup> Andi Saputra, "MA Kabulkan Uji Materi SKB 3 Menteri Soal Seragam Sekolah," Detik News, May 7, 2021, <https://news.detik.com/berita/d-5561541/ma-kabulkan-udi-materi-skb-3-menteri-soal-seragam-sekolah>.

<sup>16</sup> Zaki Amali, "Larangan Mencegah & Wajib Berjilbab Di Sekolah Memupus Intoleransi," Tirto, February 4, 2021, <https://tirto.id/larangan-mencegah-wajib-berjilbab-di-sekolah-memupus-intoleransi-f9WW>.

<sup>17</sup> Andi Saputra, "MA Perintahkan Mendikbud-Mendagri-Menag Cabut SKB Seragam Sekolah," Detik News, May 7, 2021, [https://news.detik.com/berita/d-5561692/ma-perintahkan-mendikbud-mendagri-menag-cabut-skb-seragam-sekolah?tag\\_from=wp\\_cb\\_mostPopular\\_list](https://news.detik.com/berita/d-5561692/ma-perintahkan-mendikbud-mendagri-menag-cabut-skb-seragam-sekolah?tag_from=wp_cb_mostPopular_list).

<sup>18</sup> K. M. Moore, "Visible through the Veil: The Regulation of Islam in American Law\*," *Sociology of Religion* 68, no. 3 (September 1, 2007): 237–51, <https://doi.org/10.1093/socrel/68.3.237>.

foundation by upholding the beliefs on One God by annulling Ministerial Decrees that contravene with the important values in National Education System Act. **Second**, research conducted by Nina Hoel and Sa'diyya Shaikh<sup>19</sup>, *Veiling, Secularism and Islamism: Gender Constructions in France and Iran*. Hoel and Shaikh examined the politicisations on prevailing laws made by France and Iran that diminish muslim women's rights on self-expression and rights of religion. One prohibits the wear of face veil coercively, and the other enforced the veil as a mandatory wearing. On the other hand, this article examines the revocation of Indonesia's national decree regarding the prohibitions or mandatory religious attributes enforcement by local governments and public school leaving the politic aspects out of its research.

**Third**, Yusuf Jailani<sup>20</sup>, *The Struggle of the Veiled Woman: 'White Savior Complex' and Rising Islamophobia Create a Two-Fold Plight*. Jailani investigates the French's 2004 decision on barring any wear of noticeable religious attires in public and the outlawing any forms of face covering in public places, effectively eliminated the use of burqa or niqab. Those laws deemed inconsistent with French principle "Laïcité" on the segregation of church and state. As of this article examines Indonesian government decision on overturning Ministerial Decree making local government and public schools unable to intervene on the use of religious attributes on school uniforms, this decision is deemed progressive since it's in accordance with the practice in European Court of Human Rights. **Fourth**, Kristen Ghodsee<sup>21</sup>, *The Miniskirt and the Veil: Islam, Secularism, and Women's Fashion in the New Europe*, Ghodsee analyses the constantly repeated debate on headscarf or head covers. Focusing on the postcommunist era at Bulgaria, being a European country with the largest Muslim, Bulgaria received a lot of backlashes and being called names for allowing such "oppression" taken a place in the country. On this article, analyzation will be focusing on the legal aspects on the annulment of Indonesian's Ministry Decree that's supporting freedom of religions and freedom of expressions rather than focusing on the history part.

**Last but not least**, Immanuel V. Chioco<sup>22</sup>, *Looking Beyond the Veil*. Chioco explores the discrimination of veiled women in United States, post 9/11

<sup>19</sup> Nina Hoel and Sa'diyya Shaikh, "Veiling, Secularism and Islamism: Gender Constructions in France and Iran," *Journal for the Study of Religion* 20, no. 1 (2007): 111–29, <https://www.jstor.org/stable/24764329>.

<sup>20</sup> Yusuf Jailani, "The Struggle of the Veiled Woman: 'White Savior Complex' and Rising Islamophobia Create a Two-Fold Plight," *Harvard International Review* 37, no. 2 (2016): 51.

<sup>21</sup> Kristen Ghodsee, "The Miniskirt and the Veil: Islam, Secularism, and Women's Fashion in the New Europe," *Historical Reflections/Reflexions Historiques* 34, no. 3 (January 1, 2008), <https://doi.org/10.3167/hrrh2008.340307>.

<sup>22</sup> Immanuel Chioco, "Looking Beyond the Veil," *Indiana Journal of Global Legal Studies* 24, no. 2 (August 1, 2017): 517, <https://www.repository.law.indiana.edu/ijgls/vol24/iss2/9>.

situation, with the increasing numbers of immigrants and the government and/or private sector's vision to assimilate minority groups into the larger one by banning the use of headscarves. This effort was proven by the case of EEOC v. Abercrombie & Fitch Stores, Inc. where a muslim woman named Samantha Elauf was refused and denied from a job because she wears a black headscarf known as hijab. Abercrombie argued that it was against their apparel policy stating any "headwear, religious or otherwise", would violate the policy. In this article, exploration on the Indonesia's prevention against discrimination by outlawing any coercion on the use or prohibition of religious attributes on school uniforms.

Based on the explanation above, this paper aims to analyze in depth why the Joint Three Ministerial Decrees annulled by the Supreme Court? How is the Supreme Court's decision be seen from the perspective of international human rights law and Islamic law? Subsequently, this study not only examine the provision to wear headscarf, however the study attempt to examine the provision to wear religious uniform that regulated on the Joint Three Ministerial Decree. This paper will be divided into 4 parts, introduction, Joint Three Ministerial Decrees through Supreme Court point of view, the Supreme Court's decision in the point of view of international human rights law and Islamic law, and conclusion.

This research employs a normative juridical research methodology. To deepen the analysis, this study employs statutory, conceptual, and comparative approach to examine the annulment of Joint Three Ministerial Decrees and the implementation of Margin of Appreciation. Analyzing the Supreme Court's decision regarding the annulment of the Joint Three Ministerial Decrees using the statute approach. Using international human rights law and Islamic law as a lens, the conceptual approach is utilized to examine the annulment of the Joint Three Ministerial Decrees. In the meantime, a comparative method is used to evaluate the application of the Margin of Appreciation in Europe and Indonesia.

