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THE CONSTITUTIONAL COURT OF
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Note From Editors

Constitutional Review (ConsRev) is pleased to present its second issue of 2021. ConsRev is an international law journal published twice a year by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. Each issue focuses on a range of topics on constitutions, constitutional courts and their decisions, and related issues on constitutional law from around the world.

This issue provides six articles by seven authors. The first article, **Social Rights and the Turkish Constitutional Court**, is by Engin Yıldırım, a sitting justice of the Constitutional Court of the Republic of Turkey. His looks at why the Turkish Constitutional Court has often rejected requests for the annulment of legislation related to social rights, especially in cases with significant budgetary implications. He explains that although the Court tends to avoid reviewing matters considered the domain of the legislative and executive, it has not hesitated to protect social rights when they entail civil and political rights.

The second article, **The Religiosity of the Indonesian Constitution: Article 29(1) and its Interpretation**, is by Ahmad Rofii, a senior lecturer at the State Institute of Islamic Studies Syekh Nurjati Cirebon, Indonesia. He examines whether the inclusion of religious words in the amended Indonesian Constitution constitutes the establishment of a religious constitution. He also challenges the received theory of the religiosity of the 1945 Constitution, by focusing on the meaning and implications of its Article 29(1) on 'belief in the One and Only God'.

Our third article, **Housing as a Human Right within an Era of International Exceptionalism**, is by Erin Elizabeth Davis, an Immigration Attorney in Charlotte, North Carolina. She looks at the failure of the international community to protect the right to adequate housing, particularly among women and indigenous peoples. While housing

is often not an explicitly written constitutional right, Davis notes that jurisprudence of regional systems can foster international dialogue on mechanisms to uphold the right to housing and protect against forced evictions.

The fourth article, **Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law,** is by Cekli Setya Pratiwi. She is a PhD candidate at the Institute of Human Rights and Peace Studies of Mahidol University, Thailand, and a senior lecturer at the Law Faculty of the University of Muhammadiyah Malang, Indonesia. She evaluates the constitutionality of Indonesia's Anti-Blasphemy Law, which was challenged unsuccessfully three times within a decade at Indonesia's Constitutional Court. She argues that in dealing with the Anti-Blasphemy Law, the Court uses a narrow and limited recognition of human rights, which not only fails to protect minority religious groups but can also trigger public disorder.

The fifth article, **Socio-economic Origins of Constitutional Review in Central Asia: Political Economy and Politico-Historical Context as Defining Factors**, is by Saniia Toktogazieva. She is an Associate Professor and Coordinator of the Human Rights program at the American University of Central Asia in Bishkek, Kyrgyz Republic. Her article identifies the main factors behind the establishment of constitutional review in Central Asia. She then examines how those factors have shaped the institutional design of constitutional courts in parts of the former Soviet Union, paying close attention to political and economic interests.

The last article of this year's second issue is **Islamic Constitutionalism: Social Movement and the Framework of the Indonesian Constitution**, co-authored by Muzayyin Ahyar and Ni'matul Huda. Muzayyin is a lecturer at the State Islamic University of Samarinda in East Kalimantan, while Ni'matul is a Professor of Constitutional Law at Universitas Islam Indonesia in Yogyakarta, both in Indonesia. The authors provide an incisive assessment of Islamic constitutionalism in the context of Indonesian social movements. They find that while Indonesia's Muslim majority and religious authorities play a growing role in building the spirit of constitutionalism, a single religion is unlikely to become formalized as the basis of the Indonesian Constitution.

As another year closes, the Editors of ConsRev hope this issue, December 2021, will be beneficial to readers, providing new insight on constitutions, constitutional courts and related issues. As always, we hope our publication will inspire law professors, judges, scholars, legal practitioners, researchers and anyone interested in having an outlet for writing on law and related issues.

Social Rights and the Turkish Constitutional Court

Engin Yıldırım

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 188-202

Through a brief examination of the Turkish experience, this article endeavors to illuminate the debate on the role of constitutional courts in interpreting social rights. The Turkish Constitutional Court has in many cases rejected applications for the annulment of legislation related to social rights, on the grounds that it is within the legislature's discretion to determine public policy priorities based on economic resources and economic stability. This article suggests the Turkish Constitutional Court has narrowly interpreted constitutionally recognized social rights within the boundaries of the Turkish Constitution, with the notable exception of labor rights in individual applications.

Keywords: Individual Application, Justiciability, Labor Rights, Social Rights, Turkish Constitutional Court.

The Religiosity of the Indonesian Constitution: Article 29(1) and Its Interpretation

Ahmad Rofii

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 203-240

This paper examines the problem of whether the inclusion of religious words in the Indonesian Constitution is tantamount to the establishment of a religious constitution. By focusing on the Constitution's provision on "belief in the One and Only God" in Article 29(1), this paper challenges the received theory of the religiosity of the Constitution. To that end, the paper first investigates the doctrinal and historical implications of Article 29(1). Particular analysis concerns the implications of this constitutionalization for Islamic law. The Constitutional Court's decision on interreligious marriage is critically examined as an example of how the received theory is endorsed and articulated in the case of marriage. This paper argues that Article 29(1) concerns all religions, without any implied exclusion of non-monotheistic religions. Moreover, this paper affirms what is called the Pancasila state, located between an exclusively secular state and a religious or theocratic state. This arguably makes the notion of the religiosity of the Constitution unjustified. The Constitutional Court, however, has interpreted Article 29(1) in a strongly religious sense, leading to religious supremacy and, accordingly, is contrary to how the Constitution ought to be understood.

Keywords: Article 29(1), Constitutional Court, Indonesian Constitution, Interreligious Marriage Case, Pancasila.

Housing as a Human Right within an Era of International Exceptionalism

Erin Elizabeth Davis

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 241-272

The right to adequate housing is an internationally recognized human right, yet it has been incontrovertibly desecrated by a lack of recognition, disproportionately affecting vulnerable groups. Economic, social, and cultural rights have encountered many challenges in an ever-increasing era of international exceptionalism and challenges arise in the protection of these rights. The right to housing is achieved in two ways: as a normative right and as a derivative right encompassed within economic, social, and cultural rights. This article introduces: (1) the normative development of economic, social, and cultural rights as recognized human rights, and their regulatory implementation through international instruments; (2) the concept of individuals as right-holders and duty-bearers of economic, social, and cultural rights; (3) understanding how the restriction of the right to housing leads to the violation of other human rights, including (a) the right to life, (b) the right to freedom from discrimination, and (c) the right to humane treatment – and the types of vulnerable groups that face the most discrimination, such as indigenous persons and women; and (4) protection against forced evictions, through an examination of the jurisprudence of the Inter-American System, European Court of Human Rights, and African Court on Human and Peoples' Rights.

Keywords*:* Indigenous Peoples, Gender-based Discrimination, Regional Mechanisms, Right to Adequate Housing.

Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law

Cekli Setya Pratiwi

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 273-299

This study examines the constitutionality of Indonesia's Anti-Blasphemy Law, which has been challenged unsuccessfully at the Constitutional Court on three occasions, in 2009, 2012, and 2018. While the Court has acknowledged the law's provisions are open to multiple interpretations, it insists on maintaining the law as it is, on the grounds that the right to religious expression is not absolute, as freedom and rights are restricted under Article 28J of the 1945 Constitution. The Court believes that canceling the law would create a dangerous legal vacuum. The ambiguity of the Court's decisions on the constitutionality of the Anti-Blasphemy Law is illustrated in recent blasphemy cases that have not been explored in previous studies. This study uses a doctrinal legal approach to examine why the Anti-Blasphemy Law is flawed and to analyze to what extent the 'particular constitutionalism' approach influenced the Court's decisions when declaring the constitutionality of the law. As such, the Court's misinterpretation of the core principles of the competing rights – the right to religious freedom and the right to freedom of expression – and its standard limitation, have been ignored. The findings of this study show that in dealing with the Anti-Blasphemy Law, the Court has a narrow and limited recognition of human rights law. The Court's fear of revoking the Anti-Blasphemy Law is based only on assumptions and is less supported by facts. The Court has failed to realize that the implementation of the flawed Anti-Blasphemy Law in various cases has triggered public disorder, with people taking justice into their own hands.

Keywords: Constitutional Court, Constitutionality of Law, Indonesian Anti-Blasphemy Law, Religious Expression, Standard Limitation of Human Rights.

Socio-Economic Origins of Constitutional Review in Central Asia: Political Economy and Politico-Historical Context as Defining Factors

Saniia Toktogazieva

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 300-325

This article pursues two main objectives. First, to identify the main factors behind the establishment of constitutional review in Central Asia. Second, to define how those factors have shaped the institutional design of constitutional courts. In doing so, this article revisits standard theories of comparative constitutional law in terms of the origin of judicial review. While the insurance theory dominates the present global discourse on judicial review, it cannot completely and accurately account for the origin of constitutional review in Central Asia. Rather, this article conveys that the main impetus and motivation behind the establishment of constitutional courts and their institutional designs has been the economic interests of Central Asian states, determined by the region's political and historical context.

Keywords: Central Asia, Constitutional Review, Constitutionalism, Judicial Review, Constitutional Courts.

Islamic Constitutionalism: Social Movement and the Framework of the Indonesian Constitution

Muzayyin Ahyar and Ni'matul Huda

Constitutional Review, Vol. 7, No. 2, December 2021, pp. 326-349

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 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.

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Social Rights And The Turkish Constitutional Court

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Abstract

Through a brief examination of the Turkish experience, this article endeavors to illuminate the debate on the role of constitutional courts in interpreting social rights. The Turkish Constitutional Court has in many cases rejected applications for the annulment of legislation related to social rights, on the grounds that it is within the legislature's discretion to determine public policy priorities based on economic resources and economic stability. This article suggests the Turkish Constitutional Court has narrowly interpreted constitutionally recognized social rights within the boundaries of the Turkish Constitution, with the notable exception of labor rights in individual applications.

Keywords: Individual Application, Justiciability, Labor Rights, Social Rights, Turkish Constitutional Court.

I. INTRODUCTION

Many countries now embody social rights, along with economic and cultural rights, in their constitutions. Prior to the Second World War, social rights were recognized by only a small number of constitutions. Today, at least one provision on social rights, from within international human rights law, is found in 95% of

* Justice of the Constitutional Court of the Republic of Turkey.

the constitutions of developing countries, whereas the rate is lower in developed welfare states.[1] At least 37 state constitutions include non-justiciable 'thick' moral commitments, essentially constitutional directives, which require the state to redistribute income and wealth, and guarantee minimum social rights.[2] Although some countries, such as Germany, do not recognize social rights in their constitutions, they incorporate the principle of the social state.

Social rights are designed to provide a social safety net by guaranteeing minimum basic needs to lead a life with dignity and self-respect.[3] It is no coincidence that in the constitutions of 31 countries, social rights are used in association with the concept of human dignity.[4] Social rights usually include the right to live in dignity, right to social security, right to education, right to health, right to housing, and protection of labor rights. Although these rights are internationally regarded as being as important as civil and political rights, whether they are part of basic rights has long been a controversial issue.[5] Social rights do not usually have the same status accorded to civil and political rights in terms of enforceability and justiciability, as they are usually interpreted as benefits dispensed by a government willing to allocate scarce resources.

This article gives a brief analysis of social rights adjudication in the Turkish constitutional system. To this end, it investigates whether the Turkish Constitutional Court has demonstrated a judicial willingness and capacity to address various aspects of social rights. Specifically, this article addresses the question of whether a specific pattern or approach can be discerned in social rights case law of the Turkish Constitutional Court.

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1 Lanse Minkler, "Introduction: Why Economic and Social Human Rights," in *The State of Economic and Social Human Rights: A Global Overview*, ed. Lanse Minkler (New York: Cambridge University Press, 2013), 2.

2 Tarunabh Khaitan, "Constitutional Directives: Morally-Committed Political Constitutionalism," *The Modern Law Review*, 82, no. 4 (2019): 604, https://doi.org/10.1111/1468-2230.12423.

3 Francesca Bignami and Carla Spivack, "Social and Economic Rights as Fundamental Rights," *The American Journal of Comparative Law* 62 (2014): 563, http://dx.doi.org/10.5131/AJCL.2013.0036.

4 Doron Shulztiner and Guy E. Carmi, "Human dignity in national constitutions: functions, promises and dangers," *American Journal of Comparative Law* 62, no. 2. (2014): 463, http://dx.doi.org/10.5131/AJCL.2014.0003.

5 James W. Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights," *Human Rights Quarterly* 30, no. 4 (2008): 985, https://doi.org/10.1353/hrq.0.0046.

II. SOCIAL RIGHTS AND THEIR JUSTICIABILITY

Although social rights constitute an important part of the international human rights corpus and are considered on a par with civil and political rights, their adjudication has not been deeply entrenched in many national and international jurisdictions. This usually emanates from a distinction between justiciable civil and political rights and non-justiciable social rights. It is assumed that while the former does not require any positive governmental action and is relatively cost-free, the latter necessitates such governmental action with intense budgetary implications.[6] This distinction, however, largely overlooks costs and policy dimensions of civil and political rights. For example, as part of its constitutional obligation to secure due process of law, the state creates judicial bodies financed by the public purse.[7] In this regard, social rights are similar to constitutionally enshrined fundamental rights in terms of their justiciability.[8] Despite this, the constitutional status of social rights is often challenged, as they are considered constitutional directives to be implemented by governments within the confines of their policy priorities, rather than being viewed as fundamental rights to be strongly protected by public authorities.[9]

Some scholars strongly object to adjudication of social rights on the grounds of democracy, legitimacy and individual freedom. They argue that while civil and political rights are relatively clear and uncontested, social rights guarantees involve a wide range of highly contested complex and polycentric issues, which should be addressed by popularly elected governments accountable to the people, rather than by the unelected judiciary.[10] It is has been claimed the judiciary

6 Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge: Cambridge University Press, 2009), 14.

7 Cecile Fabre, "Constitutionalizing social rights," *The Journal of Political Philosophy* 6, no. 3 (2002): 268.

8 Frank I. Michelman, "The Constitution, Social Rights, and Liberal Political Justification," *International Journal of Constitutional Law* 1, no. 1 (2003): 16-19, https://doi.org/10.1093/icon/1.1.13.

