

ISLAMIC CONSTITUTIONALISM: SOCIAL MOVEMENT AND THE FRAMEWORK OF THE INDONESIAN CONSTITUTION

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Abstract:

The main purpose of this article is to discuss Islamic constitutionalism in the context of Indonesian social movements. Constitutionalism is part of the study of constitutional law when the discussion focuses on the concept of limiting the power of the government. Using historical and sociological approaches, this article examines socio-political circumstances in Muslim society and their relationship to the spirit of constitutionalism in Indonesia. Indonesia does not explicitly name any particular religion in its Constitution, even though most of its population is Muslim. After a series of constitutional reforms over 1999–2002, there was no formalization of Islam in the Constitution. Two important academic questions arise when dealing with this phenomenon. First, to what extent are Indonesia's religious social movements involved in constructing the narrative of constitutionalism? Second, how do the spirit of constitutionalism and Islam play a role in strengthening Indonesia's Constitution? This article notes that some Muslims in Indonesia have been striving to build a narrative of Islamic constitutionalism through social movements since the nation's pre-independence era. Nevertheless, this Islamic constitutionalism has not resulted in the formalization of an Islamic constitution in Indonesia due to several factors: the historical roots of the nation's establishment, the pluralist stance of

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Indonesia's mainstream civil Islamic movements, and the presence of the Pancasila as the state ideology. This article also reveals that Indonesia's Muslim majority and religious authorities play a role in building the spirit of constitutionalism; however, the formalization of a specific religion as the basis of the constitution has never been realized in Indonesia.

Keywords: Constitution, Islamic Constitutionalism, Islamic Social Movement.

I. INTRODUCTION

Since the beginning of Indonesian history, the nation has had a strongly heterogeneous social composition. Numerous ethnic and religious identities were involved in the journey of the state's formation. This heterogeneity had a major impact on the birth of the multicultural Indonesian state and formed the character of pluralism in Indonesian constitutional law. Such pluralism is manifested in the various ethnic, religious and cultural values in the basic rules of the state. This condition of diversity, termed constitutional pluralism by Neil Walker, has a more heterarchical than hierarchical pattern. In such a situation, the various contents of a Constitution tend to be more interconnected and complementary to each other, rather than being sequential in rank.¹ A constitution is often defined in legal terms as the basis for an entire legal system, formed by the consensus of a community with the aim of maintaining the running of state power. Constitutions are usually formed by the desire or spirit to exercise control that limits the authority and power of rulers. This spirit is known as constitutionalism.

Indonesia has had interesting experiences in constitutions and constitutionalism. Prior to the nation's 1945 declaration of independence, there was considerable debate over the constitution and the basis of the state. The minutes of the Investigating Committee for the Preparation for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, BPUPKI) indicate there was vigorous discussion on the form of the basic identity of the nascent state. Three

¹ Neil Walker, "The Idea of Constitutional Pluralism," *The Modern Law Review* 65, no. 3 (2002): 317–59.

major voices of identity emerged from the nation's founding fathers, reflecting the influential ideologies of the time, namely, democratic nationalism, socialism-communism, and Islamic nationalism. The determination of the ideology to be used as the basis of a state is highly relevant to the study of constitutionalism. The spirit and values present in constitutionalism reflect the notion that power must be controlled by values originating from an ideology, be it religious, nationalist or some other political ideology. Therefore, the values of an ideology shape the corresponding notion of constitutionalism.

After its declaration of independence, Indonesia has continued to face debates on what kind of values should be the basis for exercising control over power. Although this debate formally ended with the adoption of the state ideology, Pancasila, and the 1945 Constitution of the Republic of Indonesia, the discourse on the values that underlie the nation's constitutionalism has persisted. This 'unfinished' debate was confirmed by events such as the enactment of a provisional constitution in 1950, the dissolution of the Constituent Assembly in 1959, the emergence of rebel movements, and, more recently, calls to Islamize the Constitution.

Unfortunately, the noisy debate over the values of constitutionalism has often been accompanied by a series of broad social conflicts. Islam, the biggest religion in Indonesia, has been in the global spotlight due to its association with several movements that demand radical changes to the values and systems of state. Indonesia's reform era, which began in 1998, was marred by the emergence of radical movements that used terror and violence. Some people consider the emergence of radical movements a 'necessary' phenomenon in a state in political transition.² However, along with two decades of democratization in Indonesia, these radical movements still persist. Moreover, they even proliferate into new movements with new methods, patterns, and strategies to strengthen the discourse

² Paul J. Carnegie, "Democratization and Decentralization in Post-Soeharto Indonesia: Understanding Transition Dynamics," *Pacific Affairs* 81, no. 4 (2009): 515–25; Quintan Wiktorowicz, *The Management of Islamic Activism: Salafis, the Muslim Brotherhood, and State Power in Jordan* (SUNY Press, 2001); Greg Barton, *Jemaah Islamiyah: Radical Islamism in Indonesia* (NUS Press, 2005).

of Islamic constitutionalism in the public sphere.³ Thus, the continuation of the democratization process in Indonesia has not signified the death of the movements that espouse radical change to the state's values and system.