## **Joint Three Ministerial Decrees in The Point of View of Indonesian Supreme Court**

The Decree concerning the Use of Uniforms and Attributes for Students, Teacher, and Teaching Staff in School Environments, obliges local governments and school principals to revoke the rules that require or prohibit uniforms and attributes with certain religious specificities under several considerations, such as right to use religious attributes is in individuals so that local governments and schools may not require or prohibit certain religious

uniforms and attributes. The other consideration is to maintain the integrity of the country, and to create tolerance for the diversity of the country.<sup>23</sup>

The Supreme Court granted the request for judicial review submitted by the *Lembaga Kerapatan Adat Alam Minangkabau* (LKAAM) West Sumatra. Through its decision number 17 P/HUM/2021<sup>24</sup>, the Supreme Court declared the Joint Three Ministerial Decrees annulled because it contradicted several higher hierarchical regulations, including the regional government law and the national education system law (sisdiknas). Some legal arguments that can be put forward include first, education is a mandatory regional authority so that the Decree has no authority to prohibit local governments and its subsidiaries from regulating school uniforms.<sup>25</sup>

The two decrees are considered against to Article 1 number 1 of Law 20/2003 concerning the National Education System which states that education is an effort to form students to "have religious spiritual strength, self-control, personality, intelligence, noble character, and skills needed by themselves, the community, nation and state. "National education must also be rooted in "religious values" and national culture and the times demands."<sup>26</sup> The purpose of education is to develop the potential of students to become "humans who believe and devoted to God Almighty, have noble character, healthy, knowledgeable, capable, creative, independent, and become democratic and responsible citizens".

Recommendation and regulations for the imposition of religious attributes are seen as an effort to educate the nation's generation according to the rules in the National Education System Law. The prohibition of recommendation or requiring the use of religious uniform of its adherents is considered as immature regulation due to it contrary to the aim of national education to shape the character of religious students from an early age.<sup>27</sup>

The author agrees with the Supreme Court, considering that neutrality in Indonesia cannot be equated with secularism in France and Turkey or other western countries which can be said to adhere to secularism intolerance,<sup>28</sup> which totally prohibits religious attributes in public places including public schools.

<sup>23</sup> Nur Hidayah Perwitasari, "SKB 3 Menteri Seragam Sekolah: Isi Dan 6 Poin Utamanya," *Tirto*, February 4, 2021, <https://tirto.id/skb-3-menteri-seragam-sekolah-isi-dan-6-poin-utamanya-f9XK>.

<sup>24</sup> Mahkamah Agung, Putusan No.17 P/HUM/2021 Mahkamah Agung (November 16, 2021).

<sup>25</sup> "Undang-Undang Republik Indonesia No.23 Tahun 2014 Tentang Pemerintahan Daerah," 244 § (2014), [https://jdih.perpusnas.go.id/file\\_peraturan/UU0232014.pdf](https://jdih.perpusnas.go.id/file_peraturan/UU0232014.pdf).

<sup>26</sup> Mahkamah Agung, Putusan No.17 P/HUM/2021 Mahkamah Agung.

<sup>27</sup> *Ibid.*

<sup>28</sup> Antony Barone Kolenc, "Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court," *Pace International Law Review* 30, no. 1 (2017): 43–118, <https://digitalcommons.pace.edu/pilr/vol30/iss1/2>.

Indonesia is not a secular state although it is also not a religious state. Indonesia is a country based on Pancasila whose first precepts contain a state based on the one and only Godhead. Thus, the State of Indonesia is not authorized to keep its citizens away from religious and religious values.

As educational institutions, schools are obliged to provide religious education according to the religion of their students. Calling and even requiring Muslim students to wear hijab is an effort by schools to instill religious observance from an early age and is part of the education. It is part of character building as well as capacity building of students.<sup>29</sup>

The schools should not force the use of uniforms with certain religious attributes on non-believers. Schools also may not prohibit students of certain religions from wearing their religious uniform. Indonesia is a democratic country so religious freedom is highly respected.<sup>30</sup> Schools may not impose certain religions or beliefs on students against their will. This is related to internal freedom that should not be reduced (non-*derogable* rights). However, regarding the external freedom of religious expression in the public sphere, within certain limits to create order and the interests of a democratic society, the state has the right to regulate it.<sup>31</sup> Freedom of religion in Indonesia is freedom that is responsible, not freedom without limits and highly respects pluralism<sup>32</sup> which is in line with the state motto: "*Bhinneka Tunggal Ika*" which is a unifying pledge of the nation, strengthening the Unity and Unity of the Indonesian nation which is multi-ethnic, multi-religious, multi-cultural.

Religious freedom in Indonesia is not without limits. Restrictions on religious freedom in Indonesia can be found in several legal sources.<sup>33</sup> This limitation aims to protect the fundamental rights or basic freedoms of each individual, in order to avoid chaotic that can interfere with the achievement of

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<sup>29</sup> Mahkamah Agung, Putusan No.17 P/HUM/2021 Mahkamah Agung.

<sup>30</sup> Zezen Zaenal Mutaqin, "The Strong State and Pancasila: Reflecting Human Rights in the Indonesian Democracy," *Constitutional Review* 2, no. 2 (2016): 159–88, <https://doi.org/10.31078/consrev221>.

<sup>31</sup> Aaa Nanda Saraswati et al., "Restriction of the Rights of Freedom of Religions: Comparison of Law between Indonesia and Germany," *Indonesia Law Review Constitution* 8, no. 1 (2018): 256–76, <https://doi.org/10.15742/ilrev.v8n3.510>.

<sup>32</sup> Agus Triyanta, "Mencari Benang Merah Konstitusional Antara Kebebasan Beragama Dan Penodaan Agama; Dari Konsep Blasphemy Law Hingga Pelarangan Ahmadiyah Di Indonesia," *UNISIA* 35, no. 78 (2013): 25–33, <https://doi.org/10.20885/unisia.vol35.iss78.art3>.

<sup>33</sup> The provision of restriction on religious freedom in Indonesia is regulated under Article 28 J of the 1945 Constitution of the Republic of Indonesia, Article 73 of Law Number 39 of 1999 concerning Human Rights, Article 18 of Law Number 12 of 2005 concerning the Ratification of the ICCPR, and PNPS Number 1 of 1965 concerning Prevention Abuse and/or Blasphemy of Religion

common goals.<sup>34</sup> However, these restrictions must be applied proportionally. Forcing religious obedience on students, teachers and administrative staff according to their religion is valid for the purpose of achieving religious spiritual, self-control, personality, intelligence, and noble character. Coercion becomes illegal and disproportionate when applied to those of different religions, even though they are minorities, the regulations in public schools in Bali that prohibit Muslim students from wearing the hijab or vice versa in schools in Padang that force non-Muslim students to wear the hijab is a violation of religious freedom.