9 Paul O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Abingdon: Routledge, 2012).

10 Jeanne M. Woods, "Justiciable Social Rights as a Critique of the Liberal Paradigm," *Texas International Law Journal* 38 (2003): 765; Helena A. Garcia, "Distribution of resources by courts," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, eds. Helena A. Garcia, Karl Klare and Lucy A. Williams (Abingdon: Routledge, 2015), 81.

would disregard the separation of power and democratic governance principles by trespassing on the domains of elected legislative bodies and assuming a function of policy-making in the field of social issues.[11] Furthermore, it has been stressed that courts cannot deal with large-scale problems as they lack the institutional capacity and the expertise necessary to adjudicate social issues.[12] There are also concerns that social rights do not deliver their promised outcomes. For example, using annual data from 160 countries between 1960–2010, researchers found that social rights did not, in general, lead to positive effects in education, health and social security.[13]

Although these criticisms are well-founded, the weak enforcement or non-enforcement of social rights may lead to neglect of the interests of people exposed to various economic and social vulnerabilities.[14] The enforceability of social rights helps create a society where people can lead a life with dignity under more egalitarian economic and social conditions. Governments are, nevertheless, usually inclined to make the realization of social rights conditional on the availability of resources, which means, in practice, deferring their full implementation to a future date.[15] They also use economic crises as a pretext to cut off public services, leading to further weakening of social rights guarantees.[16]

In addition to indirect constitutional protection, social rights are often adjudicated under the heading of other constitutional rights, such as equality and non-discrimination, property, privacy, right to life, and dignity. In other words, the judiciary can read them into traditional civil rights, such as the right to life.

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[11] Lilian Chenwi, "Democratizing the Socio-Economic Rights Enforcement Process," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, eds. Helena A. Garcia, Karl Klare and Lucy A. Williams (Abingdon: Routledge, 2015), 182; Kari H. Ragnarsson, "The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post-2008 Austerity Cases," *Global Constitutionalism* 8, no. 3 (November 2019): 605, https://doi.org/10.1017/S2045381719000212.

[12] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), 33.

[13] Christian Bjørnskov and Jacob Mchangama, "Do Social Rights Affect Social Outcomes?" *American Journal of Political Science* 63, no. 2 (April 2019): 452, https://doi.org/10.1111/ajps.12421.

[14] Dennis M. Davis, "Socio-Economic Rights: Has the Promise of Eradicating the Divide Between First and Second Generation Rights Been Fulfilled?" *Comparative Constitutional Law,* eds. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward Elgar Publishing, 2011), 524.

[15] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (New York: Oxford University Press, 2007), 28.

[16] Xenophon Contiades and Alkmene Fotiadou, "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation," *International Journal of Constitutional Law* 10, no. 3 (2012): 662, https://doi.org/10.1093/icon/mor080.

With the exception of some constitutional courts, particularly from the Global South, supreme courts are usually reluctant to change their jurisprudence that prioritizes civil and political rights over social rights.[17]

III. THE TURKISH EXPERIENCE

The development of economic and social rights in Turkey can be traced to the 1961 Constitution, which stipulated in Article 2 that the Turkish Republic was a social state, while Article 10 provided for fundamental rights and social justice.

Although the 1961 Constitution contained a section on social and economic rights, they were not accepted as individual claim rights, as Article 53 of the 1961 Constitution stated: "The state shall carry out its duties to attain the social and economic goals provided in this section only insofar as economic development and its financial resources permit." Hence, the state was obliged to provide those rights as long as financial resources were available to provide them. An individual could not claim that social rights be provided by state organs as there was not any mechanism granting a direct individual application to the court under the provisions of the 1961 Constitution.

Turkey's 1982 Constitution has adopted a similar understanding of social rights in its provisions. Article 2 of the 1982 Constitution, which defines the characteristics of the state and which is an irrevocable provision, stipulates that "Turkey is a democratic, secular and social state governed by the rule of law". Article 5 of the Constitution states that it is a fundamental aim and duty of the state:

> "to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

[17] Natalia Angel-Cabo and Domingo Lovera Parmo, "Latin American Social Constitutionalism: Courts and Popular Participation," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, eds. Helena A. Garcia, Karl Klare and Lucy A. Williams (Abingdon: Routledge, 2015), 99.

Although this article provides the Constitutional Court with a tool to interpret social rights in reviewing of the constitutionality of law, it is rarely used in such reviews.

The 1982 Constitution includes a special section on social and economic rights, encompassing 24 articles. Those rights are generally accepted as policy directives for the Parliament. Furthermore, the Constitution includes a provision setting the limits of social rights. Article 65 of the Constitution stipulates: "The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the priorities appropriate with the aims of these duties." On the basis of Article 65, the Turkish Constitutional Court often allows the legislative and the executive to determine economic and social policies as they see fit. Even if the Constitutional Court might desire enforcing constitutionally recognized social rights, Article 65 may be regarded as a bulwark against the justiciability of social rights in the Turkish context. On the other hand, Article 65 also points out that the state has to fulfill its social duties. This is particularly evident if we interpret Article 65 in conjunction with Articles 2 and 5 of the Constitution. Accordingly, social rights cannot be seen merely as non-binding directives for the other branches of power, as Article 65 does not relieve the government from its responsibility to realize the social goals of the Constitution.

When the Turkish Constitutional Court adjudicates social rights cases, it generally adopts a weak form of judicial review, particularly in cases with significant budgetary implications. It has often dismissed annulment claims, indicating the Parliament's discretion to allocate economic resources and budgetary planning. This does not, however, mean the Court has frequently failed to protect social rights. For example, in its review of a statutory provision raising the pension age, the Court held that, in two different rulings, the state is obliged to establish a social security system and provide citizens with social

benefits.[18] In a previous ruling, the Court also noted that Article 65 cannot be used as a bulwark for the non-fulfillment of state responsibilities regarding the establishment and maintenance of a social security system.[19] From the Court's standpoint, the state cannot design and implement policies preventing citizens from enjoying their social rights.

From time to time, the Turkish Constitutional Court has read social rights through the prism of civil and political rights. For example, the right to life, personal inviolability, material and spiritual entity of the individual (Article 17) was used in a number of social security cases regarding the time restriction on payments by health insurers. Different social security schemes specified that medical costs could be covered up to 18 months at the most, regardless of the medical problems. The Court found the relevant provisions of the schemes unconstitutional and annulled them.[20] For the Court, setting such a time limit infringed the right to life protected by Article 17 of the Constitution, while conditions stipulated in Article 65 could not be valid reasons because the state is compelled to protect the lives of citizens and not to put their lives at risk because of budgetary considerations.[21] In another case, involving the right to education secured in Article 42 of the Constitution, the Court maintained that the content of a right should not be determined in isolation from the rest of the Constitution. Thus, the Court infused the right to education with the essential guarantees of fundamental rights, elevating it to the status of the first generation rights.[22]

[18] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1996/66, K. 1997/7 (The Constitutional Court of the Republic of Turkey, 31 January 1997); Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1999/42, K. 2001/41 (The Constitutional Court of the Republic of Turkey, 23 February 2001). The decisions of the Turkish Constitutional Court are available at: https://kararlarbilgibankasi.anayasa.gov.tr.

[19] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1993/17, K. 1996/38 (The Constitutional Court of the Republic of Turkey, 1993/17, 18 November 1993).

[20] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1996/17, K. 1996/38 (The Constitutional Court of the Republic of Turkey, 16 October 1996).

[21] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 2005/52, K. 2007/35 (The Constitutional Court of the Republic of Turkey, 3 April 2007).

[22] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/4, K. 1990/6 (The Constitutional Court of the Republic of Turkey, 12 April 1990).

An interesting feature of the Turkish Constitutional Court's social rights jurisprudence is its generally favorable attitude toward civil servants. In its decisions regarding civil servants' social rights, the Court usually emphasizes the constitutional principles of the social state and equality, avoiding using Article 65 in its deliberations. This contradicts its general approach to the adjudication of social rights. The Court appears to have generously protected civil servants from attempts to curtail their social and economic rights. For example, the Court did not hesitate to annul a provision which prevented civil servants from claiming their transportation expenses when being appointed to another city.[23] While it is reluctant to invoke rights to non-existent social benefits, the Court does not usually allow regressions from existing levels of social services.

