Constitutional identity, expressivism, and constitutional change through judicial interpretation: The Indonesian LGBT *case as a case study*

Ignatius Yordan Nugraha*,

Constitutional change can be produced through judicial interpretation when a particular dictum becomes informally entrenched and creates a new constitutional meaning without the need for a formal amendment. However, scholarship has not yet scrutinized the form of legal reasoning that may be used to push for such a change. The purpose of this article is to analyze the role of expressivism in justifying constitutional change through judicial interpretation. For this purpose, I have developed the expressivist framework into what I call "operationalized expressivism," which refers to constitutional courts interpreting references to constitutional identity in the constitution such as to create a juridical effect. I then use the dissenting opinion in the Indonesian LGBT *case as a case study of how operationalized expressivism can initiate a constitutional change. I have selected this particular opinion because of its potential to radically transform the constitutional landscape of Indonesia, as the dissenting judges have declared the Indonesian Constitution as a "Godly" Constitution that requires all laws to be consistent with religious values.*

1. Introduction

In 2017, following a prolonged battle in the courtroom that lasted more than eighteen months, the Indonesian Constitutional Court rendered its judgment in the

* PhD Research Fellow, Hasselt University, Hasselt, Belgium. Email: yordan.nugraha@uhasselt.be. The research presented in this article was conducted within the framework of a project funded by the Special Research Fund (BOF) of Hasselt University (grant ID: BOF20OWB11) entitled "Clashes between International Human Rights Law and Constitutional Law? LGB Rights as a Case Study." The research for the article was started when the author was affiliated with Ghent University, and was then continued at Hasselt University. I would like to thank Eva Brems and Stijn Smet for their comments on the final draft of the article.

LGBT case.[1] The case originated in a petition by the "Family Love Alliance" to criminalize sex outside marriage, rape of males, and consensual homosexual intercourse between adults. The applicants relied on morality and religious values to justify their petition.[2] As the case progressed, it was the effort to criminalize homosexual sex that gained spotlight in the media within the context of a moral panic sweeping across the Muslim-majority country of Indonesia.[3] For this reason, the case is often dubbed as the "*LGBT* case," despite the misnomer.[4]

In response to this petition, the Court ruled that it lacks the power to expand the scope of the Criminal Code; such a task is to be undertaken by the lawmakers, instead (who include the People's Representative Council and the President). The majority decision, however, was narrowly passed in a 5-to-4 ruling. The dissenting judges declared that the Indonesian Constitution is a "Godly" Constitution, and that "Godly values" are the highest constitutional values. They thus held that all laws that are limiting or contradicting religious values must be set aside. Furthermore, with regard to homosexual sex, the judges found that the conduct is "intrinsically, humanly, and universally very repugnant," and on account of this "intrinsic repugnancy," an explicit criminalization by the legislature is not required.[5]

Indonesia has often been described as a state that is "neither secular nor Islamic."[6] The Indonesian Constitutional Court has also previously ruled in the 2008 *Suryani* case, which concerns a petition to implement Islamic criminal law nationwide,

[1] Constitutional Court, Decision No. 46/PUU-XIV/2016, Dec. 14, 2017 (Indon.), www.mkri.id/public/content/persidangan/putusan/46_PUU-XIV_2016.pdf [hereinafter *LGBT*]. All translations from the *LGBT* case are by the author.

[2] *Id.* The Indonesian Criminal Code is based on the Wetboek van Strafrecht voor Nederlands-Indië [Dutch East Indies Criminal Code], and it became the criminal code of the Republic of Indonesia in accordance with Article II of the Transitional Provisions of the 1945 Indonesian Constitution, which stipulates that "[a]ll existing laws and regulations shall remain in effect as long as new laws and regulations have not yet taken effect under this Constitution." The Criminal Code was then adopted by the newly-formed Indonesian government with very few amendments through Law No. 1 of 1946 on Criminal Law (Indon.). *See further* Tim Lindsey & Simon Butt, Indonesian Law 185–6 (2018).

[3] To understand the full extent of the moral panic, see Kyle Knight, *Fresh Wave of Anti-LGBT+ Moral Panic Hits Indonesia*, Hum. Rts. Watch (Nov. 6, 2018), www.hrw.org/news/2018/11/06/fresh-wave-anti-lgbt-moral-panic-hits-indonesia. Same-sex activity was never criminalized at the national level (with an exception in the province of Aceh that enacts Islamic criminal law since 2006).

[4] *See, e.g.*, Stefanus Hendrianto, *Not #LoveWins: On the Indonesian LGBT Case*, I•CONnect Blog (Jan. 11, 2018), www.iconnectblog.com/2018/01/not-lovewins-on-the-indonesian-lgbt-case/. Based on the author's observation, in the Indonesian language, "LGBT" is often used as a synonym for "homosexuality" in general to the extent that people would ask questions such as "is he LGBT?" As a result, the use of the term might be confusing to international observers.

[5] Constitutional Court, Decision No. 46/PUU-XIV/2016, Dec. 14, 2017, at 465 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting) (Indon.) [hereinafter *LGBT*].

[6] B. J. Boland, The Struggle of Islam in Modern Indonesia 38–9 (1971); Nadirsyah Hosen, *Religion and the Indonesian Constitution: A Recent Debate*, 36 J. Se. Asian Stud. 419, 424 (2005). While Indonesia is a country where Muslims make up a majority of the population, Islam is not the state religion. Instead, Indonesia recognizes the religions of Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Since 2017, by virtue of an Indonesian Constitutional Court ruling, the state also recognizes the existence of local beliefs whose adherents were previously often required to conform to one of the six official religions.

that "Indonesia is not a religious state that is based only on one particular religion, yet Indonesia is also not a secular state that does not pay any attention to religion at all. . .."[7] The Indonesian state is founded on the Pancasila, the five fundamental principles of the Indonesian state that are spelled out in the Preamble to the 1945 Constitution.[8] The first principle, *ketuhanan yang maha esa*, literally means "all-one divinity,"[9] although it is popularly understood as "belief in One God."[10] This principle can also be found in the operative part of the Constitution; Article 29(1) enshrines that "the state shall be based on belief in One God."[11] In this regard, the dissenting opinion has shaken the ground of Indonesian constitutional law, as it has effectively used the first principle to argue for a "Godly values repugnancy test" by which all laws are to be tested based on their compatibility with religious values. Such a repugnancy test has never formed part of the Indonesian constitutional jurisprudence.

In light of this background, this article explores the use of expressivist reasoning (as exhibited in the dissenting opinion of the *LGBT* case) to initiate a constitutional change through judicial interpretation. "Expressivism" has been defined as the view that a constitution reflects the identity of the nation.[12] The definition itself has been criticized by Mark Tushnet, since written constitutions may "operate at a substantial remove from their nation's character."[13] In order to address this shortcoming, I have developed "classical expressivism" into what I call "operationalized expressivism," which refers to the interpretation by constitutional courts that references to a constitutional identity (a label self-ascribed by a constitution) or an element of constitutional identity (a marker of constitutional identity, such as constitutional values or principles) can have a juridical effect instead of being purely emblematic.

The main argument of this article is that constitutional courts can initiate a constitutional change through an operationalized expressivist reasoning.[14] In other words, by claiming to be the interpreter of a state's constitutional identity or elements of

[7] *See* Constitutional Court, Decision No. 19/PUU-VI/2008, ¶ 3.18, Aug. 8, 2008.