These regulations emphasize that the principle of state neutrality must be seen as a second principle after the principle of religious freedom regarding claims to non-discriminatory implementation. The state must be neutral, impartial, non-discriminatory, against all religions. But that does not mean that the state has the right to prohibit development religion, religious teaching, which requires obedience to its adherents. Neutrality is not an end but as a means that has an additional function in the service of freedom of religion or belief and its non-discriminatory realization. Implementing the principle of neutrality means that the state demonstrates its commitment to consistently act fairly, inclusively and non-discriminatory in a way vis-a-vis the religious and philosophical diversity that exists or emerges in society. However, from this point of view, neutrality is exactly the opposite of the idea of exclusivism to rid society of the existence of religion under the title of a neutral state.<sup>35</sup>

Moreover, the right to freedom takes precedence over all other rights. To strengthen the entire system of liberties enjoyed by all and to ensure the same or different essential liberties are adequately protected, freedom can and must be limited only by freedom itself. In contrast, only these two factors should serve as constraints. According to this view, one's religious rights may be limited so long as this does not violate the religious freedom rights of others or their rights that differ from those of others. In other words, there are limits to the extent to which people of diverse religions can exercise their fundamental rights without compromising those of others.<sup>36</sup>

The sociopolitical context surrounding the debate on wearing religious uniforms for students who do not adhere to its tenets in Indonesia is multifaceted landscape shaped by the nation's diverse cultural and religious

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<sup>34</sup> Nanda Saraswati et al., "Restriction of the Rights of Freedom of Religions: Comparison of Law between Indonesia and Germany."

<sup>35</sup> Heiner Bielefeldt, "Misperceptions of Freedom of Religion or Belief," *Human Rights Quarterly* 35, no. 1 (February 2013): 33–68, <https://doi.org/10.1353/hrq.2013.0009>.

<sup>36</sup> John Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1971).

fabric.<sup>37</sup> Indonesia is known for its religious plurality, with the majority of its population being Muslim. However, the country also accommodates various religious and ethnic groups, contributing to a rich tapestry of diversity. This diversity has sparked discussions on the appropriate balance between preserving cultural and religious identities and respecting individual freedoms, particularly within the educational sphere.<sup>38</sup>

Factual evidence highlights instances where the mandatory wearing of religious uniforms has been met with resistance and controversy. Cases have emerged where students from non-adherent religious backgrounds or those who identify as secular have faced challenges in complying with uniform regulations that are aligned with Islamic principles.<sup>39</sup> These incidents have triggered debates on the potential marginalization of individuals who do not conform to the prescribed dress code, raising questions about religious freedom and the right to express one's personal beliefs within the educational environment.<sup>40</sup>

From a legal perspective, the Indonesian constitution guarantees freedom of religion under Article 29, ensuring that every citizen has the right to adhere to and practice their chosen faith. However, the application of this constitutional right becomes complex when it comes to issues like mandatory religious uniforms in educational institutions. The debate is further shaped by the principle of Pancasila, the national ideology, which promotes unity in diversity.

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<sup>37</sup> Sindung Haryanto, "The Sociological Context of Religion in Indonesia," in *Research in the Social Scientific Study of Religion, Volume 30* (Brill, 2019), 67–102, [https://doi.org/10.1163/9789004416987\\_006](https://doi.org/10.1163/9789004416987_006).

<sup>38</sup> Viola Thimm, "Introduction: (Re-)Claiming Bodies Through Fashion and Style—Gendered Configurations in Muslim Contexts," in *(Re-)Claiming Bodies Through Fashion and Style: Gendered Configurations in Muslim Contexts*, ed. Viola Thimm, New Directions in Islam (Cham: Springer International Publishing, 2021), 1–18, [https://doi.org/10.1007/978-3-030-71941-8\\_1](https://doi.org/10.1007/978-3-030-71941-8_1).

<sup>39</sup> Ariane Utomo et al., "Who Wears the Hijab? Predictors of Veiling in Greater Jakarta," *Review of Religious Research* 60, no. 4 (December 1, 2018): 477–501, <https://doi.org/10.1007/s13644-018-0345-6>.

<sup>40</sup> Maemonah Maemonah et al., "Contestation of Islamic Educational Institutions in Indonesia: Content Analysis on Social Media," *Cogent Education* 10, no. 1 (December 31, 2023): 2164019, <https://doi.org/10.1080/2331186X.2022.2164019>.

# The Supreme Court's Decision in the Point of View of International Human Rights Law and Islamic Law

## A. International Human Rights Law Point of View

Belief and practice constitute the two components of religious freedom. These two components are discussed in numerous international human rights law instruments, such as the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (DEID), and the European Convention on Human Rights (ECHR).<sup>41</sup> Article 18 of the UDHR affirms that everyone has the right to freedom of thought, conscience, and religion; this right includes the freedom to change one's religion or belief, alone or with others, and to manifest his religion or belief in teaching, practice, worship, and observance in public or in private. The provisions of the UDHR were subsequently disclosed in other legal instruments, including the ICCPR, the ECHR, and the DEID, through the use of comparable language.

Based on those legal instruments, it is known that religious freedom includes internal<sup>42</sup> and external freedom.<sup>43</sup> Internal freedom, namely freedom related to the mind, for example, freedom to embrace a certain religion or belief, new or traditional religion (is the right to belief), not to embrace any religion (atheism), change religion and belief either alone or in community (The Right to Change Religion or Belief).<sup>44</sup>

Internal freedom, also referred to as inner freedom is absolute and cannot be restricted by the government (non-derogable rights), even during a national

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<sup>41</sup> Bryan Edelman and James T Richardson, "Imposed Limitations on Freedom of Religion in China and the Margin of Appreciation Doctrine: A Legal Analysis of the Crackdown on the Falun Gong and Other 'Evil Cults,'" *Journal of Church and State* 47, no. 2 (2015): 243–67, [http://www.censur.org/2001/falunjan\\_07.htm](http://www.censur.org/2001/falunjan_07.htm).