In addition to its constitutionality review competency, the Turkish Constitutional Court can hear individual constitutional complaints – a process introduced in 2012 following a constitutional amendment in 2010. The Turkish constitutional complaint system is explicitly restricted to 'classic' rights and freedoms enshrined in both the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR). The amended Article 148 of the Constitution stipulates that anyone who claims that his/her constitutional rights set forth in the ECHR have been infringed by a public authority, has the right to apply to the Constitutional Court after exhausting all administrative and judicial remedies. Only the fundamental rights and freedoms set out in the Constitution, which are also guaranteed in the ECHR and its Additional Protocols, may be invoked. This means that individual application has a relatively limited scope of protection against violations of social rights, as it is limited to protect fundamental rights regulated in the ECHR rather than all rights secured in the Turkish Constitution. Violation claims related to social rights are excluded from the individual application mechanism as they do not directly fall under the protection of constitutional complaint but they can be made enforceable

[23] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 2004/54, K. 2005/24 (The Constitutional Court of the Republic of Turkey, 26 November 2005).

and amenable to judicial implementation by means of reading and interpreting them into 'classic' rights.

In one of the early violation judgments, the Turkish Constitutional Court protected the right to social security through an interpretation of the right to a fair trial. The applicant, whose arm was amputated as a result of a traffic accident, requested a disability pension from the Social Security Institution (Sosyal Güvenlik Kurumu or SGK). The applicant applied to the SGK on 8 July 2008 and requested a disability pension; but she was referred to hospital by the SGK on 16 February 2010 and subsequently granted a disability pension from 1 April 2010. The applicant requested the pension commence from the date she had lodged the application. She was not paid the pension for a period of 20 months and no response was given with regard to her application. The Court ruled that the applicant's right to a reasoned decision under the scope of the right to a fair trial was violated and ordered the SGK to pay the applicant the disability pension for the period of 20 months between the date she had applied to the SGK and the date she had been granted the pension.[24]

It is, however, in the field of labor rights, rather than other social rights, that the Turkish Constitutional Court has pursued an active approach to safeguard rights of applicants. The main reason for this is that most applications related to labor rights have fallen within the scope freedom of association, which includes the right to unionize. The Court has interpreted this right to include the right to strike and the right to undertake collective agreements. In an individual application by a trade union, the Court found the postponement of a strike in a glass-making company for 60 days on the grounds of public health and national security contravened the trade union rights guaranteed by Article 51 of the Constitution.[25] The Court maintained that the decision to postpone the strike had rendered the exercise of the constitutional right to strike and collective

[24] Individual Application to Constitutional Court, Nurten Esen, Application No. 2013/7970 (The Constitutional Court of the Republic of Turkey, 10 June 2015).

[25] Individual Application to Constitutional Court, Kristal-İş Application No. 2014/12166 (The Constitutional Court of the Republic of Turkey, 2 July 2015).

bargaining practically meaningless. The Court underlined that the decision to postpone the strike was not based on a compelling social need and therefore was not necessary in a democratic society.

In another case, a teachers' union in 2012 instructed its members not to turn up at their workplaces for two consecutive days to protest a new education bill in the Parliament in 2012. Following disciplinary investigations, education authorities cautioned the teachers who took part in the collective action. In response to a number of applications lodged by the cautioned teachers, the Court ruled that the disciplinary sanction imposed on the teachers was a violation that had a chilling effect on their right to unionize and was not necessary in a democratic society.[26] The same union also called on its members to conduct a similar collective action to protest ISIS attacks in Northern Iraq, resulting in disciplinary fines being imposed on some protesters. In an individual application arising from this case, the Court did not find a violation, pointing out that the union's call for action was not related to core union activities defined as protecting and improving its members' economic, social and cultural interests.[27] In this decision, the Court developed criteria regarding the circumstances under which the freedom of association may be restricted, making use of the European Court of Human Rights' case law. For the Turkish Constitutional Court, core union activities deal with issues arising from labor relations.

Under neo-liberal economic policies and reformed labor laws, unionization has become increasingly difficult in many parts of the world and Turkey is no exception in this trend. Employers can easily fire their employees who wish to join a union despite the existence of constitutional and statutory laws securing the right to unionize. The Turkish Constitutional Court considers unions as "organized structures aiming to protect the rights and interests of their members"[28] and has

[26] Individual Application to Constitutional Court, Tayfun Cengiz, Application No. 2014/8 18 (The Constitutional Court of the Republic of Turkey, 18 September 2014).

[27] Individual Application to Constitutional Court, Ahmet Parmaksız, Application No. 2017/29263 (The Constitutional Court of the Republic of Turkey, 22 May 2019); Individual Application to Constitutional Court, Dilek Kaya Application No. 2018/14313 (The Constitutional Court of the Republic of Turkey, 4 October 2019).

[28] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 2013/1, K. 2014/161, § 23 (The Constitutional Court of the Republic of Turkey, 22 December 2014).

determined that unionization is "an important democratic instrument serving the creation of social justice".[29] Since the Court accepts the right to unionize as a part of the freedom of association, it has also issued violation rulings on this matter. For example, in one case, the applicants, who were not members of a union, had been dismissed on the ground of "underperformance" in their job, whereas they claimed they were fired for attempting to join a labor union.[30] The Court ruled in favor of the applicants, concluding that joining a union is one of the core tenets of the right to unionize.[31] Similarly, the Court often holds that individuals are entitled to join and take part in union activities and they should not face any sanctions by employers or public authorities for exercising their constitutional rights.[32] Moreover, the Court safeguards the right not to join a union and the right to join a union as one's own free choice.[33] When a local authority exerted pressure on its unionized employees to resign from their union and threatened them with termination of their employment contract, the Court issued a violation ruling upon receiving an individual application from the union.[34] The Court has also protected unions from interference in their internal management by public authorities or employers.[35]

Although the Turkish Constitutional Court narrowly interprets union activities by confining them to mainly economic issues, there are cases where the Court considers political demands within the scope of lawful union activities. For example, when a union member was fined for displaying a banner that demanded

[29] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 2015/62, K. 2015/84, § 15 (The Constitutional Court of the Republic of Turkey, 30 September 2015).

[30] Individual Application to Constitutional Court, Anıl Pınar and Ömer Bilge Application No: 2014/15627 (The Constitutional Court of the Republic of Turkey, 5 October 2017).

[31] Individual Application to Constitutional Court Hüseyin Demirdizen, Application No. 2014/11286 (The Constitutional Court of the Republic of Turkey 21 September 2016).

[32] Individual Application to Constitutional Court, Eğitim ve Bilim Emekçileri Sendikası ve Diğerleri, Application No. 2014/920 (The Constitutional Court of the Republic of Turkey, 25 May, 2017); Individual Application to Constitutional Court, Abdulvahap Can ve Diğerleri, Application No. 2014/3793 (The Constitutional Court of the Republic of Turkey, 8 November 2017).

[33] Individual Application to Constitutional Court Adalet Mehtap Buluryer, Application No. 2013/5447 (The Constitutional Court of the Republic of Turkey, 16 October 2014).

[34] Individual Application to Constitutional Court, Türkiye Genel Hizmetler İşçileri Sendikası, Application No. 2016/14475 (The Constitutional Court of the Republic of Turkey, 30 September 2020).