The democratization that commenced following the resignation of long-serving authoritarian president Suharto in 1998 was a strategic response to the nation's financial, political, and social problems. After decades of a repressive regime, democratization provided hope for those who rejected the use of the state for religious purposes, yet it also gives a place for religious interests. A democratic political mechanism will provide benefits for Muslims as the nation's majority religious population. As the majority, the position of the Muslim community's voice will be more decisive in giving direction to the struggle of the Indonesian people. This is because a democratic political mechanism will place each political group proportionally. In addition, a rational and healthy democratic mechanism, rather than authoritarian rule, will certainly be more legitimate to formalize Islamic teachings.⁴

The condition of democratization after Suharto's resignation sparked the formation of numerous new political parties, including Islamic parties.⁵ During the Suharto era, the only permitted Islam-oriented party from 1973 to 1998 was the United Development Party (*Partai Persatuan Pembangunan*, PPP), which had been required since 1983 to have Pancasila as its sole foundation or principle. Following the fall of Suharto, PPP made Islam its principle. Other Islamic parties formed after Suharto's resignation included the Crescent Star Party (*Partai Bulan Bintang*, PBB), Justice Party (*Partai Keadilan*, PK), Nahdlatul Ulama Party (*Partai Nahdlatul Ulama*, PNU), and Ummah Awakening Party (*Partai Kebangkitan Umat*, PKU). Two other parties that contested the 1999 general election were based around the leaders of Indonesia's two largest Muslim organizations, namely the

³ Muhammad Abzar Duraesa and Muzayyin Ahyar, "Reproliferation of Islamist Movement in Surakarta: Trajectory and Strategy in The Post Democratization Indonesia," *DINIKA: Academic Journal of Islamic Studies* 4, no. 2 (December 19, 2019): 201, <https://doi.org/10.22515/dinika.v4i2.1637>; Muzayyin Ahyar, "Islamic Clicktivism: Internet, Democracy and Contemporary Islamist Activism in Surakarta," *Studia Islamika* 24, no. 3 (December 31, 2017): 435–68, <https://doi.org/10.15408/sdi.v24i3.4859>.

⁴ Abdul Ghofur, *Demokratisasi dan Prospek Hukum Islam di Indonesia: Studi atas Pemikiran Gus Dur [Democratization and the Prospect of Islamic Law in Indonesia: A Study of Gus Dur's Thoughts]* (Yogyakarta: Walisongo Press and Pustaka Pelajar Press, 2002), vi.

⁵ Islamic parties in Indonesia are characterized by having Islam as their founding principle.

National Awakening Party (*Partai Kebangkitan Bangsa*, PKB) of Nahdlatul Ulama leader Abdurrahman Wahid and the National Mandate Party (*Partai Amanat Nasional*, PAN) of Muhammadiyah chairman Amien Rais. While Wahid and Rais were both pro-Pancasila, other Muslims sought to voice their aspirations for the implementation of Islamic law in Indonesia through various Islamic organizations. For instance, the Islamic Defenders Front (*Front Pembela Islam*, FPI), the paramilitary Laskar Jihad, the Indonesian Mujahidin Council (*Majelis Muhahidin Indonesia*, MMI) and Hizbut Tahrir.

The boisterous voice of democratization, which is partly a manifestation of Islamic constitutionalism, continues to be heard in various regions in Indonesia. Several Muslim communities want some degree of Islamic law in their own regions, or at least the enactment of sharia-based regional policies. Such demands stem from a desire to provide a natural place for Islamic law in Muslim-majority Indonesia, but the results have prompted debate on the extent to which Indonesian law should be shaped by Islamic law.

The above phenomena can certainly be related to the constitutionalism discourse, the study of which has a broad scope in Indonesia. All phenomena related to the constitutionalism discourse have relevance to two other important variables: Islam and social movements. Muslim politicians seeking popularity tend to amplify their religious credentials by espousing basic Islamic values of constitutionalism through social movements as a means of mobilization. This study raises several academic questions regarding the interplay of dynamics between constitutionalism, Islam, and social movements in Indonesia. For example, are religious social movements involved in constructing the narrative of constitutionalism? And how do Islam and the spirit of constitutionalism play a role in strengthening the Indonesian Constitution? This article explores the discourse of constitutionalism within the framework of social movements in Indonesia, such as the debate over Islamic constitutionalism, the voice of Islamic constitutionalism values, and practical efforts to institutionalize Islamic law in the framework of the Indonesian Constitution.

II. SOCIAL MOVEMENT AND ISLAMIC CONSTITUTIONALISM: A THEORETICAL FRAMEWORK

It is important to provide definitive theorization on the terms ‘social movement’ and ‘Islamic constitutionalism’ as used in this article. In general, social movement theory is used more in sociological and political studies than in legal studies. However, social movement theory in this article is presented as a perspective in looking at legal phenomena, especially constitutional law in Indonesia. Thus, legal studies would no longer seem incompatible with other academic approaches. Therefore, social movement theory can be juxtaposed with interdisciplinary legal studies, as demonstrated by the connection between law and politics. Social movement theory is one of the sub-discussions of political science, while law is a main product of politics and political struggle. Scholars have proposed various theories on social movement in line with their own idiosyncrasies. This article will now look at three categories of social movements and their characteristics.