[8] Undang-Undang Dasar Republik Indonesia [Constitution of the Republic of Indonesia] [Indon. Const.] 1945, amend. IV.

[9] *See, e.g.*, Olaf Schumann, *Multifaith Dialogue in Diverse Settings: The Social Impact, with Special Attention to Indonesia and Germany*, *in* Theology and the Religions: A Dialogue 199, 200–1 (Viggo Mortensen ed., 2003).

[10] Such a monotheistic interpretation has been contested by secular actors, as the word for "God" in Indonesian is *Tuhan* and not *ketuhanan* (the literal translation being "divinity"). Furthermore, this translation fails to reflect the vagueness of the original formulation of the first principle. Nevertheless, since the first principle is popularly construed and translated as "belief in One God," this article will use this translation.

[11] Indon. Const. 1945, amend. IV.

[12] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1269-81 (1999); Kenji Yoshino & Michael Kavey, *Immodest Claims and Modest Contributions: Sexual Orientation*, *in* Oxford Handbook of Comparative Constitutional Law 1079, 1086–8 (Michel Rosenfeld & András Sajó eds., 2012).

[13] Tushnet, *supra* note 12, at 1270.

[14] There are currently two forms of judicial review that have proliferated worldwide, namely the diffuse model of judicial review that grants the power of judicial review to all judges, and the Kelsenian model (originating in Czechoslovakia and Austria in 1919, based on Hans Kelsen's theories) that grants the power of judicial review to a special constitutional court. *See* Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 Rev. L. & Econ. 103, 104 (2006). For the purpose of this article, the term "constitutional courts" will cover both of these models.

constitutional identity, they can introduce various changes to the constitution, such as the establishment of a new yardstick for constitutional review although such a yardstick was not explicitly provided in the constitution. In order to demonstrate this point, this article focuses on the dissenting opinion to the Indonesian *LGBT* case. This particular case is selected because of the potential of the dissenting opinion in transforming the constitutional landscape of Indonesia, specifically through the establishment of a "Godly values repugnancy test." Within the Indonesian context, this article argues that if the dissenting opinion had become the majority, it would have constituted a starting point of a constitutional change through the development of "consolidated jurisprudence," which is defined as the dictum of the Constitutional Court that has attained persuasive force after having been reiterated several times in different judgments.

As a note, the approach of this article is not to assess whether the operationalized expressivist interpretation of the dissenting judges is the *right* interpretation of (elements of) Indonesia's constitutional identity. Instead, the focus is on the "constitutional justification" that was advanced by these judges in order to establish a "Godly values repugnancy test," and also how this justification had the potential of initiating a constitutional change. Through such an approach, this article takes a next step in the scholarship by incorporating expressivism into the theory of constitutional change. In a world where identity politics are manifesting themselves at a higher rate,[15] it is likely that an operationalized expressivist argument, as demonstrated in the Indonesian case, can be invoked in other jurisdictions to pursue a particular ideological agenda that may redefine the constitutional foundation of a state.

The article is structured as follows. Section 2 critically assesses expressivism and also lays down the "operationalized expressivist" framework. Section 3 explains the dissenting opinion to the *LGBT* case and also demonstrates how the reasoning of the dissenting judges constitutes a form of operationalized expressivism. Finally, Section 4 analyzes the operationalized expressivist reasoning in the dissenting opinion in order to understand how the opinion could have initiated a process of "constitutional change through the development of consolidated jurisprudence."

2. The framework of operationalized expressivism

Operationalized expressivism bears some similarities to the expressivist tradition that has been identified by Mark Tushnet.[16] The use of the term "expressivism," however, creates a risk of misapprehension. For instance, "expressivism" has been used in the context of "comparisons [with foreign law] undertaken to ascertain the extent to which constitutions represent underlying national cultures and experiences and how those experiences manifest through constitutional interpretation."[17] In order to avoid such a conceptual mismatch with regard to "operationalized expressivism," I commence by

[15] *See* Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment (2018).

[16] Tushnet, *supra* note 12, at 1269–81.

[17] Sam Halabi, *Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri DK Basu v. State of West Bengal*, 3 Notre Dame J. Int'l & Comp. L. 73, 81 (2013).

elaborating classical expressivism (as explained by Tushnet) together with the criticism against it. Subsequently, I lay down the framework of "operationalized expressivism" that is used for the analysis in this article.

2.1. Classical expressivism

Expressivism has been explained by Tushnet as the view that "constitutions help constitute the nation, to varying degrees in different nations, offering to each nation's people a way of understanding themselves as political beings."[18] At the same time, expressivism states that constitutions are the product of each nation's unique history, and that constitutions are shaped by culture.[19] Vicki Jackson also observed that "[n]ational constitutions are often documents of both self-constitution and self-expression. They may be written to describe, or inscribe, a particular set of self-conceptions of the dominant groups in their society. . .."[20] Thus, under expressivism, there is a two-way understanding that constitutions help shape a nation and at the same time are also shaped by that nation's historical, cultural and religious context.

With this foundational tenet in mind, Tushnet stated that an expressivist approach will basically "contrast the self-understandings found in the constitutional documents of different nations."[21] Thus, preambles are highly pertinent for an expressivist analysis, as they contain rich references to a particular identity (such as nation, religion, or a particular civilisation) or elements of identity (such as traditional or religious values).[22] For instance, the Preamble to the 1937 Irish Constitution proclaims the devout adherence of the Irish people to their "Divine Lord, Jesus Christ," and it further mentions the cardinal virtues of "Prudence, Justice and Charity."[23] On top of that, expressivist references can be found in the Constitution's operative part. For instance, Article 3(1) of the 1957 Malaysian Constitution states that "Islam is the religion of the Federation."[24]

The expressivist exercise of comparative constitutional law has been criticized for its essentialist outlook. First, expressivism postulates that constitutions are the embodiment

[18] Tushnet, *supra* note 12, at 1228. *See also* Mark Tushnet, *Constitution*, *in* Oxford Handbook of Comparative Constitutional Law, *supra* note 12, at 217, 219; Gary Jeffrey Jacobsohn, Constitutional Identity (2010); Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 Rev. Pol. 361 (2006).

[19] Tushnet, *supra* note 12, at 1270.

[20] Vicki Jackson, Constitutional Engagement in a Transnational Era 18 (2013). *See also* Peter Häberle, *The Constitutional State and Its Reform Requirements*, 13 Ratio Juris 77, 79 (2000) ("Constitution is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of a cultural heritage and the foundation of its expectations").

[21] Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 12 (2008).

[22] Jackson, *supra* note 20, at 19; Jacobsohn (2006), *supra* note 18, at 384–7.

[23] Constitution of Ireland 1937. *See also* Eoin Carolan, *The Evolution of Natural Law in Ireland*, *in* The Invisible Constitution in Comparative Perspective 431, 440–1 (Rosalind Dixon & Adrienne Stone eds., 2018) (arguing that "[g]iven the complicated but undeniable links between Irish nationalism and the majority Catholic population, a constitutional invocation of Christian values could also function as an assertion of a specifically Irish identity").