[35] Individual Application to Constitutional Court, Tez-Koop-İş Sendikası ve Yalçın Çalışkan, Application No. 2013/6759 (The Constitutional Court of the Republic of Turkey, 3 February 2016).

education in their mother tongue, the Court concluded that the applicant's right to unionize was violated as a result of the imposition of an administrative fine.[36]

On the other hand, the Court accepts that limitations on trade union rights do not clash with the requirements of a democratic social order as they can be legitimately restricted on national security, public order, public health and general morality grounds, as stipulated in Article 51 of the Constitution. For example, it did not consider bans on strikes in the oil industry, funeral services, and National Defense Ministry workplaces to be unconstitutional.[37] For the Court, prohibiting strikes in essential services defined as economic activities vital for protecting national security and public health does not constitute disproportionate intervention in the right to strike.[38] However, in the same decision, the Court unanimously ruled that a ban on strikes in banking and urban public transportation services is unconstitutional.[39] It argued that "strikes in essential services may result in serious problems for national security and public health but banking and urban public transportation services do not directly affect national security and the whole society".[40] As a result, the strike bans on these services are incompatible with the requirements of the democratic social order. While the Court does not see a constitutional problem in the prohibition of strikes in essential services, it protects the right to strike in other economic activities and services.

IV. CONCLUDING REMARKS

The inclusion of social rights in a constitution reflects fundamental social preferences but these do not necessarily translate into public policies. Since justiciability of these rights often results in outcomes with significant economic and political implications, with some notable exceptions in the Global South

[36] Individual Application to Constitutional Court, Abdulvahap Can ve Diğerleri, Application No. 2014/3793 (The Constitutional Court of the Republic of Turkey, 8 November 2017).

[37] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E E. 2013/1, K. 2014/161, 22/10/2014, §§ 225-226 (The Constitutional Court of the Republic of Turkey, 22 October 2014).

[38] Ibid.

[39] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E E. 2013/1, K. 2014/161, 22/10/2014, §§ 235-236 (The Constitutional Court of the Republic of Turkey, 22 October 2014).

[40] Ibid.

(e.g., South Africa, Columbia and India), courts are generally inclined to remain aloof from this highly controversial area. Not surprisingly, in its social rights case law, the Turkish Constitutional Court shows a reluctance to delve into the detail of how the state allocates resources. The Court has been careful not to cross the separation of powers divide, as it is disinclined to review matters considered to be more the proper domain of the legislative and executive branches. On the other hand, the Court has mainly protected labor rights in cases stemming from individual applications, as it has interpreted these rights as a component of freedom of association. In this way, the Court strives to establish a fair balance between the public interest and the rights and freedoms of individuals. It can be concluded that while the Turkish Constitutional Court is reluctant to implement social rights directly, it does not hesitate to do so when it associates them with civil and political rights.

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The Religiosity Of The Indonesian Constitution: Article 29(1) And Its Interpretation

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Abstract

This paper examines the problem of whether the inclusion of religious words in the Indonesian Constitution is tantamount to the establishment of a religious constitution. By focusing on the Constitution's provision on "belief in the One and Only God" in Article 29(1), this paper challenges the received theory of the religiosity of the Constitution. To that end, the paper first investigates the doctrinal and historical implications of Article 29(1). Particular analysis concerns the implications of this constitutionalization for Islamic law. The Constitutional Court's decision on interreligious marriage is critically examined as an example of how the received theory is endorsed and articulated in the case of marriage. This paper argues that Article 29(1) concerns all religions, without any implied exclusion of non-monotheistic religions. Moreover, this paper affirms what is called the Pancasila state, located between an exclusively secular state and a religious or theocratic state. This arguably makes the notion of the religiosity of the Constitution unjustified. The Constitutional Court, however, has interpreted Article 29(1) in a strongly religious sense, leading to religious supremacy and, accordingly, is contrary to how the Constitution ought to be understood.

Keywords: Article 29(1), Constitutional Court, Indonesian Constitution, Interreligious Marriage Case, Pancasila.

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I. INTRODUCTION

The amendment of the 1945 Constitution over 1999–2002 had a significant impact on the place of religion in Indonesia. A number of provisions containing references to religion were inserted, including religious values, *iman* (faith) and *takwa* (piety), religious judiciary, and legislation of religion. Together with the readoption of the principle 'belief in the One and Only God' (*Ketuhanan Yang Maha Esa*)[1] in the Preamble to the Constitution and Article 29(1), this 'new' constitutionalism has been considered as establishing what can be called a 'Godly constitutionalism'. In line with this, four of the nine justices of the Constitutional Court in 2016, in response to a petition to ban extramarital sex, suggested the constitutional principle of belief in the One and Only God requires that all legislation and case law should be "illuminated by religious values and divine light".[2] With such significant reference to religion, can the 1945 Constitution be meaningfully categorized as a religious constitution? What would this categorization imply?

This paper examines whether the Constitution's references to belief in God constitute the establishment of a religious constitution. 'Religious constitutionalism' is used here as a category distinct from its rival, 'secular constitutionalism'. While the latter establishes the institutional separation of state and religion, the former makes religion(s) the basis of government. Secular constitutionalism has two different models: the first excludes and is hostile to religion, while the second is benevolent and inclusive of religion.[3] On the other hand, religious constitutionalism establishes a religion or some religions as the only state-recognized religion(s). A religious constitution might take the form of strong or moderate religiosity. In a strong religious constitution, religion has determinate authority in matters of public life. What might be called 'theocratic constitutionalism' is based on the idea of the rule of religious law or norms.[4] Conversely, a moderate religious constitution is a constitution which endorses and establishes religion(s) by law but is highly supportive of religious freedom.

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1 *Ketuhanan Yang Maha Esa* is sometimes translated in English as 'belief in One Supreme God' and 'belief in the One Almighty God'. This paper uses 'belief in the One and Only God', as per the Indonesian government's official translation of the 1945 Constitution.

2 Judicial Review of Criminal Law, Decision of Constitutional Court No. 46/PUU-XIV/2016 (The Constitutional Court of the Republic of Indonesia, 2017).

3 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2013), 95–97.

4 Larry Catá Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering," *Indiana Journal of Global Legal Studies* 16 (2009): 85.

By focusing on Article 29(1), this paper challenges the received theory of the religiosity of the 1945 Constitution. To this end, the paper first investigates the doctrinal and historical implications of Article 29(1). It then critically analyzes the Constitutional Court's decision in the Interreligious Marriage Case as an example of how the received theory is endorsed and articulated in the case of marriage. In this paper, I argue that Article 29(1) refers to all religions equally. Article 29(1) establishes a middle way of state-religion relations, that is, a state which endorses neither the strict separation of state and religion nor the supremacy of religion as in theocratic constitutionalism. It is arguably unjustified then to assume the religiosity of the Constitution. However, the Constitutional Court's interpretation of Article 29(1), as in the Interreligious Marriage Case, adopts religious supremacy. This case demonstrates a gap between how the Constitution ought to be understood and its authoritative interpretation by the Constitutional Court.

II. ARTICLE 29(1): THE CONSTITUTIONAL SIGNIFICANCE OF BELIEF IN GOD

Article 29 of Chapter XI on religion covers the thorny issue of state-religion relations. Article 29 states:

(1) The state is based upon the belief in the One and Only God;
(2) The state guarantees the freedom of religion for each citizen and to practice such religion and belief accordingly.