First, a social movement is a group of people who seek to build a radical new social order. This type of social movement is usually not only against the existing social order and government, but also tries to make significant changes in society. Second, a social movement is a political activity in which the non-elite attempt to challenge the power of the elite. People involved in this type of social movement usually lack political influence, social prestige, and abundant capital. Their interests are not routinely articulated or represented in the political system. The third type of social movement is defined as political activities with confrontational and disruptive tactics, such as occupying vital objects, boycotting businesses and blocking roads. This third type of social movement tends to have more back-up power and is more legally, socially, and politically literate, so the movement can have a wider influence.⁶

A social movement grows when it gains the support of resources and successfully mobilizes them, engaging in collective actions and networking to

⁶ Aribowo, *Peta Teori Gerakan Sosial [Map of Social Movement Theory]* (Surabaya: Airlangga University Press, 2020), 10.

amplify its goals. Yet a well-organized movement may not succeed in achieving change unless it gains the support of elements of the political elite. Indeed, the opportunism of the political elites is one of the variables driving social movements to form a force. This is seen when the political elites attempt to seize opportunities created by protest movements by proclaiming themselves as defenders of the people's aspirations. Sidney Tarrow notes that political opportunities are shaped and seized amid the interaction between social movement actors and political parties.⁷

The development of social movements is also determined by the size and strength of available resources and to what extent they are properly mobilized. Tarrow explains that in order for the mobilization process to be used properly, there are three important elements that must run symbiotically in a social movement: formal organization, mobilizing structure, and organization of collective action. Tarrow says the actors of the mobilization structure in a movement must be internalized in other systems controlled by high-level leaders, both those with legitimate power and charismatic leaders.⁸

Other scholars of social movement theory, such as McAdam, McCarthy and Zald, classify the organizational structure of social movements as either formal or informal. For the sake of mobilizing social movements, these two organizational structures use cultural and ideological frames.⁹ Such social movements demonstrate the collective challenge posed by a number of people who share common goals and solidarity. In simplifying all social movement theories, there are several key words in understanding social movements. First, a social movement is an attempt to respond to a condition that is considered less than ideal. Second, social movements require involvement of the general public in order to achieve social change. Furthermore, in some cases, social movements involve identity conflicts, often leading to struggles in identity politics, including Islamic identity, resulting in political activism.¹⁰

⁷ Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge University Press, 2011).

⁸ *Ibid.*, 136.

⁹ Charles Tilly, Ernesto Castaneda and Lesley J. Wood, *Social Movements 1768-2012* (Routledge, 2015).

¹⁰ Quintan Wiktorowicz, *Islamic Activism: A Social Movement Theory Approach* (Indiana University Press, 2004).

Another variable that needs to be clearly theorized is the term 'Islamic constitutionalism'. We need to refer to constitutionalism as the basic concept of this particular terminology. History shows the idea of constitutionalism been part of the journey of human civilization. For example, in the ancient Greek and Roman civilizations, the words *politeia* (Greek for 'constitution') and *constitutio* (Latin for 'constitution') could refer to the act of establishing, a determining composition, or an administrative enactment. In England, the word constitution appeared in the 12th century in the Constitutions of Clarendon, a set of legislative procedures issued by King Henry II in 1164 in an effort to exercise state control over the Roman Catholic Church. In ancient times, the term constitution did not have its contemporary era meaning of the entire legal framework of a state. Although the term constitutionalism was not recorded until 1835, royal decrees, elite agreements and political charters could be interpreted as classical ideas of constitutionalism. The Medina Charter, the Magna Carta, and the United States Bill of Rights all reflect the existence of the idea of constitutionalism. Presently, the legal term 'constitution' is interpreted as a basic law determining the fundamental principles of how society exercises control over power in order to attain common goals.¹¹

Universalism and centralism of power over the centuries became popular systems of power, manifested in kingdoms, empires and caliphates. The existence of such centralized power systems, led by a single authority, resulted in abuse of power, arbitrariness and corruption. Another problem was that holding power over a vast area made it difficult for a single political ruler to effectively retain control. As a result, disintegration and fragmentation of authoritative political rule was inevitable. In addition, internal conflicts and power struggles among the ruling elite make power politically weak. On the external factor, regional nobles or leaders with different identities from outside rulers would demand their rights. Regional areas consider their identity eroded by the invasion of power.

¹¹ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (New York: Cornell University Press, 1966); William G. Andrews, *Constitutions and Constitutionalism*, 3rd edition (New Jersey: Van Nostrand Company, 1986); William Montgomery Watt, *Muhammad: Prophet and Statesman* (Oxford: Oxford University Press, 1961); Ni'matul Huda, *Hukum Tata Negara Indonesia [Indonesian Constitutional Law]* (Depok: Raja Grafindo Persada, 2005).

This resulted in a spirit of rejection of colonialism, which stoked the spirit of nationalism. The concept of the nation-state was then formed as a manifestation of the thought of 'one state, one nation'.¹² The experience of people who have long lived under centralized power prompts them to desire the limitation of power. Such limitation of power was implemented to avoid the despotism of rulers, feudalism, and authoritarianism. This condition gave birth to the spirit of constitutionalism and the formulation of a modern constitution.