[24] Malay. Const. 1957.

of a nation's particular context. However, there have been cases where constitutions have failed to reflect this.[25] Gary Jacobsohn explained that "constitutional identity can accommodate an aspirational aspect that is at odds with the prevailing condition of the society within which it functions."[26] Jackson also stated that constitutions can be "highly aspirational" in the sense that they are "seeking to return to a former, better time, or to transform the society into something new and better."[27] An example that aptly illustrates this point is the Indian Constitution. Tushnet observed that this particular document "has been reasonably vigorously enforced by India's Supreme Court, some of whose decisions are articulate confrontations with the dilemmas posed by the efforts of the nation's founders to design a secular and democratic constitution for a highly stratified and religiously pluralist society."[28] Overall, as summarized by Michel Rosenfeld, "constitutions cannot be thought of exclusively as the purely internal expression of a polity that coheres as a unified whole," since the creation of a constitution may constitute "an act of negation" that entails "a break with the polity's prevailing conceptions of collective identity."[29]

Second, the foundational tenet of expressivism assumes that there is a monolithic understanding of a nation's identity.[30] In reality, a nation's identity is often subject to a vigorous debate.[31] Jacobsohn also held that constitutional identity is subject to "an ongoing process entailing adaptation and adjustment as circumstances dictate."[32] As an illustration, in Indonesia, the constitution is subject to a fierce debate between pluralist and Islamic approaches.[33] While the national ideology of Pancasila is regarded as a compromise between both,[34] Islamist resurgence in the post-Suharto era has led to efforts to redefine or even amend the Constitution to allow for the formal recognition of Shari'a,[35] while the interpretation of the first principle of Pancasila itself remains contested between different actors.[36]

[25] Tushnet, *supra* note 12, at 1270.

[26] Jacobsohn, *supra* note 18, at 128.

[27] Jackson, *supra* note 20, at 18.

[28] Tushnet, *supra* note 12, at 1270.

[29] Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community 203 (2009).

[30] Tushnet, *supra* note 21, at 14–15.

[31] Tushnet, *supra* note 12, at 1279–80.

[32] Jacobsohn, *supra* note 18, at 13.

[33] Ayang Utriza, *La transformation du droit musulman en droit positif de l'État indonésien* [*Transformation of Muslim Law into Positive Law of the Indonesian State*], *in* La charia aujourd'hui: Usages de la référence au droit islamique [Shari'a Today: Practices of References to Islamic Law] 199, 200–2 (Baudouin Dupret ed., 2012); David Bourchier, *Two Decades of Ideological Contestation in Indonesia: From Democratic Cosmopolitanism to Religious Nationalism*, 49 J. Contemp. Asia 713 (2019).

[34] Boland, *supra* note 6; Alfitri, *Religion and Constitutional Practices in Indonesia: How Far Should the State Intervene in the Administration of Islam?*, 13 Asian J. Comp. L. 389, 393 (2018).

[35] For example, there was a failed effort to insert "Shari'a" into Article 29 of the Constitution. *See further* Nadirsyah Hosen, Shari'a & Constitutional Reform in Indonesia 201–2 (2007); R. E. Elson, *Two Failed Attempts to Islamize the Indonesian Constitution*, 28 Sojourn: J. Soc. Issues Se. Asia 379 (2013).

[36] Hyung-Jun Kim, *The Changing Interpretation of Religious Freedom in Indonesia*, 29 J. SE. Asian Stud. 357 (1998).

2.2. Operationalized expressivism

Having elaborated the tenets of classical expressivism and also the criticism against it, I will now develop it into a new framework called "operationalized expressivism." "Operationalized expressivism" refers to the interpretation by constitutional courts that references to a constitutional identity or elements of constitutional identity can also have a juridical effect. With regard to the meaning of the term "constitutional identity," it refers to "a label that is self-ascribed by constitutions." This is demonstrated by the Malaysian Constitution in which the label "Islam" is ascribed to the state. At the same time, constitutions also contain references to "elements of constitutional identity." I define this term as "constitutional values, principles or other markers of constitutional identity in constitutions."[37] For example, in the Irish Constitution, the principles of "prudence," "justice," and "charity," together with references to the Holy Trinity and Jesus Christ, can be regarded as elements of the Catholic identity of the Constitution.[38]

Expressivist references can become legally operable in constitutional courts. In other words, these sorts of references will not be viewed as strictly declaratory or symbolic.[39] Instead, I submit here that expressivist references in the constitution can be interpreted by constitutional courts as being "legally prescriptive" in the sense that they can impose an enforceable legal obligation to uphold what is prescribed by a constitutional identity or element of constitutional identity. For example, courts may establish that the existence of Islam as a state religion requires all laws to be consistent with the Shari'a. In this way, I will not be incorporating the term "aspirational" as understood by Jackson and Jacobsohn. The reason is that, as observed by Jeff King, the word "aspiration" contains the connotation of "hope," which is why "aspirational" is often contrasted with "binding commitments."[40] Such a connotation will not fit with

[37] The use of the term "values" and "principles" in different constitutions could be confusing, and Gary Jacobsohn has observed that they are often conflated. He himself has argued that "value" and "principle" are conceptually distinct. He found that constitutional values have "a culturally determined meaning that provides it with a particularistic significance that effectively severs the idea of values from any universalistic claims." Meanwhile, constitutional principles are regarded to be universalistic in their reach. However, Jacobsohn himself has admitted that there are instances when "constitutional principles" could be enshrined in a contextual manner. Article 18B(2) of the Indonesian Constitution, for instance, recognizes the existence of customary law societies if, inter alia, they are in line with "the principles of the Unitary State of the Republic of Indonesia." There are also "constitutional values" that are framed universally, such as the reference to "the promotion of democratic values" under Article 75.19 of the Argentinian Constitution on the power of congress. Thus, the distinction between the two has become rather uncertain in the realm of comparative constitutional law. *See further* Gary Jeffrey Jacobsohn, *Constitutional Values and Principles*, *in* Oxford Handbook of Comparative Constitutional Law, *supra* note 12, at 777.

[38] *See* Aileen Kavanagh, *Natural Law, Christian Values and the Ideal of Justice*, 48 Ir. Jurist 71 (2012) (arguing that "natural law was part of Ireland's rebellion against what was perceived to be Britain's positivist tradition," and thus "[i]t gave expression to something which seemed distinctively Irish, or, at the very least, gave an Irish flavour to ideas and principles which were relied on elsewhere. . .." In this way, references to natural law in the Irish Constitution could also be considered as elements of the Irish constitutional identity). *See also* Carolan, *supra* note 23, at 441 (reaching a similar conclusion).

[39] By contrast, Yoshino and Kavey held that expressivism is more "symbolic" rather than "instrumental." Yoshino & Kavey, *supra* note 12, at 1079.

[40] Jeff King, *Constitutions as Mission Statements*, *in* Social and Political Foundations of Constitutions 73, 82 (Denis J. Galligan & Mila Versteeg eds., 2013).

the operationalized expressivist framework, as the framework is focused on a legal obligation that may arise from an expressivist provision.