The wording and authority of Article 29 have led to ongoing controversy over the appropriate role of religion in Indonesia. It raises issues such as what counts as religion, how state-religion relations might be justified in line with the article, and the legal implication of 'belief in the One and Only God'. Owing to its ambiguity, Article 29 has so far been adopted as a locus of constitutional legitimacy for competing views on the state enforcement of religious law. In the following paragraphs, Article 29(1) is examined in terms of its creation in 1945 and its readoption during the amendment process more than 50 years later. Through this examination, it becomes clear how the article was articulated differently in both constitutional periods, and how the differences, in particular between the Islamist and secular-nationalist factions, colored its creation and adoption.

2.1 Article 29(1) of the Original Constitution

The first formal draft of the Indonesian Constitution made no reference to belief in God. The draft version of Article 29 in the section 'On Religion' (*Tentang Agama*) consisted of only one paragraph, providing a state guarantee of religious freedom. It read, "The State guarantees the freedom of every resident to profess any religion [*agama apapun*] and to worship according to his/her own religion." This article was the same as a rough draft of a provisional constitution proposed nearly a month earlier on 15 June 1945 by a seven-member group led by Husein Djajadiningrat and including Supomo.[5]

On 22 June 1945, a 'Committee of Nine' of the drafters drew up a draft preamble to the constitution. This draft preamble was called the Jakarta Charter. It included the five principles of the state ideology, Pancasila, but the first principle contained an additional 'seven words' effectively stating that Muslim citizens would be required to follow Islamic law: "*dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya* [with the obligation to carry out Islamic Sharia for its adherents]".

During the debates among the Investigating Committee for the Preparation for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, BPUPKI) on 13 July 1945, Otto Iskandardinata suggested a revision to the draft constitution's Article 29, so the article would consist of two paragraphs: the first to contain the first principle of the Jakarta Charter, namely, "belief in God, with the obligation to carry out Islamic Sharia for its adherents", and the existing single paragraph on religious freedom to be placed second.[6]

The Constitutional Drafting Committee accepted this suggestion, with revisions. The paragraph on "belief in God" appeared in the second draft, Chapter X on Religion, now as Article 28(1), which read, "The State shall be based on the belief in God with the obligation to perform religious rituals [*ibadah*]." Before this latest draft was discussed, the Drafting Committee proposed another revision of the first paragraph, which then read, "The

[5] A.B. Kusuma, ed., *Lahirnya Undang-Undang Dasar 1945: Memuat Salinan Dokumen Otentik Badan Oentoek Menyelidiki Oesaha2 Persiapan Kemerdekaan* [the Birth of the 1945 Constitution: Containing Copies of Authentic Documents of the Investigating Committee for the Preparation for Indonesian Independence], revised (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2009), 195 (Article 14 'On Religion').

[6] Kusuma, 314–15.

State shall be based on the belief in God, with the obligation to carry out Islamic Sharia for its adherents." Here, the draft inserted the 'seven words' of the Jakarta Charter. In Supomo's explanation, this new phrase was a further step in accommodating Islamic law, after it was adopted in the draft preamble. As was the case with the Jakarta Charter, the draft paragraph was also agreed to by both the Islamist and secular nationalist representatives in the Committee.[7] Meanwhile, the numbering of the section on religion was reverted to Article 29, while the chapter number was altered to XI.

Despite the initial acceptance of the textual revision, a meeting of the Preparatory Committee for Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia*, PPKI) on 18 August 1945 replaced the 'seven words' with "*Yang Maha Esa* [the One and Only (God)]".[8] With this change, the final version of Article 29 was unanimously accepted.

The adoption of Chapter XI and Article 29 resulted in there being no clear significance of the word 'religion' and the phrase 'belief in the One and Only God'. The inclusion of the latter phrase and the exclusion of the 'seven words', in both Pancasila and the Constitution, was not reached with wholehearted agreement by the nation's founding fathers. In particular, the Islamists' aspiration for shariah law was dismissed. As a *modus vivendi*, Article 29 would have been understood differently by the framers, who had diverse religious affiliations and ideological perspectives. Mohammad Yamin, employing a systematic interpretive method, proposed a restrictive interpretation, to the effect that 'religion', as the title of the chapter, meant 'monotheistic religion', consistent with Paragraph 1 of the article.[9]

However, the fact that the word 'religion' was chosen as an all-inclusive term, agreed to by all the framers, would suggest it should include all faiths and religions, as might have been expected by the framers and the general public. Moreover, the phrase 'belief in the One and Only God' does not necessarily mean a monotheistic belief. The adoption of the words 'One and

[7] Hadikusumo, while agreeing to the seven words of the preamble, objected to their adoption in paragraph 1 of the article because of their ambiguity. This is probably related to his previous suggestion to remove the words '*bagi pemeluk-pemeluknya* [for its adherents]' so that Islamic sharia would bind everyone, not only Muslims. Kusuma, 413–15.

[8] Kusuma, 471.

[9] Mohammad Yamin, *Pembahasan Undang-Undang Dasar Republik Indonesia* [*Commentary on the Constitution of the Republic of Indonesia*] (Jakarta: Jajasan Prapantja, 1960), 523.

Only' as the replacement of the 'seven words' signified a reluctant agreement, and therefore suggests that their legitimate importance was more sociological than legal. What was fundamental in the paragraph, therefore, centered on the term 'belief in God' (*Ketuhanan*), another expression of religion which suggested inclusive understanding.

The constitutional arrangement of God and religion in Article 29, together with the Preamble's five principles (Pancasila), has conventionally been regarded as the basis for identifying Indonesia's approach to state-religion relations as a middle way, combining both secular and Islamist visions. Founding president Sukarno's speech on Pancasila as the foundation of the state, delivered to the BPUPKI, was evidence of this approach.[10] During Suharto's New Order regime (1965-98), this middle way was then characterized as being neither secular nor theocratic.[11] Instead of belonging to either of the dichotomic alternatives, Indonesia was viewed as a state based on the 'belief in the One and Only God', exactly as may be read from the first paragraph of Article 29. In this model of state-religion relations, limited religious norms and laws might be incorporated by the state. The omission of the 'seven words' from the first paragraph, therefore, could not be interpreted as barring Islamic law from being part of the state legal system. The reason for this omission was mostly the implication for unequal treatment of the existing religions, by giving preference to Islam, rather than because of any objection to state incorporation of religious norms, as such.

From the wording of Article 29(1), one might assume the belief in 'the One and Only God' is the sole, or supreme basis, of the state, which corresponds with the belief in the superiority of the first principle of Pancasila. This would imply, as Hazairin has argued, that state policies, in general, should not contravene religious norms, and that the state should enforce religious laws for its adherents.[12] However, the structure of the Constitution does not support this interpretation. Article 29 is part of Chapter XI on religion, signifying that the meaning of a 'basis for the state' would be conceivable

[10] Kusuma, *Lahirnya Undang-Undang*, 156.

[11] This 'neither-nor' approach aimed to maintain unity and harmony. For a critical analysis of this approach, see Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis* (Leiden: E. J. Brill, 1988), 183–221.

[12] Hazairin, *Demokrasi Pantjasila* [*Pancasila Democracy*] (Jakarta: Tintamas, 1970), 18–19.

only in the context of religion. In other words, the article would suggest that in terms of religion, the state is based on the belief in the One and Only God. There are principles which might also be considered as bases of the state, other than that of religion. It may be argued that this religious basis constitutes part of the foundation of the state, Pancasila, as enshrined in the last paragraph of the Preamble. Article 29(1), therefore, suggests only *a* basis, not the *only* basis, of the state. Consequently, being only *a* basis of the state, the 'belief in the One and Only God' should not have a conclusive role in determining state laws and policies.