<sup>42</sup> Anne Jenichen, "The Politics of Normative Power Europe: Norm Entrepreneurs and Contestation in the Making of EU External Human Rights Policy," *JCMS: Journal of Common Market Studies* 60, no. 5 (September 1, 2022): 1299–1315, <https://doi.org/10.1111/JCMS.13157>.

<sup>43</sup> Michael Parsons, "Authority and Freedom," *Journal of the American Psychoanalytic Association* 69, no. 6 (2020): 1163–90, <https://doi.org/10.1177/00030651211067241>.

<sup>44</sup> Javier Martinez-Torron, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights," *Global Jurist Advances* 3, no. 2 (December 22, 2003): 1–40, <https://doi.org/10.2202/1535-1661.1089>.

emergency.<sup>45</sup> External freedom, on the other hand, is the freedom to manifest one's religion or belief in worship, teaching, practice, and religious observance, which can be limited by the state based on the law and is required in a democratic society for the benefit of public safety and the protection of public order, health, morals, and the rights and freedoms of others.<sup>46</sup> According to ICCPR<sup>47</sup> and General Comment No. 22<sup>48</sup>, also the Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion and Belief, external freedom consisting of:

1. Carrying out their religion and beliefs in worship activities
2. Have a place of worship
3. Using/using religious symbols
4. Commemorating religious holidays
5. Appoint or elect a religious leader
6. Teaching and disseminating religious materials (including broadcasting religion)
7. The right of parents to ensure religious and moral education for their children
8. Communicating with individuals and communities about religious affairs at national and international levels
9. Establish and run humanitarian agencies/collect and receive funding.
10. File a conscientious objection.

There are 3 restrictions allowed according to The *Siracusa* Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. The first is for the sake of public safety,<sup>49</sup> the second is public order,<sup>50</sup> where the restrictions must be in the form of a law, meet the necessity test, are proportional and non-discriminatory.<sup>51</sup> The third is public health. Article 18(3) of the ICCPR adds one more restriction on public morals.

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<sup>45</sup> Zainal Abidin Bagir et al., *Membatasi Tanpa Melanggar Hak Kebebasan Beragama Atau Berkeyakinan* (Yogyakarta: Center for Religious and Cross-cultural Studies (CRCS), 2019).

<sup>46</sup> Robert Patrick Whelan, "Realizing Freedom as Non-Domination: Political Obligation in Kant's Doctrine of Right," *Res Publica* 28 (2022): 85–101, <https://doi.org/10.1007/s11158-021-09512-5>.

<sup>47</sup> Human Rights, "International Covenant on Civil and Political Rights."

<sup>48</sup> *Ibid.*

<sup>49</sup> Whelan, "Realizing Freedom as Non-Domination: Political Obligation in Kant's Doctrine of Right."

<sup>50</sup> Ministry Justice, "Penal Code of Indonesia," Directorate General of Law and Legislation Ministry of Justice § (1946), [https://centralauthority.kemenkumham.go.id/images/PDFmedia/1\\_Indonesia\\_Penal\\_Code--update.pdf](https://centralauthority.kemenkumham.go.id/images/PDFmedia/1_Indonesia_Penal_Code--update.pdf).

<sup>51</sup> Bagir et al., *Membatasi Tanpa Melanggar Hak Kebebasan Beragama Atau Berkeyakinan*.

Community morals are values or norms that are essential to develop in society. These moral values are subjective, and can change from one time to another.

Restrictions that can be imposed on the freedom to manifest religion fall into three categories :<sup>52</sup> (a) limitations inherent in the concept of protected rights; (b) restrictions regarding the rights and freedoms of others; and (c) restrictions related to public interest. This restriction is made considering that unlike internal religious freedom has an individual aspect, external freedom has a collective individual aspect. Freedom to manifest religion is closely related to freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR) because many adherents of religions and beliefs want to form a community of worship or association.<sup>53</sup>

It is not easy to draw a strict line between internal and external freedom. For instance, the court admits that it is quite difficult to define what is meant by religion in international human rights law instruments. The articles in the UDHR, ECHR, ICCPR and DEID apply not only to traditional and established religions (Hinduism, Christianity, Islam, Judaism, Buddhism, Sikkhism), but also to forms of religious movements, including Druidism and Scientology, as well as various philosophical beliefs (pacifism), , atheism, etc. While there has been controversy over whether a set of beliefs qualifies as a religion, the Court has recently argued it is not its authority to regulate such abstract matters. In the absence of international community consensus, this will depend on the classification carried out by the national laws of each country.<sup>54</sup> For instance, in 2008 the Indonesian government issued a Joint of Three Ministerial Decrees consisting of the Attorney General, the Minister of Home Affairs and the Minister of Religion which prohibited *Ahmadiyah* followers from carrying out all their activities in the country.<sup>55</sup>

Indeed, it resulted in the promulgation of many local regulations prohibiting this belief and even the persecution of its adherents.<sup>56</sup> The question is, does this prohibition fall into the category of prohibiting the right to freedom of religion internally or externally? If embracing the *Ahmadiyah* belief is an internal right then the state should not have the right to prohibit it. However, if what is prohibited is the activity of manifesting their beliefs which are

<sup>52</sup> Martinez-Torron, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights."

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Kementerian Agama, "Surat Keputusan Bersama Menteri Agama, Jaksa Agung, Dan Menteri Dalam Negeri Republik Indonesia No. 3 Tahun 2008 Tentang Peringatan Dan Perintah Kepada Penganut, Anggota, Dan/Atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) Dan Warga Masyarakat," KEP-033/A/JA/2008 § (2008).

<sup>56</sup> Halimatusa'diah, "Dari Prasangka Hingga Diskriminasi: Menyoal Stigma Sesat Dan Kekerasan Terhadap Ahmadiyah Dalam Perspektif Komunikasi," *Jurnal Avant Garde* 5, no. 1 (2017): 15–35, <http://dx.doi.org/10.36080/avg.v5i1.611>.

considered to cause unrest and division in the general public, then this is included in the category of external rights, where for the sake of public order the government has the right to prohibit it. It is not easy to answer this question. As an additional note, the *Ahmadiyah* belief has existed in Indonesia since 1926. Prior to the 2008 Joint Ministerial Decrees, the MUI had already issued a fatwa in 2005 that *Ahmadiyah* was a deviant belief, misleading and had left Islam. The same thing happened to the followers of the Shia and *Gafatar* belief.<sup>57</sup>

The difficulty in drawing a strict boundary between external and internal freedom lies not only in the difficulty of defining what is meant by religion but also in the difficulty of distinguishing between embracing a religion and manifesting religion, especially if it is added to the term religious values. The manifestations of freedom of religious include the celebration of religious holidays; ritual slaughter; the use of religious symbols at work, school and other public places.<sup>58</sup> In fact, courts often draw a distinction between actions or practices that embody a religion or belief and those that are motivated only by religion. However, this approach can lead the Court to fall into the trap of deciding whether certain practices are formally required by a religion, which of course is a teleological area, not the jurisdiction of judges.