A wave of constitutionalism emerged following the French Revolution and later mushroomed in some newly independent states, such as Indonesia, after the end of World War II. Modern constitutionalism appears with a form of consensus which has three important elements. First, the common goals of society. In other words, general acceptance of the same philosophy of state. Second, consensus regarding the rule of law as a foundation of state organizations. Third, consensus regarding certain state institutions and constitutional procedures.¹³ Some scholars have argued that protection of human rights is also an important element in the constitutionalism discussion.¹⁴

When the spirit of constitutionalism is present in countries with a majority Muslim population, it is adapted to Islamic values, which are believed to be fully implemented. The heated discussions of Islamic constitutionalism cannot be separated from the context of the development of the Arab world during and following the Gulf War. Since the Gulf War, scholars have conducted several studies on the position of Islamic constitutionalism in democratic governments. The issue of Islamic constitutionalism in the Muslim world, especially in countries with democratic systems, signifies a unique aspect of constitutional thought. Modern constitutionalism is closely related to the development of the Western concepts of democracy, secularization, human rights, political liberation, and freedom. Meanwhile, Islamic values have certain limitations in all the concepts of constitutionalism that have developed in the Western world.

¹² Ernest Gellner, *Nations and Nationalism* (New York: Cornell University Press, 2008).

¹³ Andrews, *Constitutions and Constitutionalism*.

¹⁴ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara [Introduction to Constitutional Law]* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006).

Islamic constitutionalism prioritizes values derived from Islamic jurisprudence; the Qur'an, sunnah (traditions and practices of the Prophet Muhammad), and several other sources of *fiqh* (Islamic jurisprudence). In this understanding, debates regarding the implementation of Islam in state affairs arise among Muslims. Some Muslims argue that Islam only emphasizes a religious value that can be adapted to any condition and in any modern political system. Meanwhile, other groups consider that Islam is not only a religious value, but also a system that technically regulates human life as a whole: social, political, cultural, and economic life. Thus, Muslims should follow the system applied by the Prophet Muhammad and other early Muslims to attain holistic Islamic teachings.¹⁵

In Indonesia's experience, the spirit of Islamic constitutionalism also occurs in the process of constitution formulation. The implementation of a constitution is considered appropriate with Islamic values. The question arises on how Islamic is the Indonesian Constitution? Siddiq Armia argues the implementation of the Constitution is in line with the idea of constitutionalism voiced by the majority of the population, including the source of the idea of constitutionalism. The application of a constitution that is sourced from the basic norms of Islam is popularly called an Islamic constitution. However, the application of a constitution in some Islamic countries still faces several problems in the interpretation of Islamic law sources: the Qur'an and the Hadith. Along with the many schools of thought and interpretation, the application of state law has the potential for multiple interpretations. Despite its Muslim-majority population, Indonesia has never explicitly declared the application of Islamic constitutionalism. However, on a practical level, many Indonesian Muslims recognize that basic Islamic principles have been implemented in the application of the Constitution. The basic principles of Islamic constitutionalism in the Indonesian Constitution are represented in several norms such as protection of the right to life, guarantee of

¹⁵ Azizah Al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24, no. 1 (1992): 1–27; Moamen Gouda, "Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective," *Constitutional Political Economy* 24 (March 1, 2013): 57–85, <https://doi.org/10.1007/s10662-012-9132-5>.

the right to religion, and the protection of property and family.¹⁶ Nevertheless, with the existence of multiple interpretations of Islamic law, the Constitutional Court's decisions are the reference for the official interpretation of Islamic law in Indonesia.¹⁷

As explained above, there is dynamic interplay between social movements and the spirit of constitutionalism. Initially, the sense of belonging to a constitution originated from social movements. A well-framed social movement may lead to an easy mass mobilization. A wave of mass mobilizations can bring the discourse of constitutionalism into a discussion of the formalization of ideas and values of political identity to be implemented into a constitution.

III. ISLAMIC NARRATIVES IN THE FORMATION OF THE INDONESIAN CONSTITUTION

During the formulation of the Indonesian Constitution in 1945, the nation's founding fathers debated whether and how to include religious narratives in the Constitution. The historical evidence of this discussion can be seen from three important debates among the drafters of the constitution. First, they discussed whether Indonesia should be established in the form of a unitary state, a federal state, or an alliance of states. Second, they debated whether Indonesia should be a republic or a monarchy. Third, they debated the relationship between religion and the state. Record indicate that some of the founding fathers quoted from the Qur'an in their speeches at the BPUPKI plenary session. The quotation of Qur'anic verses aimed to strengthen the opinion that constitutionalism is compatible the noble values of religion.¹⁸ There was also a strong debate over whether the new constitution should include a draft preamble, which was known as the Jakarta

¹⁶ Muhammad Siddiq Armia, "Implementing Islamic Constitutionalism: How Islamic is Indonesia Constitution?" *Al-Adalah* 15, no. 2 (2018): 437–50.

¹⁷ Alfitri Alfitri, "Putusan Mahkamah Konstitusi sebagai Tafsiran Resmi Hukum Islam di Indonesia [Constitutional Court Decisions as an Official Interpretation of Islamic Law in Indonesia]," *Jurnal Konstitusi* 11, no. 2 (May 20, 2016): 296–314.