The framework of operationalized expressivism may be vulnerable to the same critiques of essentialism as leveled against classical expressivism, since the use of constitutional identity and elements of identity may again be reprimanded for being monolithic and not reflective of the way a nation views itself.[41] Jacobsohn himself has adopted a "dynamic" account of "constitutional identity." He argued that "a constitution acquires an identity through experience," and that such an identity "emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[42]

Nevertheless, an operationalized expressivist framework does not concern itself with whether a constitutional identity or an element of constitutional identity is really reflective of the nation's society. Such a framework admits that "constitutional identity" and "elements of constitutional identity" are contestable.[43] Jacobsohn himself has stated that while his approach is fluid, it is not "fluidity without boundaries," since "textual commitments such as are embodied in preambles often set the topography upon which the mapping of constitutional identity occurs."[44] He also held that the fact that a constitution is disharmonic is not "fatal" to the inquiry of constitutional identity; instead, it is key to understanding the concept.[45] Furthermore, under the operationalized expressivist framework, the terms "identity" and "element of constitutional identity" are not understood as *the* identity and element of constitutional identity, but rather as one of the subjective understandings of what constitutes a constitutional identity or an element of constitutional identity and how they operate in the legal sphere. It is for this reason that this article focuses on "constitutional justifications" invoked by constitutional court judges instead of trying to infer the *real* identity or element of constitutional identity as originally intended by the drafters.

3. The *LGBT* case and operationalized expressivism

Having elaborated the exact meaning of "operationalized expressivism," I will now apply this framework to the *LGBT* case. The case itself was initiated on April 19, 2016, through a petition to the Indonesian Constitutional Court (Mahkamah Konstitusi) by a family advocacy organization named "Family Love Alliance" (Aliansi Cinta Keluarga, AILA). They requested the expansion of the material scope of the Indonesian Criminal Code so that it would be in line with Indonesian (religious) values.[46]

41 *Cf.* Tushnet, *supra* note 12, at 1270; Jacobsohn, *supra* note 18, at 127–32.

42 Jacobsohn, *supra* note 18, at 7.

43 Yaniv Roznai, Unconstitutional Constitutional Amendment 148 (2017); Pietro Faraguna, *Identity*, *in* Max Planck Encyclopaedia of Comparative Constitutional Law para. 18 (2020), http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e792.

44 Jacobsohn (2010), *supra* note 18, at 13.

45 *Id.* at 15; 88.

46 Constitutional Court, Decision No. 46/PUU-XIV/2016, Dec. 14, 2017 (Indon.).

The applicants specifically argued that articles 284, 285, and 292 of the Indonesian Criminal Code need to be amended. Article 284 criminalizes only adultery (sex between a married person and someone who is not that person's spouse) and not sex outside marriage, while article 285 is concerned with female rape victims and article 292 forbids same-sex activity with minors. In the view of the petitioners, the scope of these articles needs to be expanded in order to ensure that they are in line with religious morality. They petitioned the Court to rephrase article 284 to include sex outside marriage, article 285 to include rape of males and article 292 to include consensual homosexual sex between adults.[47]

In December 2017, the Indonesian Constitutional Court officially rejected AILA's petition in a 5-to-4 ruling. The five judges who ruled against the applicants were I Dewa Gede Palguna, Maria Farida Indrati, Suhartoyo, Manahan Sitompul, and Saldi Isra. The majority asserted that the lawmakers (consisting of the People's Representative Council and the President) are the only legally competent bodies to undertake this task.[48] They also explained that the Constitutional Court has long accepted its role as a "negative legislator" (referring to the power to invalidate a provision in a judicial review) instead of a "positive legislator" (referring to the power to enact laws).[49] Expanding the scope of the criminal act of "adultery" to include sex outside marriage would transform the Constitutional Court into a "criminal policy maker" while the role is exclusively within the hands of the lawmakers.[50] The majority then criticized the overreliance of the petitioners toward criminal law as the *ultimum remedium* for the social problems of "deviant behavior."[51] Finally, the majority argued that the criminal code articles that were subjected to judicial review were not in themselves contrary to the Constitution, and that the problem of "incomplete law" needs to be resolved by the lawmakers.[52]

At the same time, the dissenting opinion to the case shook the ground of Indonesian constitutional law, as the minority argued that the Indonesian Constitution is a "Godly" Constitution, and that all laws that are not in line with religious values must be declared unconstitutional. In this section, I shall demonstrate how this dissenting opinion constitutes a form of "operationalized expressivism." The findings then become the basis of the analysis in Section 4, in which I demonstrate the constitutional transformation potential of the operationalized expressivist reasoning contained in this dissenting opinion.

There were four sitting judges who voiced their objection to the reasoning of the majority, namely Anwar Usman, Wahiduddin Adams, Aswanto, and also the Chief Justice of the Constitutional Court at that time, Arief Hidayat.[53] Their argument is founded on the first principle of the Pancasila, "belief in One God" (*ketuhanan yang*

[47] *Id.* at 429–31.
[48] *Id.* at 439.
[49] *Id.* at 441–2.
[50] *Id.* at 444.
[51] *Id.* at 445–6.
[52] *Id.* at 447–52.
[53] *Id.* at 453 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

maha esa). The judges commenced with the observation that "Pancasila is the source of all sources of state law."[54] They continued: "The enshrinement of the Pancasila as the foundation and ideology of the state and also as the philosophical ground of the state implies that every substance of legislation shall not contravene the values that are embodied in the Pancasila."[55] Particularly with respect to the first principle, the dissenting judges posited that "Godly values are read and construed hierarchically. Godly values are the highest values as they are concerned with something absolute."[56] On this premise, they argued that an act can be considered "good" if it is not contrary to the laws of God.[57]

The dissenting judges subsequently referred to a hodgepodge of constitutional articles as the legal foundation of their argument. These include Article 1(3) of the Constitution that declares Indonesia as a country based on the rule of law; Article 18B that recognizes the existence of "customary law societies" and their rights (as long as they exist, regulated by law and if they are in line with societal development and principles of the state); and particularly Article 29(1) stipulating that "the state shall be based on belief in One God."[58] The judges then asserted that "all legislation in Indonesia must always be in line and can never be contrary to the foundation of belief in One God and religious values and also living law that are in line with societal development and principles of the state."[59] They also highlighted the fact that Article 28D(1) of the Constitution (on the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law) utilizes the term "just law" and not "a mere legal certainty." As a result, they argued that a legal certainty in the form of a legislation that "reduces, narrows, oversteps and/or contradicts the foundation of belief in One God and living law which are in line with societal development and principles of the state" would have to be considered as contrary to the Constitution and thus invalid.[60]

They admitted that the existence of these aforementioned articles "essentially does not negate the rights and freedoms of mankind."[61] Nevertheless, they observed that Article 28J(2) of the Constitution requires every person to adhere to restrictions that are imposed by the law for the purpose of recognizing and respecting the rights and freedoms of others and also of satisfying "just demands" that are based on considerations of morality, religious values, security, and public order in a democratic society.[62] The dissenting judges concluded that the Indonesian Constitution through this article has declared itself to be a "Godly Constitution." According to them, this "Godly" nature is reflected by how Indonesian laws always start with the phrase "By the Grace of

[54] *Id.* at 454 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Indon. Const. 1945, amend IV.
[59] *LGBT*, No. 46/PUU-XIV/2016 at 455 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).
[60] *Id.* at 455–6 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).
[61] *Id.* at 456 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).
[62] Indon. Const. 1945, amend. IV.

the One God" (*Dengan Rahmat Tuhan yang Maha Esa*) and how the judgments of the Constitutional Court themselves also contain the headnote "For the Sake of Justice Based on Belief in One God" (*Demi Keadilan Berdasarkan Ketuhanan yang Maha Esa*). Thus, they concluded that all laws "must always be enlightened by religious values and divine enlightenment (*sinar ketuhanan*)."[63] They even declared that the legal system in Indonesia must not give or allow norms which "reduce, narrow, overstep and/or contradict religious values."[64] For the dissenting judges, the Constitutional Court as "the sole interpreter and the guardian of the constitution" and "the guardian of the state ideology" has the constitutional obligation to ensure that such norms are not in place.[65]