Subsequently, the following will describe how court practice interprets the rules of religious freedom. The author refers to the practice of the European Court of Human Rights (ECtHR) considering that this court is currently the most advanced and most respectful court of human rights and has always been a reference for resolving cases of human rights violations in the international community. From the research that the author conducted on ECtHR decisions regarding cases of the use of religious symbols in the public sphere, it appears that ECtHR has placed religious "pluralism" in the highest place that is fundamental to a democratic society, and insists that conflicts between religions, or between religions and non-religious, can be solved by tolerating all forms of religion and belief peacefully in society. Efforts to achieve religious pluralism or multiculturalism, where various religious groups can live together peacefully in society have proven not easy. European history is replete with examples of extreme religious intolerance and the ECHR was adopted soon after the persecution and genocide of adherents of the religion, Judaism, in the hope that it would help prevent such atrocities from happening again.<sup>59</sup>

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<sup>57</sup> Agama, Surat Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia No. 3 Tahun 2008 tentang peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat.

<sup>58</sup> Françoise Tulkens, "Freedom of Religion under the European Convention on Human Rights: A Precious Asset," *Brigham Young University Law* 39, no. 3 (2014): 509–30.

<sup>59</sup> *Ibid.*

The courts have consistently stressed the need for state neutrality. In the case of *Serif v. The Greek court* asserted that in a situation of inter-religious tension, the government should work to promote pluralism and “ensure tolerance between each other”. In such conditions the role of the authorities is not to remove the causes of tension by eliminating pluralism, but must ensure that inter-group could tolerate each other. The role of the state must be conducive to public order, religious harmony and tolerance in a democratic society.<sup>60</sup>

To maintain the pluralism, ECtHR provides a margin of appreciation (MoA) to countries in interpreting religious freedom according to culture, traditions and what is developing in society.<sup>61</sup> The UN Human Rights Committee (UN HRC) refers to the MoA as judicial institutions Tribunals.<sup>62</sup> The existence of the MoA is not mentioned in human rights conventions such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights, or also the International Covenant on Civil and Political Rights, but is developed by court institutions, especially ECtHR through cases which they decided and accepted, it followed by the Inter-American Court of Human Rights (IACtHR).<sup>63</sup>

The MoA is a mechanism for granting sovereign states discretionary authority to adopt both positive steps to comply with the ECHR and other measures that, despite interfering with some of the rights and freedoms agreed to by them, are nonetheless justifiable because they are necessary to maintain public order and/or protect the rights and freedoms of others in a democratic society.<sup>64</sup> The MoA has emerged as a central concept within the institutional and legal framework of the European Convention on Human Rights (ECHR).<sup>65</sup>

The judges stated that the State's authority should be granted a certain MoA, which becomes more or less broad in accordance with the level of

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<sup>60</sup> Kolenc, “Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court.”

<sup>61</sup> Bosko Tripkovic, “A New Philosophy for the Margin of Appreciation and European Consensus,” *Oxford Journal of Legal Studies* 42, no. 1 (2021): 207–34, <https://doi.org/10.1093/ojls/gqab031>.

<sup>62</sup> Gianluigi Palombella, “Non-Arbitrariness, Rule of Law and the ‘Margin of Appreciation’: Comments on Andreas Follesdal,” *Global Constitutionalism* 10, no. 1 (March 15, 2021): 139–50, <https://doi.org/10.1017/S2045381720000088>.

<sup>63</sup> Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012).1

<sup>64</sup> Raffaella Nigro, “The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil,” *Human Rights Review* 11, no. 4 (2010): 531–64, <https://doi.org/10.1007/s12142-010-0161-z>.

<sup>65</sup> Dominic McGoldrick, “A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee,” *International and Comparative Law Quarterly* 65, no. 1 (November 16, 2015): 21–60, <https://doi.org/10.1017/S0020589315000457>.

consensus that exists among the States parties to the convention on matters not expressly regulated by the Convention.<sup>66</sup> The MoA is applied in various ways related to ECHR provisions that are not absolute rights, for example freedoms related to the derogation clause in article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The broad implementation of the MoA by national authorities must be balanced with strict control over the proportionality between the goals pursued and their needs in a democratic society. The MoA is a suitable instrument to overcome the problem of law enforcement that is not reinforced by consolidated international social values, nor is there a common value to be found at the international level. Some vague and undefined terms in the Convention must be interpreted clearly in the value system of each country.<sup>67</sup>

It is undeniable that the MoA is often criticized because it is seen as incompatible with human rights<sup>68</sup> and aspirations that underlie universal standards because it allows preferential treatment of states and majority groups to the detriment of the protection of individuals and minorities.<sup>69</sup> On the other hand, for its proponents, the MoA is an important constitutional tool designed to preserve the fundamental prerequisites and virtues of liberal democracy, namely respect for pluralism.<sup>70</sup>

The reasons for granting the MoA at ECtHr are: First, national democratic authorities understand local conditions better than international judges to formulate public policies in certain human rights fields. Second, the conditions differ from one place to another, thus requiring a contextual approach. The scope of the MoA will vary according to the circumstances, subject and background. Third, historical developments, cultural diversity and political thought in a country must also be taken into account. The state has its own democratic vision.<sup>71</sup> The role of the state's MoA is very important in the theoretical construction of the interpretation of freedom to manifest religion. Courts in Strasbourg have recognized the relativity of the country's MoA. However, the courts do not give states unlimited discretionary powers

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<sup>66</sup> Steven Greer, "The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?", *UCL Human Rights Review* 3 (2010): 1–14.

<sup>67</sup> Nigro, "The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil."

<sup>68</sup> Gary Born et al., "'A Margin of Appreciation': Appreciating Its Irrelevance in International Law," *Harvard International Law Journal* 61, no. 1 (2020).