¹⁸ Mohammad Yamin, "*Himpunan Risalah Sidang-Sidang Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia Dan Panitia Persiapan Kemerdekaan Indonesia Yang Berhubungan Dengan Penyusunan Undang-Undang Dasar 1945 [The Compilation of Minutes of Plenary Sessions in the Investigating Committee for the Preparation for Indonesian Independence and the Committee of Indonesian Independence Preparation]*" (Sekretariat Negara Republik Indonesia, 1959), quoted from several documents on preparations for the Constitution's formulation.

Charter and included a seven-word stipulation that Muslims should follow Islamic law. The Jakarta Charter, formulated by BPUPKI on June 22, 1945, was later dropped on August 18, 1945. The Jakarta Charter only become a historical document through a decree of President Sukarno in 1959, when he abrogated Indonesia's 1950 Provisional Constitution and reverted to the 1945 Constitution. Through the discussion and debate on the Constitution, religious narrative in the formulation of the Constitution has colored the spirit of constitutionalism in Indonesia.

Many religious narratives were recorded long before Indonesia's wave of political reform commenced in 1998. However, in order to avoid too broad a discussion, the authors only explore various attempts to voice religious narratives related to constitutionalism from the reform era to the present. A decade after the onset of reformation, many social movements were formed with various identities. Some of these social movements participate in responding to the nation's reconditioning. Some groups take the role of social movements through political parties as a practical political movement. At the beginning of the reform era, there were many calls for Islamic constitutionalism, including the institutionalization of Islamic law.

During the Suharto regime (1965-98), the institutionalization of Islamic law was limited to family law issues. For instance, the issuance of Law No. 1 of 1974 on Marriage, Government Regulation No. 28 of 1977 on Waqf, Law No. 7 of 1989 on Religious Courts, and Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI). During the transitional government under President B.J. Habibie (1998-99), the direction of the national law, as outlined in the Broad Guidelines of State Policy (*Garis Besar Haluan Negara*, GBHN) underwent a fundamental change as a product of the reform era. Part of the 1999 GBHN (Chapter IV, A.2) stated, among others: "...to organize a comprehensive and integrated national legal system by recognizing and respecting religious law and customary law as well as updating colonial heritage laws and discriminatory national laws, including gender inequality and

their incompatibility with Reformation demands through legislation programs.” Following a general election in 1999, the new government issued Law No. 25 of 2000 on the National Development Program for 2000–2004. This law’s General Elucidation of Chapter III, on Legal Development, affirms:

“The enforcement of the rule of law based on the values of truth and justice as well as respect for universal human rights has been degraded. This condition was, among others, because the government in the past did not represent the aspirations of the people and development needs based on religious law and customary law in legal development. Efforts to be made are to formulate and form aspirational laws and regulations by recognizing and respecting religious and customary laws through increasing the role of the National Legislation Program...”

From this affirmation, it can be understood that the development of national law is broadly taken from three legal sources: customary law, religious law, and external law (the colonial legal system). In the early reform era, the government also issued two laws relating to the interests of Muslims: Law No. 17 of 1999 on Organization of the Hajj, and Law No. 39 of 1999 on Zakat Management. The presence of these two laws does not shift the position of Islamic law far from its original position, namely as a law that regulates family law issues.

During the Suharto era, the government did not explicitly provide a place for Islamic law in the national legal system. But now, in an era of reform that puts considerable emphasis on democracy, there has been greater community involvement in decision-making for public affairs and free competition in the arena of values that may become a source of law. For example, the Acehese people wanted Islamic law in their province, which has special status. So strong were their demands, that finally, through Law No. 44 of 1999 in conjunction with Law No. 18 of 2001, the central government implemented Islamic law in the province of Nanggroe Aceh Darussalam. In 2006, this legislation was repealed and replaced with Law No. 11 of 2006 on the Government of Aceh. The implementation of Islamic law in Aceh prompted some Muslims in various regions to urge their

local governments and legislative assemblies to implement Islamic law in their regions through the issuance of sharia-based regional regulations.¹⁹

Research on several movements that demand the implementation of Islamic law in Indonesia shows the assumption that reform of Islamic society or Islamization can take place through the legal system, institutions, and state instruments. Likewise, the application of sharia is considered effective in overcoming various kinds of problems faced by the regions – such as crime and prostitution – and those faced by the Indonesian people. However, as happened in the political arena during the Constituent Assembly period of 1956-59 and during the reform era, the issue of the application of sharia bylaws, introduced in a number of regions in Indonesia, has sparked fierce controversy. Apart from the government itself, the nation's two largest mass Muslim organizations, Nahdlatul Ulama (NU) and Muhammadiyah, and various non-governmental organizations strongly opposed the implementation of sharia law.

The spread of sharia bylaws in several regions in Indonesia (besides Aceh) in the early 2000s was criticized by the Ministry of Home Affairs. The Director General of Regional Autonomy at that time, Oentarto Sindung Mawardi, for example, suggested the central government would cancel sharia regulations, because they were contrary to higher regulations. Likewise, then-Home Affairs Minister Hari Sabarno opposed a regional regulation governing the implementation of Islamic law in Pamekasan reGENCY of Madura Island, East Java. According to him, the regulation must be revoked by the local government and the local legislative assembly because it contradicted Law No. 22 of 1999 on Local Government.