The dissenting judges then turned to the three disputed criminal code articles. They argued that article 284 of the Criminal Code—the criminalization of adultery—is "essentially very influenced by the secular-hedonistic philosophy and paradigm which dominate the formation of legal norms in Europe in the past, and which surely are different from the sociological condition in Indonesia."[66] They then observed that article 284 of the Criminal Code is based on the Dutch concept of *overspel* (adultery) during colonial times that only prohibited sex between a married person and an unmarried person. The concept did not include sex outside marriage in general.[67] As a result, the judges concluded that the concept of *overspel* in article 284 of the Criminal Code restricts and even contradicts religious values, "divine enlightenment," and the living law of the Indonesian society which forbid *zina*, otherwise known as unlawful sexual intercourse that includes both "adultery" and "fornication."[68] Although they did not corroborate their statement with any anthropological authority,[69] they added that the practice of people in the Indonesian Archipelago before the colonial times never considered sex as a private matter and that *zina* was always considered to be repugnant (*tercela*).[70] They also cited Surah Al-Isra 17:32 to demonstrate that *zina* is considered very repugnant under Islam.[71] In addition, to further reinforce their point that a narrow interpretation of *zina* constitutes an "unjust legal certainty," they referred to previous "resistance efforts" by citing an old decision from the year 1977 by the Supreme Court of Indonesia, which recognized the "customary criminal act" of

[63] *LGBT*, No. 46/PUU-XIV/2016 at 456 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[64] *Id.* at 456–7 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[65] *Id.* at 457 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[66] *Id.*

[67] *Id.* at 457–8 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[68] *Id.* at 458 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[69] In fact, even in societies where Islam was widely practiced, Dutch Orientalist Snouck Hurgronje observed that the "natives" did not practice "pure" Islamic law, but rather the customary (*adat*) version of it. *See* Simon Butt, *Islam, the State and the Constitutional Court in Indonesia*, 19 Pacific Rim L. & Pol'y J. 279, 285–6 (2010).

[70] *LGBT*, No. 46/PUU-XIV/2016 at 458 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting). As a note, the dissenting judges conflated *ketercelaan* with *verwijtbaarheid*. The term *verwijtbaarheid* under Dutch law simply means "culpability" and does not contain a negative connotation, while *ketercelaan* in Indonesian implies that the conduct is inherently "repugnant" or "despicable." Therefore, the term *verwijtbaarheid* will not be used in this article and instead "repugnancy" should be understood as a direct translation of "*ketercelaan*."

[71] *Id.* at 459 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

zina between a married man and another woman;[72] a 1980 Supreme Court Practice Note; and also proposed revisions of the penal code that tried to reinstate "the concept of intrinsic repugnancy of sex outside marriage."[73]

The dissenting judges have also invoked a sort of *reductio ad absurdum* based on their conclusion that the 1945 Constitution is a "Godly" Constitution. They observed that if article 284 of the Criminal Code were to be maintained, it would jeopardize "the authority of constitutional supremacy and the law in Indonesia."[74] For them, it would be absurd that laws and legal judgments that always refer to "God" are containing norms that are not in line with "the law of God."[75]

While the dissenting judges agreed with the majority that the Court must not act as a "positive legislator," they emphasized that "adultery and fornication essentially are *mala in se* and not *mala prohibita* because of its intrinsic repugnancy (*ketercelaan*) as it is clearly stated in the Quran and other holy books, and therefore the aspect of the approval from (the representation of) the people is not a *sine qua non* aspect [for criminalization]."[76] Therefore, in their view, accepting the AILA's petition would simply mean reinstating the concept of *zina* as it was before the Dutch came and introduced their concept of *overspel*.[77]

Turning to article 285 of the Criminal Code on rape, the dissenting judges observed that this article embodies a "male-superiority complex" that is not in line with the principle of equality before law as guaranteed by the Constitution. In their view, both males and females can potentially be victims of rape, and the attempt of a female to rape a male is not deemed to be unprecedented. They also stated that such an act is occurring more often due to developments of culture and medical technology (they specifically referred to genetic engineering and medicine). Furthermore, they opined that the repugnancy element of rape is caused not only by the potential unwanted pregnancy, but also by the physical and psychological trauma and the social stigma, which can also be experienced by male victims. Therefore, the judges believed that the limited scope of article 285 is not in line with the Constitution.[78]

Finally, with respect to article 292 of the Criminal Code on the prohibition of same-sex activity with minors, the dissenting judges observed that this article only protects minors from "lewd" acts.[79] They declared that the phrasing of the article is:

> . . . clearly a "victory" for the homosexuals and some members of the Dutch *Tweede Kamer* who were affirmative of homosexual practices, even though homosexual practices are clearly one of the sexual conducts that are intrinsically, humanly and universally very repugnant according

[72] *Id. See also* Supreme Court, Decision No. 93/K/Kr/1976, Nov. 19, 1977 (Indon.).

[73] *LGBT*, No. 46/PUU-XIV/2016 at 459–60 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[74] *Id* at 460 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[75] *Id.*

[76] *Id.* at 461–2 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting) (*mala in se* refers to conducts that are deemed to be inherently wrong even if there is no regulation stating that they are wrong, whereas *mala prohibita* means conducts that are wrong by virtue of law).

[77] *Id.* at 462 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[78] *Id.* at 464 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[79] *Id.*

> to religious laws and divine enlightenment and also living law of society, and therefore we believe that the word "adult", the phrase "a minor" and the phrase "whose minority he knows or reasonably should presume" in article 292 of the Penal Code ought to be declared as contrary to the 1945 Constitution and have no binding legal effect.[80]

In anticipating human rights arguments, they stressed that the Constitution does not allow "absolute freedom" to act arbitrarily, particularly if the act is not in line with religious values. They also reiterated their view that the 1945 Constitution is a "Godly Constitution" by stating: "Whenever the 1945 Constitution is dealing with the values of religion, the 1945 Constitution as a Godly Constitution must assert its identity as the guarantor of the freedom of religion and not the freedom from religion."[81] Thus, based on this reasoning, the dissenting judges argued that the petition of AILA to criminalize homosexual sex should also have been accepted.

The dissenting opinion itself does not hold water with regard to its sweeping factual claims.[82] For instance, it is dubious to simply claim without any evidence that *all* customary law societies in Indonesia consider sex outside marriage and homosexual sex as a crime punishable by law. The dissenting judges have also failed to corroborate its claim that homosexual sex is "universally repugnant," and it is rather glaring that they have only referred to a Quranic verse in order to demonstrate the "inherent repugnancy" of *zina*. Moreover, the dissenting judges have misrepresented both the 1977 Supreme Court Decision and the 1980 Supreme Court Practice Note, since, as pointed out by Simon Butt, "[t]he Decision and the Note refer to married men committing adultery with married women (who are not their wives) or unmarried women. These documents say nothing about sex between unmarried couples."[83]

The dissenting judges have also erred by using Article 18B(2) of the Constitution to conclude that all laws must be in line with "living law of society." This article is in fact only recognizing the existence of customary law societies and their traditional rights.[84] While it might be invoked to argue for allowing the national court to accept the prosecution of customary criminal act in a certain society, it is simply a *non sequitur* to invoke it in the context of a national law. For example, citizens of Jakarta and Surabaya are not part of a customary law society in the mountains of Papua or in rural Aceh. It would thus be untenable to invoke this article to extend the application of a customary criminal act in a certain area to the entire archipelago.