<sup>69</sup> Monica Lugato, "The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity," *Journal of Catholic Legal Studies* 52 (2013): 1–19, <http://ssrn.com/abstract=2182377> Electronic copy available at: <http://ssrn.com/abstract=2182377>.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

(unbounded power of appreciation). The Court, along with the International Human Rights Commission, is responsible for ensuring that state obligations are met. Courts are empowered to decide whether state “restrictions” are compatible with religious freedom. The MoA stems from the need to recognize the diversity of conditions under which the Convention applies in participating countries and it is understood as an instrument of “judicial self-limitation courts”, especially the ECtHR, which appear to be diverse and frequently to be inconsistent.<sup>72</sup>

In the case of *Lautsi and Others v Italy* App no 30814/06 (ECtHR 18 March 2011) regarding neutrality in public school classrooms, ECtHR asserts that the existence of a cross in public school classes protested by the plaintiff does not contradict article 34 of the ECHR because the cross is a symbol of Religion in Italian cultural heritage.<sup>73</sup> In Italy, the state and the church have a long history of coexistence. Residents of Italy are required to recognize this relationship and the Italian people's deep historical connection to the Catholic religion, especially given the Vatican's presence in Rome. Secularism in Italian schools means that the state cannot compel students to adopt religions that contradict their own beliefs, preventing them from engaging in religious propaganda. However, this does not rule out the possibility of certain religions enjoying preferential treatment in the public sphere.<sup>74</sup> The court determined that the state's neutrality is non-coercive in a case where Italy was granted a MoA to promote diversity. While the state cannot compel individuals to embrace or practice a particular religion, this does not preclude the state from continuing to provide certain religious privileges in the public sphere.

As for the case of *Leyla Sahin vs. Turkey* (Judgment 10 November 2005) also the case of *Kervanci & Dogru vs. France* (Decision 4 March 2009), where the defendants experienced problems being prohibited from participating in activities on their campus and school because they were considered to have violated the prohibition on campus and school prohibitions regarding the prohibition of wearing the hijab or uniform and symbols that indicate the identity of a particular religion. In both cases, which are almost similar, the court ruled that there were no violations of international human rights law instruments related to religious freedom committed by either Turkey or France. The Court stated that the role of the State was to ensure impartial neutrality in the practice of various religions, cults and beliefs. The prohibition of wearing uniform show that the characteristics of a particular religion such as the hijab is important to ensure public order, religious peace and tolerance in a

<sup>72</sup> D Tsarapatsanis, “The Margin of Appreciation Doctrine: A Low-Level Institutional View,” *Legal Studies* 35, no. 4 (2015): 675–97, <https://doi.org/10.1111/lest.12089>.

<sup>73</sup> Lori G. Beaman, “The ‘Religion’ of the Minority versus the ‘Culture’ of the Majority,” *Journal of Law & Religion* 28 (2012): 67–104.

<sup>74</sup> *Ibid.*

democratic society. Furthermore, the court stated that the principle of secularism enshrined in both Turkish and French constitutions reflects the rule of law and respect for human rights and democracy, which may be deemed necessary for the protection of the democratic system in Turkey neither French.<sup>75</sup> In both cases, the ECtHR uses the MoA, respecting the culture, values that developed in France and Turkey.

France upholds the constitutional principle of secularism, which emerged during the French Revolution as a means to establish a non-religious public sphere. In this country, religious practices and expressions are not accommodated. Secularism in France employs the language of tolerance and intolerance to justify the state's relationship with religion. In the cases of France and Turkey, the Court views state neutrality in these two countries as reflected in regulations that completely prohibit any religious expression within public institutions. The state utilizes its authority to safeguard public neutrality. In French, neutrality is referred to as "laïcité," representing a form of religious neutrality with a strong secular nature that conveys a direct opposition to religion in the public sphere. Similarly, Turkey adopts a strict form of "laicidad" as a policy aimed at countering the emergence of Islamic fundamentalism."<sup>76</sup>

The Court in Strasbourg emphasized the State's responsibility as a neutral and unbiased organizer in managing diverse religions, cults, and beliefs. It is crucial for the State to ensure that its role contributes to maintaining public order, religious harmony, and tolerance in a democratic society. The prohibition of hijab and veils in Turkey is seen as adhering to the principles of the rule of law, human rights, and democracy. These measures are considered necessary to safeguard the democratic system in Turkey. Consequently, the Court reached a unanimous decision that there was no violation of Article 9 of the Convention, which pertains to the prohibition of head coverings, in the case of Leyla Sahin vs. Turkey.<sup>77</sup>

Unlike Turkey, France, Spain and Italy, Indonesia is neither a secular state nor a religious state. Indeed, Indonesia also does not agree with the concept of intolerant secularism that exists in France and Turkey. Indonesia had its own standard to implement its Margin of Appreciation which rooted from *Bhineka Tunggal Ika* value. Allowing students to wear the hijab at school is a precise basis for the Supreme Court in formulating a decision. Because it is a form of religious manifestation for a Muslim. In addition, it should be understood that the purpose of education in Indonesia is to shape students so that they can have

<sup>75</sup> Witte and Pin, "Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts."

<sup>76</sup> James Brown, "Islamic Fundamentalism and Turkey," *Journal of Political & Military Sociology* 16, no. 2 (1998): 235–46.

<sup>77</sup> Council of Europe: European Court of Human Rights, Sahin V. Turkey (November 10, 2005).

religious values in them. However, requiring all women students to wear *Hijab* in public school is not relevant with the educational value system in Indonesia and international human rights law.

As explained before, wearing *Hijab* is one type of external religious freedom whereas requiring this action to all women students at public school is against the freedom of religion values. It shall bear in mind that not all the women students who's studied in public school are Muslim. Therefore, the Supreme Court's decision to annul the Decree is relevant to the international human rights law particularly on a matter of Margin of Appreciation that apply in Indonesia.

Furthermore, the Supreme Court's decision related to the annulment of the Decree, indeed, can be seen from various perspectives, both from international human rights law as previously explained and also from the point of view of Islamic law.