Such sharia bylaws are difficult to challenge by judicial review by the Supreme Court. Under the Constitution, the Supreme Court has no explicit authority to examine and to review sharia bylaws. The Constitutional Court is not allowed also to examine bylaws, even though their content intersects with the content of the Constitution. Hierarchically, the position of bylaws (*peraturan daerah*) is far

¹⁹ Ni'matul Huda, *Desentralisasi Asimetris dalam Negara Kesatuan Republik Indonesia: Kajian Terhadap Daerah Istimewa, Daerah Khusus, dan Otonomi Khusus [Asymmetrical Desentralization in the Unitary State of the Republic of Indonesia: A Study of Extraordinary Regions, Special Regions and Special Autonomy]* (Bandung: Nusa Media, 2014).

below law (*undang-undang*). The Supreme Court has authority to examine sharia bylaws only if they violate human rights norms regulated in human right laws.

The emergence of sharia bylaws continued to cause considerable controversy as the reform era continued. On June 13, 2006, 56 members of parliament from the Peace and Prosperity Party (*Partai Damai Sejahtera*) and the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia Perjuangan*) submitted a memorandum of refusal, asking the President to revoke various ‘anti-immorality’ regulations. Such regulations are part of the formalization of Islamic law in Indonesia. They are usually issued by local governments through sharia bylaws aimed at prohibiting sins in Islam, such as prostitution and drinking alcohol, and at upholding Islamic dress code. These regulations tend to have more basis in Islamic law, so their enactment is considered to violate the constitution and state ideology Pancasila. However, on June 27, 2006, 134 members of parliament from several political factions submitted a ‘counter-memorandum’ against the repeal of these anti-immorality regulations.

When the 1945 Constitution was amended over 1999–2002, there were calls for Article 29 on religion to be amended to include the Jakarta Charter’s ‘seven words’ obliging Muslims to follow Islamic law.²⁰ Significantly, NU and Muhammadiyah rejected the proposal. Their stance was issued in a joint press conference between NU chairman Hasyim Muzadi and Muhammadiyah chairman Ahmad Syafii Maarif on August 7, 2002. This rejection was based on the logical argument that the formalization of religion should be supported by culture and religious awareness. In other words, the formalization of Islam is not merely about an Islamic constitution, it also requires substantial religious implementation from Muslim society.

The amplification of Islamic constitutionalism re-emerged during a political fight ahead of the 2019 general election and presidential election. At that time,

²⁰ The Jakarta Charter was a constitutional document drawn up by members of BPUPKI in June 1945. The document later formed the basis of the preamble to the draft Indonesian Constitution. The Jakarta Charter included Pancasila, the first principle of which was written as “*Ke-Tuhanan dengan kewajiban menjalankan syariat Islam bagi pemeluknya* [Belief in God with an obligation to follow Islamic sharia for its adherents]”. The seven words “*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*” were removed in August 1945 and the principle was written as “*Ketuhanan yang Maha Esa* [Belief in the One and Only God]”.

Indonesian society was polarized between supporters of the two rival pairs presidential and vice-presidential candidates: Joko Widodo and his running mate Ma'ruf Amin, and Prabowo Subianto and his running mate Sandiogo Uno. A national religious narrative at that time was mobilized in a social movement known as the 'Action to Defend Islam [*Aksi Bela Islam*']'. This movement was a continuation of the mass rallies that had commenced in 2016 against then-Jakarta Governor Basuki 'Ahok' Tjahaja Purnama, an ethnic Chinese Christian, who was accused and later convicted of blasphemy against Islam. In the 2019 political battle, the Action to Defend Islam movement was transformed into a brotherhood movement called the Alumni Brotherhood 212 (*Persaudaraan Alumni 212*, PA 212), on another occasion the name was changed to Presidium Alumni 212. This movement raised the theme of Islam as a foundation in national life, resulting in a discourse on the Unitary State of the Republic of Indonesia with Islamic Law (*NKRI Bersyariah*, referred to here as 'Sharia Indonesia'). The issue was discussed at the Fourth Forum of Muslim Leaders (*Ijtima' Ulama IV*), arranged by sympathizers of the 212 movement. Calls for a Sharia Indonesia have long been voiced by controversial Muslim leader Habib Muhammad Rizieq Shihab, who is popularly known as Habib Rizieq. He started a discourse on Sharia Indonesia through his work titled *Wawasan Kebangsaan Menuju NKRI Bersyariah* (National Insight toward a Unitary State of the Republic of Indonesia with Islamic Law), published in 2012.²¹ The discourse gained greater public prominence when it was dedicated to the 21st anniversary of Rizieq's Islamic Defenders Front (*Front Pembela Islam*, FPI) and became one of the final decisions in the Fourth Forum of Muslim Leaders.