Despite these shortcomings, the central feature of the dissenting opinion is basically the reliance on "Godly values" in the first principle of the Pancasila, which are claimed to be the highest constitutional values. Based on this understanding, the

[80] *Id.* at 465 (Hidayat, Usman, Adams, and Aswanto, JJ., dissenting).

[81] *Id.*

[82] Simon Butt, *Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts*, 50 J. Legal Pluralism & Unofficial L. 402, 413 (2018).

[83] *Id.*

[84] This term basically refers to indigenous people. *See further* Constitutional Court, Decision No. 31/PUU-V/2007, ¶¶ 3.15.2–3.15.5, June 18, 2008 (Indon.). *See also* Lindsey & Butt, *supra* note 2, at 136; Yanis Maladi, *Eksistensi Hukum Adat dalam Konstitusi Negara Pascaamandemen* [*Existence of Customary Law in the State Constitution Post-Amendment*], 22 Mimbar Hukum 450 (2010).

dissenting judges declared the 1945 Constitution as a "Godly Constitution." This particular interpretation of the Indonesian constitutional identity is then used to argue that all laws that are limiting, overstepping, or contradicting religious values are inherently unconstitutional. Thus, the arguments of the dissenting judges fall under the category of "operationalized expressivism," as the first principle of the Pancasila is not interpreted as a merely symbolic provision, but rather as having a far-reaching juridical effect.

More specifically, this operationalized expressivist reasoning has led the dissenting judges to conclude that "Godly values" constitute a yardstick for constitutional review. The application of this "yardstick" was demonstrated by the conclusion of these judges with regard to the petition of AILA. Since the dissenting judges claimed sex outside marriage and homosexual sex to be "very repugnant" and against religious values, they concluded that articles 284 and 292 of the Criminal Code are unconstitutional, as these articles are deemed to have reduced and narrowed the application of religious values in Indonesia. Consequently, if this dissenting opinion had become the majority, it would have given rise to a sort of "Godly values repugnancy test" by which all laws will be reviewed based on their compatibility with "religious values."

4. Operationalized expressivism and constitutional change through judicial interpretation

The potential repercussions of operationalized expressivism in the dissenting opinion extend further than the infringement of individual rights. In this section, I argue that if this dissenting opinion had become the majority, it would have *initiated* a process of constitutional change, specifically by establishing a "Godly values repugnancy test" as a yardstick for constitutional review. First, I explain why the judgment of the Indonesian Constitutional Court, which is not part of a formal amendment procedure, can still initiate a process of constitutional change through the development of "consolidated jurisprudence." Second, I elaborate on why the establishment of a "Godly values repugnancy test" can be considered as a novel constitutional change, and how the dissenting opinion would have initiated a constitutional change through consolidated jurisprudence if it had been accepted.

4.1. Constitutional Court judgment and constitutional change

Before assessing whether the dissenting opinion to the *LGBT* case had the potential to change the constitution through judicial interpretation, one might ask whether the judgment of the Indonesian Constitutional Court can really alter the constitution without having recourse to a formal amendment procedure. After all, from a formalistic point of view, constitutional amendment in Indonesia can only be initiated and enacted by the People's Consultative Assembly (consisting of members of the People's Representative Council and the Regional Representative Council) as provided under Article 37 of the Constitution.

Nevertheless, such a view overlooks the possibility of constitutional change through judicial interpretation. In this regard, Richard Albert has discussed how a constitutional change may be produced through "the development of constitutional conventions."[85] The term "constitutional conventions" refers to the way judicial interpreters conform to a practice because of the conviction that they ought to do so.[86] Albert argued that "the informal entrenchment of a constitutional convention generates a new constitutional meaning but without a new constitutional writing."[87] In other words, unwritten norms can modify a written constitution.[88] Albert himself has postulated at the lowest level of abstraction different possible mechanisms for constitutional change through constitutional conventions, including incorporation by refinement of an existing text.[89]

Although Indonesia is part of the civil legal system where judges are not obligated to follow precedents, Albert's observation can still be applied to Indonesia. In practice, the Indonesian Constitutional Court often refers to previous cases that have become part of its jurisprudence.[90] Furthermore, the Indonesian legal scholarship recognizes the existence of "consolidated jurisprudence" (*yurisprudensi tetap* or *vaste jurisprudentie*) where the reasoning of the Court attains persuasive force for similar cases if the same reasoning has been pronounced several times in different judgments.[91] Thus, the term "constitutional convention" corresponds to "consolidated jurisprudence." Based on this understanding, within the specific context of Indonesia, Richard Albert's framework of "constitutional change through the development of constitutional conventions" can be adapted into "constitutional change through the development of consolidated jurisprudence."

At the same time, it is unclear when a particular constitutional interpretation can be considered as part of "consolidated jurisprudence." Paulus Effendie Lotulung argued that there is no "mathematical requirement" with regard to how many times a dictum must be reiterated in subsequent cases in order to become "consolidated." For him, a court judgment can already create a consolidated jurisprudence if the interpretation differs from the previous one and can become a standard to be followed in subsequent cases.[92] Meanwhile, Oly Viana Agustine believes that if a particular interpretation has

[85] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 Dublin U. L.J. 387, 390 (2015).

[86] *Id. See also* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 Am. J. Comp. L. 641, 647–56 (2014); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 5 U. Ill. L. Rev. 1847 (2013); Ivor Jennings, The Law and the Constitution 134–6 (5th ed. 1972).

[87] Albert, *supra* note 85, at 393.

[88] *Id.*

[89] *Id.* at 391.

[90] Simon Butt, The Constitutional Court and Democracy in Indonesia 64–6 (2015); Oly Viana Agustine, *Keberlakuan Yurisprudensi pada Kewenangan Pengujian Undang-Undang dalam Putusan Mahkamah Konstitusi* [*The Enforceability of Jurisprudence Regarding the Power to Review Laws in the Decision of the Constitutional Court*], 15 Jurnal Konstitusi 642, 648–9 (2018). An example used by Agustine is the jurisprudence on legal standing before the Constitutional Court.

[91] *See* Agustine, *supra* note 90, at 649; Enrico Simanjuntak, *Peran Yurisprudensi dalam Sistem Hukum di Indonesia* [*The Role of Jurisprudence in the Legal System of Indonesia*], 16 Jurnal Konstitusi 83, 94–5 (2019).

[92] Paulus Effendie Lotulung, Peranan Yurisprudensi Sebagai Sumber Hukum [The Role of Jurisprudence as a Source of Law] 9 (1997).

been used in three different judgments, it can already be considered as "consolidated jurisprudence."[93]

Nevertheless, irrespective of when a particular interpretation has become "consolidated," there still needs to be a starting point when that interpretation was first introduced by the Indonesian Constitutional Court. Based on this observation, it can be concluded that when a new dictum or interpretation is advanced in a judgment of the Indonesian Constitutional Court, this novel judgment may initiate a process of constitutional change, particularly when that dictum or interpretation constitutes a break with the previous understanding of constitutional identity or element of identity. The change would at some point become "consolidated" when this new dictum or interpretation has been reiterated and applied in subsequent cases.