## B. Islamic Law Point of View

Based on Islamic law, there are two primary sources of law, there were *Al-Qur'an* and Sunnah. Subsequently, these sources supported by secondary sources of law which consisted of *Ijtihad* and *Ijma*.<sup>78</sup> The provisions related to wear *Hijab* had been written in the glorious *Al-Qur'an*. The *Al-Qur'an* lays down the principle of the law of modesty. Islam forbids Muslim women from showing their bosoms or flaunting their beauty unless they are in the presence of their husbands, other women, children, or eunuchs, as well as those men who have become so inextricably linked to their lives that they are not permitted to marry them. The *Al-Qur'an* makes it abundantly clear that what a woman wears on a daily basis is permissible, despite the fact that it is forbidden to display one's zinat (which literally translates as "that which appears to be beautiful" or "that which is used for embellishment or adornment"). Instead, if the zinat is displayed unintentionally or accidentally, it does not constitute a violation of the law of modesty.<sup>79</sup>

Although the terms "scarf" and "hijab" are often used interchangeably, it is essential to recognize that a hijab encompasses more than just a scarf. In this particular context, hijab is a broad term that encompasses various clothing items, including scarves, as well as diverse dress styles from different parts of the world. The term "hijab" carries cultural implications, such as the Shalwar Khamis in Pakistan or the Burqa in Afghanistan. However, whenever a Muslim

<sup>78</sup> Onder Bakircioglu, "The Principal Sources of Islamic Law," in *Islam and International Criminal Law and Justice*, ed. Tallyn Gray (Brussels: Torkel Opsahl Academic Publisher, 2018), 16.

<sup>79</sup> *Ibid.*

woman covers her adornment, she is considered to be wearing a hijab or a head covering. It is important to note that the literal meaning of "hijab" is "curtain," "partition," or "screen."<sup>80</sup>

The command to wear *Hijab* appear on the Al-Ahzab verse 59. It appear as one of the verses in the *Al-Qur'an* which protects a woman's fundamental rights, as follows:

*O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when outside): that they should be known (as such) and not molested.*

It is stated in this verse that Allah SWT orders His Prophet Muhammad SAW to instruct his own wives, daughters, and all believing women who wish to leave the house to wear a veil that covers their entire bodies, heads, and necks. In two places in the *Al-Qur'an*, Muslim women are required to wear the *Hijab*, first of all that just written in *Al-Ahzab* and subsequently in *An-Nur* verse 31, as following here:

*And tell the believing women to lower their gaze, and protect their private parts and not to show off their adornment except that which is apparent, and to draw their veils all over their "Juyub" and not to reveal their adornment except to their husbands, or their fathers, or their husband's fathers, or their sons, or their husband's sons, or their brothers or their brother's sons, or their sister's sons, or their women, or their right hand possessions, or the "Tabi'in" among men who do not have desire, or children who are not aware of the nakedness of women. And let them not stamp their feet so as to reveal what they hide of their adornment. And all of you beg Allah to forgive you all, O believers, that you may be successful.*

In this verse, there are numerous details about the Muslim woman, including when she is required to wear Hijab (Veil) and when she is not required to do so. Beginning with the command to lower their gaze, this verse instructs believing women that they are not permitted to look at men with a desireful expression, and that if she happens to see something she is not permitted to see, she is not permitted to continue to look. The first glance, which is completely

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<sup>80</sup> Kamal-Deen Olawale Sulaiman and Fatai Gbenga Raifu, "Investigating the Importance of Wearing Hijab by Muslim Women," *Insan Cita Journal of Islamic Studies in Indonesia and Southeast Asia* 5, no. 1 (2020): 1–18, [www.journals.mindamas.com/index.php/insancita](http://www.journals.mindamas.com/index.php/insancita).

unintentional and completely casual, is completely innocent.<sup>81</sup> Furthermore, this verse also directs believing women to conceal their *zeenah* or adornments, except for those that are naturally visible. There were disagreements among the companions and other scholars regarding the interpretation of this exception.<sup>82</sup> Additionally, the verse instructs believing women to cover their necks with a head covering. According to Ibn Jubair, Allah SWT (Subhanahu Wa-Ta'ala, meaning God Almighty) commanded them to fully cover their necks and chests during prayer. In the past, when women covered their heads but allowed the covering to fall on their backs, they were unintentionally exposing their necks and parts of their chests, similar to the practices of the pre-Islamic era known as al-Jahiliyah. This information is reported by Imam Al-Bukhari and other scholars, with Aisha RA providing her account, *“May Allah bestows His mercy on early emigrant woman, when Allah reveled: And to draw their veils all over Juyubihinna”, they tore their woolen dress and they used it as “Khimar”*.<sup>83</sup>

In other words, it is undeniable that God, in His wisdom, advises believers to dress and conduct themselves in a way that enhances their status in this world and the hereafter. Muslims generally do not perceive modest attire as a burden aimed at oppressing either gender. This encapsulates the essence of Ibadah (Islamic obligation), which involves wholeheartedly surrendering to Allah's commands in every aspect of our lives, regardless of their significance, including His instruction for women to cover their heads with the hijab.<sup>84</sup>

It narrated by Aisha, when we were with the Messenger of Allah when the riders passed us, we drew our outer cloaks over our faces as soon as they got close enough. As they passed, we would turn around and uncover our faces. According to *Sahih* (Authentic) Al-Bukhari, Um 'Atiya RA was instructed by the Prophet Muhammad SAW to bring out our menstruating women and veiled women during religious gatherings and Muslim invocations on the two Eid festivals. These menstruating women were instructed to keep their distance from their Musalla (little mosque). A woman asked, *“O Allah's Apostle! What*

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<sup>81</sup> Naseem Akhter, Shaheed Benazir Bhutto, and Arshad Munir, “Hijab (Veil): Protection for Woman (Islamic Perspective) International Conference on Arabic Studies & Islamic Civilization,” ed. ICASIC, *ICASIC Journal* 4 (2017): 9–17, <http://en.wikipedia.org>.

<sup>82</sup> Angraini Binti Ramli and Radwan Jamal Elattrash, “A Reflection on Women Attire in the Qur'an: A Study on Ayat Al-Hijab,” *Mazahib Jurnal Pemikiran Hukum Islam* XVI, no. 2 (2017): 125–34, <https://doi.org/10.21093/mj.v16i2.818>.

<sup>83</sup> K.O Sulaiman, “The Effects of Marital Infidelity amongst Women in Contemporary World: A Critical Analysis from Islamic Ethics,” *IUG Journal of Humanities and Social Science* 1, no. 1 (2017).