Proponents of the campaign for Sharia Indonesia have framed it as a representation of the aspiration of some Muslim communities. Their voice has been amplified in the political struggle related to the relationship between religion and the state in the democratic era. The discourse on Sharia Indonesia has faced criticism and opposition from various parties. Critics feel it exceeds the

²¹ Al-Habib Muhammad Rizieq bin Husein Syihab, *Wawasan Kebangsaan Menuju NKRI Bersyariah* [National Insight toward a Unitary State of the Republic of Indonesia with Islamic Law] (Jakarta: Suara Islam Press, 2012).

national consensus on the state ideology. The Unitary State of the Republic of Indonesia – as a state form – is the consensus reached by the nation’s founding fathers. Therefore, forming Sharia Indonesia would constitute a new format of statehood. Consequently, the concept of Sharia Indonesia needs to be carefully examined because it may polarize Indonesians.²²

The variety of responses from various groups to the Sharia Indonesia discourse is concrete proof of ongoing Islamic narratives voiced on the issue of constitutionalism.

IV. THE CONSTITUTION AND SOCIAL TRANSFORMATION OF INDONESIAN MUSLIM SOCIETY

Of the various constitutional reforms in Indonesia, the second amendment to the 1945 Constitution, conducted in 2000, involved the most additions of the word *agama* (religion). The word *agama* (translated in the official English version as ‘religion’, ‘religious’ and ‘religions’) is placed 12 times in the Constitution. In two instances, it relates to the presidential and vice presidential oath of office. In two other instances, it relates to the function of the Regional Representative Council (DPD), which participates in the discussion of draft laws and oversees the implementation of various laws, including those related to religion. In one instance, the word *agama* relates to judicial power within the Religious Courts. In another instance, it relates to efforts to promote and to develop education and culture. The other uses of the term *agama* appear in and Article 29 on religion.

The inclusion of the word ‘religion’ in the Constitution shows the state’s attention to existing religion in Indonesia. In other words, the constitutionalism of the Indonesian people is brought, in part, by religious enthusiasm. Then, what changes have occurred with the addition of ‘religious content’ to the Constitution? There are at least two national changes: first, legal changes and legal adjustments; second, national changes in social conditions, education, culture, and economic infrastructure.

²² Ali Akhbar Abaib Mas Rabbani Lubis and Syaiful Bahri, “NKRI Bersyariah: Praktik Spasial, Representasi Ruang, Ruang Representasional [Sharia Unitary State of the Republic of Indonesia: Spatial Practice, Space Representation and Representational Space],” *Al-Daulah: Jurnal Hukum dan Perundangan Islam* 10, no. 2 (October 3, 2020): 222–50, <https://doi.org/10.15642/ad.2020.10.2.222-250>.

A decade after the amendment to the Constitution, many religious aspirations were raised and some were formalized in statutory regulations. At the statutory level, eight laws now contain Islamic law, covering economy, justice, and halal products. These eight laws are as follows:

- Law No. 10 of 1998 on Banking
- Law No. 38 of 1999 on Zakat Management
- Law No. 41 of 2004 on Waqf
- Law No. 3 of 2006 amending Law No. 7 of 1989 on Religious Courts
- Law No. 19 of 2008 on State Sharia Securities
- Law No. 21 of 2008 on Sharia Banking
- Law No. 23 of 2011 on Zakat Management
- Law No. 33 of 2014 on Halal Product Assurance

With the existence of these laws with nuances of Islamic law, there are dozens of derivative regulations providing technical implementation of the laws. This proves the great extent to which the government is actively making legal adjustments stemming from the spirit of Islamic constitutionalism of the Indonesian people.

In addition to laws, one study shows there are 422 sharia-based regulations at the local level in the form of bylaws, gubernatorial/mayoral/regent-level regulations and decrees. The study, conducted by Dani Muhtada, highlighted three main points related to sharia regulation in Indonesia. First, the diffusion of sharia regulations in some parts of Indonesia is formed by internal and external factors. External factors include geographical conditions and the interaction of local policy actors with other religious actors. Meanwhile, internal factors include local political dynamics, in which political campaigns of feature religious identity. Thus, some local politicians campaign on a platform of Islamic values and regulations in order to attract votes. When votes have been gained, there is symbiosis regarding the respective interests of the local politicians and religious preachers. Second, sharia regulations in Indonesia could be implemented because of the closeness between the Indonesian Ulema Council (MUI), as an association

of authoritative Muslim scholars, and wider political networks. Third, the spread of sharia regulations in Indonesia is done through three important mechanisms: legal learning, competition, and familiarization among political elites from several regions adopting sharia bylaws.²³

The inclusion of religious words in the Constitution has also brought about a proliferation of social movements with religious themes. Without fear of being muzzled, religious activists can voice their aspirations about religion in a free public sphere. Public facilities easily become places to accommodate mass mobilizations of religious action. In the realm of education, many formal religious education institutions have been formed. Likewise, non-formal religious education has also proliferated. Islamic education institutions in the form of study centers, boarding schools (*pesantren*), and Islamic teaching groups (*majelis taklim*) have become widespread, from the national level to the local level. These religious education institutions receive increasing enthusiasm from the Muslim community.