2.2 Article 29(1) in the Amendment Process

In the constitutional amendment process of 1999–2002, discussions of religion must be viewed within the context of the previous and existing discursive practices of religion in Indonesia. The debates between members of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) on the amendment to Article 29 demonstrate this diverse understanding of the nature of constitutional 'religion', the significance of 'belief in the One and Only God', and how all of these subjects might be determined and regulated by the state. Although the result of the process was the unchangeability of the article, the debates shed some light on its significance regarding the legitimacy of the state support of religion.

The complexity of religious issues, and the opacity of the roles of religion, led some members of the MPR, in the early years of the amendment process, to suggest the need for constitutional clarity on the status of religion and its relation to 'belief in the One and Only God' as according to Article 29.[13] However, while members of the MPR seemed to agree on the importance of religion, and the centrality of belief in the One and Only God, in the life of the state, no attempt at agreement was seriously attempted on what the Constitution meant by 'religion'. The amendment drafters' different views on these matters were evident in the debates on whether Article 29 should be amended.

[13] Majelis Permusyawaratan Rakyat Republik Indonesia [People's Consultative Assembly], *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Satu* [*Minutes of the Amendment of the 1945 Constitution of the Republic of Indonesia: Meeting Year 2000, Book One*], revised (Jakarta: Sekretariat Jenderal, 2010), 79 (Hobbes Sinaga of F-PDIP).

Secular nationalist factions of the MPR, including the Indonesian Democratic Party of Struggle faction (*Fraksi Partai Demokrasi Indonesia-Perjuangan*, F-PDIP) and the Indonesian Armed Forces and National Police faction (*Fraksi Tentara Nasional Indonesia/Kepolisian Republik Indonesia*, F-TNI/POLRI), and the Christian-based Love the Nation Democratic Party faction (*Fraksi Partai Demokrasi Kasih Bangsa*, F-PDKB) insisted on upholding the original article and securing it from any amendment. In contrast, two Islam-oriented factions, the Crescent Moon and Star Party faction (*Fraksi Partai Bulan Bintang,* F-PBB) and the United Development Party faction (*Fraksi Partai Persatuan Pembangunan*, F-PPP), proposed and consistently argued for the reinstatement of the 'seven words' of the Jakarta Charter, suggesting that Paragraph 1 of Article 29 should read, "The state shall be based on the belief in the One and Only God, with an obligation to carry out Islamic Sharia for its adherents." The Union of Muslim Sovereignty faction (*Fraksi Perserikatan Daulat Umat*, F-PDU) at first proposed a slight change to Paragraph 2 of Article 29, as did the faction of the Interest Groups Representatives (*Fraksi Utusan Golongan*, F-UG), in which the word 'belief' was to be omitted, but the former later joined the stance of F-PBB and F-PPP. Other factions, including the National Awakening Party faction (*Fraksi Kebangkitan Bangsa*, F-KB), Golkar Party faction (*Fraksi Partai Golkar*, F-PG), the Reform Faction (*Fraksi Reformasi*, F-Reformasi) and Indonesian National Unity faction (*Frasksi Kesatuan Kebangsaan Indonesia*, F-KKI), suggested a different additional paragraph.[14]

The long-lasting, heated debates on the amendment to Article 29 revealed three different viewpoints. First, was the Islamist factions' proposal to add

[14] On the polarization between the MPR factions on the amendment of the Article 29 and the various proposals for the amendment, see Umar Basalim, *Pro-Kontra Piagam Jakarta di Era Reformasi* [*Pros and Cons of the Jakarta Charter in the Reform Era*] (Jakarta: Pustaka Indonesia Satu, 2002); Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945 [Drafting Team of the Comprehensive Text of the Processes and Results of the Amendment of the 1945 Constitution], *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama* [*Comprehensive Text of the Amendment of the 1945 Constitution of the Republic of Indonesia: Background, Processes, and Debates Results 1999-2002, Book VIII Citizens and Population, Human Rights and Religion*], revised (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 88–107; Valina Singka Subekti, *Menyusun Konstitusi Transisi: Pergulatan Kepentingan dan Pemikiran Dalam Proses Perubahan UUD 1945* [*Drafting the Transitional Constitution: The Struggle of Interest and Ideas in the Process of the Amendment of the 1945 Constitution*] (Jakarta: PT RajaGrafindo Persada, 2008), 147–166; Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007), chap. 6; R.E. Elson, "Two Failed Attempts to Islamize the Indonesian Constitution.," *SOJOURN: Journal of Social Issues in Southeast Asia* 28, no. 3 (November 2013): 405–20.

the 'seven words' to the existing first paragraph. Its supporters relied on the significance of the Jakarta Charter, as well as a conciliatory assurance made by Sukarno in 1959 that he had depended on the Jakarta Charter when issuing a decree that reinstated the 1945 Constitution, and also the religious consideration of the obligation for Muslims to carry out Islamic law.[15] This view marked a second revival of efforts to restore the 'seven words', after the first one during the Constituent Assembly debates of post-1945 Islamist aspirations. What differentiated the contemporary Islamist perspective from that of its predecessors is the weak demand of the former for constitutional Islamization. In the pre-constitutional amendment period, the Islamist groups kept supporting the idea of an Islamic state, according to the ideals of strong religious constitutionalism, whereas during the amendment process, having accepted the reality of the Pancasila state, they demanded only the adoption of the 'seven words'.

Second, some Islam-based factions maintained that Article 29 was a national consensus and considered it a common platform (*kalimah sawā'*) that remained compatible with the demands of Islam. Although it was not religiously ideal, the article could still be relied on to advance their Islamic objectives.[16] Despite their difference concerning the inclusion of the 'seven words', both this view and the Islamist perspective shared a similar concern in furthering religious interests. By reference to the Islamic worldview, such as that of the compatibility of Paragraph 1 with the principle of *tawḥīd* (Islamic monotheism), the second perspective saw Article 29 as supporting the application of religious precepts. Harifuddin Cawidu of the F-UG made an unqualified religious argument for supporting this article, as he propounded what he called the "cultural-substantive" view of Islam, which meant that although sharia was not enshrined in it, the current Constitution remained religiously legitimate, because, under this Constitution, Islamic law in general could be applied by Muslims.[17]

[15] See the pro-Jakarta Charter arguments (F-PDU, F-PBB, and F-PPP) in Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2002, Buku Lima* [*Minutes of the Amendment of the 1945 Constitution of the Republic of Indonesia: Meeting Year 2002, Book Five*], revised (Jakarta: Sekretariat Jenderal, 2010), 640, 642, 649, 667–70.

[16] This was the view of the F-Reformasi and F-KB. See Majelis Permusyawaratan Rakyat Republik Indonesia, 661, 665–6, 693.

[17] Majelis Permusyawaratan Rakyat Republik Indonesia, 240.

Third, the secular-nationalist factions, which wanted Article 29 to be unchanged, argued the article was the ideal arrangement for state-religion relations. It was a meeting point for differences of religion and belief, which remained relevant. The concerns and justifications were mostly on the primacy of national integrity, unity and harmony amid diversity.[18] These were also the concerns of the first generation of the secular-nationalist group, during the 1945 constitution-making.