4.2. "Godly values repugnancy test" and constitutional change

The dissenting judges have relied on operationalized expressivism to argue for a "Godly values repugnancy test." If this repugnancy test had been adopted by the majority, it would have initiated an unprecedented constitutional change, as such a repugnancy test has never formed part of the Indonesian constitutional jurisprudence. Moreover, although Article 28J(2) of the Constitution enshrines a human rights limitation clause based on considerations of religious values, the Indonesian Constitution does not explicitly provide for a "Godly values repugnancy test" by which all laws are to be tested based on their compatibility with religious values. Thus, the introduction of such a repugnancy test would have constituted what Albert calls "a constitutional change through incorporation by refinement," as "Godly values as the highest values" dicta would have "refined" the previous understanding on the first principle of Pancasila and also Article 29(1) of the Indonesian Constitution.[94]

While one might claim that the "Godly values repugnancy test" is a mere logical implication of Indonesia's "Godly" constitutional identity, the operationalized expressivist argument behind the dissenting opinion is also unprecedented. In this regard, Butt has commented that the "Godly values as the highest values" argument "appears to be a relatively novel interpretation, or at least the first time the norms of Pancasila have been formally ranked by a judicial institution."[95] Moreover, even if we accept that the Indonesian Constitution has always been "Godly" by virtue of the first principle of Pancasila, it does not alter the fact that a "Godly values repugnancy test" did not exist in Indonesian constitutional law before.

The introduction of a "Godly values repugnancy test" itself would imply that existing laws would be declared unconstitutional not only if they contravened religious values, but also if they failed to fully encapsulate what is mandated by these values. This would have the implication of constitutionalizing the criminalization of acts that are against Godly values without the need of a formal amendment procedure. Thus, criminalization of sex outside marriage and homosexual sex would no longer be

[93] Agustine, *supra* note 90, at 649.
[94] Albert, *supra* note 85, at 396.
[95] *See* Butt, *supra* note 82, at 410.

viewed as a mere legislative measure; in effect, they would become constitutionalized, and decriminalization of these acts by the lawmakers would be impossible without amending the Constitution itself.[96]

Based on these considerations, it can be concluded that if the dissenting opinion had become the majority, it would have *initiated* a process of "constitutional change through the development of consolidated jurisprudence." The "Godly values repugnancy test" would become a novel feature of Indonesian constitutional law, and this constitutional change would then be "consolidated" when the test has been applied several times in subsequent Constitutional Court cases.

Although it is true that the dissenting opinion had failed and thus one might argue that this conclusion is purely speculative, it should be noted that the dissenting opinion itself had almost become the majority. One of the judges who sided with the majority, Saldi Isra, was only appointed as a constitutional judge in April 2017 as a replacement for Patrialis Akbar. Judge Akbar was "dishonorably dismissed" from the Court in February 2017 after he was arrested by the Corruption Eradication Commission due to allegations of bribery.[97] At the beginning of the case, Akbar showed his sympathy to the petitioners' cause. He stated that "Our freedom is limited by moralistic values as well as religious values. This is what the declaration of human rights doesn't have. It's totally different [from our concept of human rights] because we're not a secular country, this country acknowledges religion. . .."[98] He also affirmed that the Constitutional Court is an institution "guided by the light of God."[99] Had he remained on the panel, it is highly likely that he would have sided with the dissenting judges.[100]

Moreover, there is a possibility that operationalized expressivm in the dissenting opinion can be raised again in the future.[101] Given that the dissenting opinion only narrowly failed, Butt speculated that "[t]his almost-equal division within the court suggests that the minority's thinking could one day be adopted by a majority, particularly if one or two judges with more conservative views are appointed to replace retirees in coming years."[102] David Bourchier has also observed that if the Chief Justice of the Court at that time, Arief Hidayat, "is of the view that human rights-based

[96] *Cf.* Holning Lau, *Asian Courts and LGBT Rights*, *in* Oxford Encyclopedia of LGBT Politics and Policy (Don Haider-Markel ed., 2020), https://doi.org/10.1093/acrefore/9780190228637.013.1230 (referring to the so-called "entrenchment of LGBT subordination").

[97] Muhammad Fida Ul Haq, *MKMK Putuskan Patrialis Akbar Diberhentikan dengan Tidak Hormat* [*Honorary Council of the Constitutional Court Decides that Patrialis Akbar is Dishonourably Dismissed*], Detik (Feb. 16, 2017), http://news.detik.com/berita/d-3424761/mkmk-putuskan-patrialis-akbar-diberhentikan-dengan-tidak-hormat.

[98] Hans Nicholas Jong, *MK Justices Want Casual Sex Outlawed*, Jakarta Post (Aug. 24, 2016), www.thejakartapost.com/news/2016/08/24/mk-justices-want-casual-sex-outlawed.html.

[99] *Id.*

[100] Butt, *supra* note 82, at 412.

[101] Rawin Leelapatana & Abdurrachman Satrio Pratomo, *The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia*, 14 Int'l Comp. L.J. 497, 519 (2020).

[102] Butt, *supra* note 82, at 412. *See also* Simon Butt, *The Constitutional Court and Minority Rights: Analysing the Recent Homosexual Sex and Indigenous Belief Cases*, *in* Contentious Belonging: The Place of Minorities in Indonesia 55, 63 (Greg Fealy & Ronit Ricci eds., 2019).

arguments are meaningless and that Indonesian law is based on divine law, then it follows that any law is open to challenge on the grounds that it does not reflect religious sensibilities."[103]

The majority has also rejected AILA's application without debunking the arguments of the dissenters. They have never repudiated the claim that the Indonesian Constitution is "Godly." Nor have they rejected the claim that this constitutional identity implies the existence of a "Godly values repugnancy test."[104] Their arguments were purely functional: the Constitutional Court cannot function as a positive legislator. The majority has even added the following disclaimer:

> That these aforementioned considerations do not imply that the Court rejects the notion of "[legal] reform" from the applicants as reflected in their petition. It also does not imply that the Court believes that the criminal law norms that are contained within the Criminal Code, especially those that were petitioned by the applicants, are already comprehensive. The Court is only stating that the norms within the articles of the Criminal Code that were petitioned by the applicants are not contrary to the 1945 Constitution.[105]

This statement indicates that the majority has not entirely excluded the idea of a "Godly values repugnancy test"; what they have refused to do is to expand the substance of an existing law when that law does not encapsulate all that is mandated by "Godly values."[106]

In fact, in the debate that followed the *LGBT* case, operationalized expressivist argument has been reiterated to push the People's Representative Council to criminalize these acts. For instance, when asked to respond to the *LGBT* case, former Chief Justice of the Indonesian Constitutional Court Mahfud MD asserted a similar operationalized expressivist argument that criminalization of sex outside marriage and homosexual sex is mandated by the Constitution and thus needs to be pursued by the lawmakers. He asserted that "the fundaments of our Constitution stipulate that LGBT must be prohibited. It is contrary to our Constitution."[107] He even went as far as stating that "LGBT and *zina* need to be punished more heavily. . .. If I were the judge, I would have granted the request."[108] Although he agreed with the majority opinion that the Indonesian Constitutional Court cannot function as a positive legislator,[109] the opinion of Mahfud MD indicates that operationalized expressivism may still be persuasive for various judicial actors in Indonesia.