Nevertheless, the growing presence of religion in the juridical-formal realm has become a dilemma. Violence in the name of religion is in common, as well as restrictions on religious civil liberties. Various cases of violence or religious conflicts in Indonesia show that regulations regarding the fulfillment of citizens' rights to practice their religion still face serious problems. According to theoretical studies, the regulation of religious rights and freedoms has many weaknesses. These weaknesses have the potential to hinder the fulfillment of people's rights to religion and to carry out religious rituals. Such shortcomings are commonly in the implementation of religious freedom and the misleading concept of the spectrum of human rights in the Constitution. One theoretical study shows the condition of freedom of religion nowadays could be a reasonable consideration for the fifth amendment to the Constitution, related to the regulation of religious rights and freedoms.²⁴

²³ Dani Muhtada, *Law and Local Politics: The Diffusion of Sharia Regulations in Indonesia* (Semarang: Badan Penerbit Fakultas Hukum Universitas Negeri Semarang, 2017).

²⁴ Muwaffiq Jufri, "Urgensi Amandemen Kelima pada Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 terkait Hak dan Kebebasan Beragama [The Urgency of a Fifth Amendment to the Indonesian Constitution on Rights and Freedom of Religion]," *Jurnal HAM* 12, no. 1 (April 22, 2021): 123–40, <https://doi.org/10.30641/ham.2021.12.123-140>.

The many narratives of constitutionalism in socio-political dynamics have an impact on Muslim behavior in Indonesia. The most obvious change is the emergence of Islamic movements, both small and large scale, local and national, through online and offline models. Several movements have brought a popular discourse on various Islamic schools of thought and behavior. The number of Islamic movements has contributed additional references to Indonesian Muslim societies in determining which Islamic teachings to follow. In fact, several new movements tried to challenge the dominance of Indonesia's older and largest mass Muslim associations, NU and Muhammadiyah.²⁵ Several decades ago, for example, NU and Muhammadiyah preachers were key figures in shaping the religious paradigm of Muslim society in terms of worship, Islamic teachings, and religious behavior. Currently, all Islamic movements have their own authorities for shaping religious behavior. In other words, NU and Muhammadiyah are no longer the only Islamic movements that have a national impact on Islamic teachings in Indonesia.

Unfortunately, this hectic profusion of Islamic movements plays a significant role in contributing to the tumultuous conflict of identity politics in every political moment. As a result, polarization continuously occurs between political groups that are considered to truly fight for Muslim aspirations and those allegedly impeding Muslim interests. In this condition, the competing narratives of Islamic constitutionalism issue interpretations on which national attitude is accordance with their movements.

Fortunately, the multiplicity of Islamic movements and voices of Islamic constitutionalism that have been present throughout history have not trapped Indonesia in a radical constitutional revolution. The Indonesian Constitution remains in its position of respecting plurality. The Constitution is not based on one particular religious identity as the basis of the state. It seems the spirit of Pancasila and the sense of nationalism are still too strong to be replaced by the quasi-nationalist spirit of Muslim movements that want Islam as the sole source of the Constitution.

²⁵ Najib Burhani, *Plural Islam and Contestation of Religious Authority in Indonesia*, 2018, https://www.academia.edu/36865699/Plural_Islam_and_contestation_of_religious_authority_In_Indonesia.

V. CONCLUSION: FAMILIARIZING ISLAMIC CONSTITUTIONALISM, BETWEEN 'ISLAMIZING' THE CONSTITUTION AND CONSTITUTIONALIZING ISLAM

What is the real narrative of Islamic constitutionalism in relation to social movements in Indonesia? In summing up this article, two important points can be highlighted as the answer. First, in terms of the relationship, the voice of Islamic constitutionalism is always accompanied by social movements. Such movements are increasingly able to mobilize more people in the era of democracy, especially in line with the present wave of political populism. Clearly, social movements are always side-by-side with the narrative of Islamic constitutionalism. Second, the narrative of Islamic constitutionalism is directed toward Islamizing the Constitution as an interpretative effort to disseminate Islamic and national values.

It needs to be clearly stated that Islamizing the Constitution through interpretation is not the same as formalizing Islam in the Constitution. Nevertheless, certain movements in Indonesia have strived to formalize Islam by having it explicitly written in the Constitution. The efforts to Islamize the Constitution through interpretation are commonly conducted by traditionalist Muslims. They argue the Constitution is already 'Islamic' because it has several values that are synonymous with many Islamic values. Meanwhile, the effort to constitutionalize Islam is made by formalist Muslims, who consider Islam should be the country's supreme law, therefore it should be written in the Constitution.

The painstaking efforts by formalist Muslims to constitutionalize or formalize Islamic law in Indonesia have tended to end in failure. Islam has never been formally written as a supreme law of the country. Nevertheless, formalizing Islam through technical regulation has been conducted successfully in specific legal acts, such as marriage law, Islamic finance, and religious courts. Since the reform era, there have been eight laws enacted that contain explicitly Islamic materials, and many sharia regional regulations have also been enacted. Finally, it is important to state that Indonesia has never been trapped into formalizing Islam in the Constitution because of three main factors. First, Indonesian Muslim society has been rooted in plurality since the early stages of Indonesia's state-

building. Second, mainstream Indonesian civil Islamic organizations, such as NU and Muhammadiyah, have a moderate interpretation of religion-state relations. Third, the stream of democratization in Indonesia is still dominated by the voice of Pancasila, which provides firm middle ground in the vigorous debate between a secular and an Islamic state. Therefore, the state ideology will direct Indonesian Muslims to believe that they do not need to formalize Islam in the state constitutional system.

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