<sup>84</sup> Esra Aytar and Peter Bodor, “Discourses of Being a Muslim Woman in Contemporary Hungary and the Hijab Paradox,” *Http://Journals.Openedition.Org/Qds*, no. 80 (August 1, 2019): 33–50, <https://doi.org/10.4000/QDS.2609>.

about one who does not have a veil (the veil is the complete cover with only one eye or two eyes showing)?". He said, "Let her share the veil of her companion".<sup>85</sup>

According to the interpretation (tafseer) by Shaykh Muhammad bin Saalih al-Uthaymeen, it was the customary practice among the women of the Sahaba (Companions of Prophet Muhammad) RA that they would not leave their homes unless they were wearing a completely concealing cloak. If a woman did not have a veil, it would be impossible for her to venture outside. This Hadith demonstrates that when the Prophet Muhammad SAW instructed them to attend the location for Eid Salah (prayer), they complied.<sup>86</sup> In this situation, the Prophet Muhammad SAW suggested that someone lend her a veil, without explicitly indicating that she could go without it. If the Prophet Muhammad SAW prohibited women from attending events like *Eid Salah*, which is a religious obligation for both men and women, how can people permit women to enter places such as markets and shopping centers where there is open mixing of genders without wearing a veil?<sup>87</sup> Therefore, it can be inferred that the requirement for Muslim women to wear the hijab is obligatory.

Based on the above-mentioned analysis, it can be seen that the Supreme Court's decision to annul the Decree was in line with the Islamic law in which the provisions of wearing *Hijab* for Muslim women is mandatory and it cannot be prohibited by anyone, even though the government. However, the message to wear *Hijab* was exclusively belong to Muslim Women and it strengthen by the *Fatwa* that issued by the Muhammadiyah.<sup>88</sup> Therefore, the schools (particularly public school) was not able to require their all women students to wear *Hijab* without considering their religion. The diversity and multicultural society in Indonesia should be respected under the value of *Bhineka Tunggal Ika*. Nonetheless, it should also be noted that although the society is plural, Indonesia is not a secular country, yet is not an intolerant secular which is practiced in several countries, especially France and Turkey, nor is it a religious state.

Indonesia is a country based on Pancasila whose first precept is to Believe in God. Referring to the MoA that is practiced at ECtHR, Indonesia can limit a person's right to manifest his religion in accordance with Indonesian conditions where the majority of adherents are Muslims, traditions, history, local wisdom and religious values that develop in Indonesia. The Supreme

<sup>85</sup> Mirna Wati and Hasep Saputra, "The Concept of Tabarruj in the Qur'an According to Muslim Commentators," *AJIS: Academic Journal of Islamic Studies* 3, no. 2 (2018), <http://journal.staincurup.ac.id/index.php/AJIS>.

<sup>86</sup> Olawale Sulaiman and Raifu, "Investigating the Importance of Wearing Hijab by Muslim Women."

<sup>87</sup> Marion Holmes Kaltz, *Women in the Mosque: A History of Legal Thought and Social Practice* (New York: Columbia University Press, 2014).

<sup>88</sup> Tim Fatwa Majelis Tarjih dan Tajdid PP Muhammadiyah, "Aurat Dan Jilbab," *Tim Fatwa Majelis Tarjih Dan Tajdid PP Muhammadiyah*, 2003.

Court's decision to annul the Decree which prohibits public schools and local governments from requiring or prohibiting to wear of religious uniform in schools is in accordance with international human rights law. When there is a violation committed by a school in Bali that prohibits Muslim female students from wearing the hijab or in contrary where schools require non-Muslim students to wear headscarves, It is disproportionate. It can be analogous to when a child plays with a knife and is injured, the solution does not then blindly prohibit the circulation of the knife. The right solution is to provide understanding for parents to always supervise their young children when playing and provide understanding to the child to be careful when using a knife. Likewise, in situations of inter-religious tension due to the issue of religious uniform, the government must continue to promote pluralism and ensure tolerance between adherents of different religions. Pluralism must be upheld, it must not be removed.

The cause of tension is not pluralism but intolerance, so it is not the pluralism that must be removed. Very disproportionate when there are schools that are intolerant of requiring religious uniform for students who do not adhere to that religion, or schools that are also intolerant of prohibiting Muslim female students from wearing the headscarf, they respond by prohibiting all public schools from requiring or prohibiting religious uniform. It would be wiser if the government gave schools an understanding to respect pluralism and not practice intolerance.

On the other hand, schools must still be allowed to require religious uniform for adherents of their religion as part of student character building from an early age, which is actually part of the school's task to educate students to become religious students with noble character, obedient to their respective religions. There is a problem that states that the obligation to wear Muslim uniform does not affect a person's religiosity, it is a personal matter for the person. It is undeniable in Indonesia that many Muslim women who wear the hijab are not based on obedience or carrying out religious obligations, but have expanded into a lifestyle, fashion trend, and some even wear it for political, legal, and other reasons. The Decree is disproportionate because it amputates the function of the school as an educational institution that has a mission to shape the character of its students from an early age to become human beings who are religious and have noble character, one of which is through recommendations or even the obligation to wear uniform that are required by their respective religions.

## Conclusion

From the explanation above, two conclusions can be drawn. First, the Supreme Court annulled the Decree contradicted the regulations of a higher

position, such as the National Education System Law and the Regional Government Law. Education is the area of authority of the regional government so that the central government has no authority to interfere with it by prohibiting schools and local governments requiring or prohibiting the use of religious uniform. The Decree is also considered contrary to the National Education System Law because prohibiting schools from requiring students to wear religious clothing is tantamount to prohibiting schools from conducting religious education, especially the formation of the character of devout religious adherents from an early age through the wearing of clothing that is required by their religion. Second, international human rights law supports the Supreme Court's annulment of 3 ministers' SKB. External religious freedom allows the state to restrict religious symbols and uniforms in public schools to promote order, peace, and tolerance between religious communities. Because countries have different cultures, customs, histories, and local wisdom, religious freedom cannot be restricted in all countries. With a Muslim majority population, the government can allow schools to recommend or require Muslim students to wear the hijab to practice religious observance from an early age to form religious and noble students. However, due to external religious freedom, the school teachers or principal cannot require all women to wear the hijab. For public order, state can limit this action. Islamic law required Muslim women to wear hijab. To avoid zeenah, do this. Islam respects women's public rights by requiring hijab. Even though the Supreme Court's decision was not mentioned in Islamic law sources, its considerations were in line with Islamic values and would allow schools to recommend or require Muslim women students to uphold their Islamic values and obey His Almighty.

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*Pakistani Activist for Female Education,  
Nobel Prize Laureate*

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