Additionally, as long as the Constitution remains "vague" with regard to the role of religion in Indonesia, there will always be a possibility that conservative (judicial) actors would interpret references to "belief in One God" as providing a constitutional

[103] Bourchier, *supra* note 33, at 729.
[104] Butt, *supra* note 82, at 413.
[105] Constitutional Court, Decision No. 46/PUU-XIV/2016, at 452, Dec. 14, 2017 (Indon.).
[106] Butt, *supra* note 82, at 413.
[107] Mahfud MD's statement in Indonesia Lawyers Club, *Tegas! Inilah Komentar Prof. Mahfud MD Soal Zina dan LGBT* [*Firm! Here is the Comment of Professor Mahfud MD Regarding Unlawful Sexual Intercourse and LGBT*], YOUTUBE at 17'45" (Dec. 19, 2017) www.youtube.com/watch?v=KMiIa-zyzGg.
[108] *Id.* at 19'05".
[109] *Id.*

obligation to ensure that all laws are in line with religious values.[110] For instance, in as early as 1973, former Minister of Internal Affairs of Indonesia and renowned expert of Islamic and customary laws Hazairin already pondered whether Article 29(1) of the Indonesian Constitution is merely declaratory or may also have a normative element.[111] He argued that the term "belief in One God" means "the sovereignty of Allah," as the Preamble to the Constitution also contains the phrase "By the grace of Allah Almighty. . .."[112] Thus, for Hazairin, Article 29(1) implies that all laws must be consistent with the rules of religions that are recognized in Indonesia, particularly rules that are related to morality.[113] He even lamented societies without Pancasila, as for him societies that are only reliant on human rights and freedoms and the rule of law are providing "avenues for the growth of Dajjal (Antichrist) and atheism" that would lead to "diabolism" and the people being dominated by "Satanic acts" such as *zina* and homosexuality.[114] This indicates that references to "belief in One God" in the Indonesian Constitution remain prone to operationalized expressivism.

5. Conclusion

The present article has explored how operationalized expressivism can initiate a constitutional change through judicial interpretation. Due to its appeal to primordial identity or element of identity, operationalized expressivism remains persuasive in justifying an effort to initiate a constitutional change through judicial interpretation. In the case of Indonesia, a country where around 96% think that belief in God is necessary in order to be moral,[115] operationalized expressivism based on religion is particularly weighty. Consequently, operationalized expressivism may still be raised by a (conservative) majority in the future in order to introduce the "Godly values repugnancy test" and thus initiate a change to the Indonesian Constitution.

Ran Hirschl has observed in his book *Constitutional Theocracy* that "[o]ne of the most fascinating but seldom-explored phenomena in comparative constitutional law is the growing reliance on constitutional courts and their jurisprudential ingenuity to block the spread of religiosity or advance a relatively universalist interpretation of sacred texts."[116] This article has explored the other side of the coin by demonstrating not only how courts may use operationalized expressivism to fulfill a conservative religious agenda, but also how such an interpretation can initiate a transformation of the constitutional order itself. Had Judge Akbar not been arrested for bribery, it is

[110] Alfitri, *supra* note 34, at 389, 393.

[111] Hazairin, Demokrasi Pancasila [Pancasila Democracy] 14 (1973).

[112] *Id.* at 16–18.

[113] *Id.* at 18–20, 69.

[114] *Id.* at 70–1.

[115] Christine Tamir, Aidan Connaughton, & Ariana Monique Salazar, *The Global God Divide: People's Thoughts on Whether Belief in God Is Necessary to be Moral Vary by Economic Development, Education and Age*, Pew Res. Ctr. (July 20, 2020), www.pewresearch.org/global/2020/07/20/the-global-god-divide/.

[116] Ran Hirschl, Constitutional Theocracy 103 (2010).

likely that the "Godly values repugnancy test" would have been part of the majority opinion, and when this repugnancy test is applied in subsequent cases, the change would become "consolidated" under Indonesian constitutional law.

Compared with other works on constitutional change through judicial interpretation,[117] the findings in this article suggest that the role of operationalized expressivist reasoning in pushing for such a change should be considered by comparative constitutional scholarship. However, because of the specific scope of the study, this research has not demonstrated a concrete example of how a constitutional convention *has been* formed through the use of operationalized expressivism. Rather, the focus of this article is to show the potential of such a reasoning being developed into a consolidated jurisprudence in the Indonesian legal context, and how the reasoning itself may be persuasive in a conservative society. More research focusing on other jurisdictions is required to provide a comprehensive understanding of the interplay between a constitutional convention and operationalized expressivism.

With the prevalence of expressivist provisions in constitutions around the world, the terrain of possibilities for this sort of research is vast. As an illustration, the declaration of Islam as the state religion under Article 3(1) of the 1957 Malaysian Constitution has been interpreted expansively by conservative judges to establish the primacy of Islamic norms in the Malaysian constitutional order.[118] Similarly, Article 2 of the 1971 Egyptian Constitution (as amended in 1980), which declares that Shari'a is the chief source of law, has been construed as requiring that all laws that are passed after this particular clause was inserted into the Constitution (22 May 1980) must be consistent with rulings of the Shari'a whose meaning and authenticity are unambiguous.[119] This is despite the criticism from Hossam Issa that Article 2 does not contain any objective norm for a constitutionality review and thus can only be enforced politically against the legislature.[120] These examples point to the use of operationalized expressivism by constitutional interpreters, and more studies are needed to appreciate the extent to which the use of operationalized expressivism has led to a constitutional change through judicial interpretation in different jurisdictions.

This research has also not delved into how judicial interpreters may seek to limit the impact of operationalized expressivism in changing the constitution. In the case of *Caleb Orozco v. Attorney General of Belize*, the Supreme Court of Belize had to decide whether the phrase "shall be founded upon principles which acknowledge the supremacy of God" in the Preamble to the Constitution may be used to quash a petition to decriminalize homosexual sex.[121] In response, the Supreme Court held that "the reference to God and the Creator does not import religious principles into the interpretation of the Constitution. The plain language of the Constitution must be given a

[117] *See, e.g.*, Albert, *supra* note 85.

[118] Yvonne Tew, *Stealth Theocracy*, 58 Va. J. Int'l L. 31, 58–60 (2018).

[119] *See* Clark Lombardi, State Law as Islamic Law in Modern Egypt 174–99 (2006).

[120] *See* Hossam Issa, *L'État de droit en Egypte, mythe idéologique et réalités politiques* [*The Rule of Law in Egypt: Ideological Myth and Political Reality*], *in* L'État de droit dans le monde arabe [The Rule of Law in the Arab World] 345, 350 (Ahmed Mahiou ed., 1997). For a discussion, see also *id.* at 159–62.

[121] Supreme Court, Claim No. 668 of 2010, Judgment, Aug. 10, 2016 (unreported) (Belize).

liberal and purposive interpretation."[122] More in-depth research that focuses on this sort of judgment is required in order to understand the type of reasonings that may be used to "counteract" operationalized expressivism.

Furthermore, the substantive scope of this article only covers the introduction of a "Godly values repugnancy test" as a yardstick for constitutional review. More research is needed on whether there are other types of constitutional changes that may be produced by operationalized expressivism. Nevertheless, with the *LGBT* case as a starting point, it is hoped that more attention will be paid to the study of constitutional change through judicial interpretation with the use of operationalized expressivism.

[122] *Id.* ¶ 57.