The Islamist demands for the inclusion of the 'seven words' failed to receive wide acceptance among the members of the MPR. Nevertheless, the Islamist factions and some members of other factions insisted on their appeal, and eventually did not take part in the readoption of the original Article 29.[19] The readoption of the article by the majority, and the decline in the influence of the Islamist factions and members, demonstrated the different paths the latter have taken from those of their predecessors in the 1945 constitution-making process, who were able to accept the article, regardless of the removal of the 'seven words'. It is not clear whether the contemporary Islamists' abstention from adopting the article suggests the reference to God in Paragraph 1 could not be religiously justified by reference to the principle of *tawhīd*, as had been advocated by many other Muslim members, and as the Islamist framers of the 1945 Constitution previously believed.

The readoption of Article 29 gives rise to some implications for a proper understanding of the reference to God and religion in the article. First, despite the failure of the Islamist proposal, most if not all factions of the MPR agreed that Article 29 affirms the middle way of the Indonesian model of state-religion relations. The agreement was a re-statement of the wide consensus, long held before the amendment process, as mentioned earlier. For the drafters of the amendments, the Pancasila state, or a state based on 'the belief in the One and Only God', was to be understood as located between a secular and a theocratic state. In other words, it was neither an exclusively secular state nor a strong religious state. It was a state which

[18] This was the argument of F-KKI, F-TNI/Polri, and F-PDIP. See Majelis Permusyawaratan Rakyat Republik Indonesia, 645, 656, 681.

[19] Majelis Permusyawaratan Rakyat Republik Indonesia, 690 (F-PPP), 691 (F-PBB), 691-2 (F-PDU), 692-5 (some members of F-Reformasi and F-UG).

gave significant roles to religion, by facilitating and encouraging religious observance;[20] all religions could live in harmony guaranteed by law.[21]

The Pancasila state is therefore the opposite of states having the non-establishment of religion, such as France, Turkey and the United States.[22] It is also contrary to states with the supremacy of religious law, or so-called constitutional theocracy,[23] such as Iran, Egypt and Afghanistan.[24] Some members of the MPR, however, argued for a stronger religious implication to be drawn from Article 29, contending that, as a consequence of Paragraph 1, no state policies should contradict religious values, norms or provisions.[25] Since this view tends to support a theocratic ideal, or strong religious constitutionalism, by establishing the supremacy of religious law, it would constitute a denial of the Pancasila state as a middle-way state. Most members of the MPR agreed that, despite its support of religious institutions and its incorporation of religious norms, the Pancasila state was not a theocratic state.[26]

Second, the MPR members from the Islamist factions seemed to agree that although the state was not based on one religion, Paragraph 1 was indicative of a preference in favor of a limited number of religions, that it restricted the constitutionally recognized religions to monotheistic religion(s).[27] From

[20] Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Lima* [*Minutes of the Amendment of the 1945 Constitution of the Republic of Indonesia: Meeting Year 2000, Book Five*], revised (Jakarta: Sekretariat Jenderal, 2010), 410, 424 (Harun Kamil), 412 (Asnawi Latief, F-PDU), 421 (Rosnaniar, F-PG), 443 (Ali Masykur Musa, F-KB).

[21] Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Tujuh* [*Minutes of the Amendment of the 1945 Constitution of the Republic of Indonesia: Meeting Year 2000, Book Seven*], revised (Jakarta: Sekretariat Jenderal, 2010), 24 (Hajriyanto Y. Thohari, F-PG).

[22] Constitution of France, Art. 1; Constitution of the Republic of Turkey, Art. 2; United States Constitution, Amend. I. On different models of the separation in these three constitutions, see Ahmet T. Kuru, *Secularism and State Policies toward Religion: The United States, France and Turkey* (New York: Cambridge University Press, 2009).

[23] Ran Hirschl, *Constitutional Theocracy* (Cambridge, Mass.; London: Harvard University Press, 2010); Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering."

[24] Constitution of the Islamic Republic of Iran, Art. 4; Dustūr Jumhūriyyah Miṣr Al-'Arabiyyah [Constitution of the Arab Republic of Egypt], Art. 2; Constitution of the Islamic Republic of Afghanistan, Art. 3. In one sense, there is similarity between the Indonesian Constitution and the Iranian Constitution (Article 2) in their reference to 'One Supreme God' as a basis of the state.

[25] Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima*, 422 (Rosnaniar, F-PG). This view is similar to that of Hazairin. See note 11 above. See also Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Leiden and Boston: Martinus Nijhoff Publishers, 2010), 30-31 (arguing that Indonesia, based on Article 29, is a monotheist state).

[26] In his introductory comments before a meeting on Article 29 in 2000, Harun Kamil suggested the Pancasila state should not interfere too much in the internal affairs of religion. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima*, 410.

[27] Majelis Permusyawaratan Rakyat Republik Indonesia, 468 (Lukman Hakim Saifuddin, F-PPP).

an Islamic point of view, as believed by many Muslim members, Paragraph 1 was justifiably accepted, for the reason that it corresponded with the principle of Islamic monotheism (*tawhīd*).[28] This correspondence, however, needed not imply any restriction on the state recognition of religion. Read together with the agreement that the Pancasila state was not a theocratic state, this would mean, as many members also held, that there was no official religion or religions, and that restricting the definition of religion to only a few recognized religions was, accordingly, constitutionally unfounded.[29] Furthermore, as argued earlier, in the light of its drafting and adoption history, the main point in Paragraph 1 was not the phrase 'One and Only (*Yang Maha Esa*)' but rather that of 'belief in God (*Ketuhanan*)'. The addition of 'One and Only' was a political compromise, which conveyed a mere symbolic value. It was 'belief in God' which was unanimously agreed upon by the framers, and so had interpretive significance. This phrase is arguably a general reference to religion. This would mean that Paragraph 1 concerns all religions, without any implied exclusion of non-monotheistic religions.

Regarding the consequences of the readoption of the original Article 29 for the legitimacy of the state incorporation of religious law, particularly Islamic law, it seems clear that the failure to incorporate the 'seven words' did not undermine the acceptability of state-enacted Islamic law, for the drafters of the amendments. It has been argued that Paragraph 1 of Article 29 makes 'belief in the One and Only God' a basis of the state, with the effect that the state must take the belief/religion, in addition to other bases, seriously in its policies. Furthermore, Paragraph 2 of Article 29 stipulates the state must guarantee both the freedom to hold a religion and to practice it (worship). State enforcement of Islamic law could, accordingly, be considered an application of Article 29, in the interests of Muslims. It is likely, by way of this sort of reasoning, that the MPR factions established the legitimacy of Islamic law. The secular-nationalist F-TNI/POLRI clearly suggested that "Islamic Sharia can be constitutionally and culturally applied, in accordance

[28] Majelis Permusyawaratan Rakyat Republik Indonesia, 412 (Asnawi Latief, F-PDU); Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2002, Buku Lima*, 225 (M. Anwar Iskandar, F-KB), 229 (Amidhan, F-PG), 249 (Yusuf Muhammad, F-KB), 252 (Achmad Aries Munandar, F-PDIP).

[29] Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima*, 429 (Amidhan, F-PG), 458 (Yusuf Muhammad, F-KB).

with the Presidential Decree on the Constitution of the 1959".[30] Even the Christian-nationalist F-PDKB could still accept legislative enactment of Islamic law, albeit while strongly resisting its constitutionalization.[31]

The previous discussion on Article 29(1) demonstrates how the drafters of the article acknowledged the legitimacy of state incorporation of religious law, Islamic law in particular. Such acknowledgment was a consequence of having 'belief in the One and Only God' as a state basis in terms of religion. Being a state basis, this principle in no way legitimizes the establishment of religious constitutionalism, in which religious values and norms become the supreme principle and law, because such establishment would be contrary to the idea and ideals of the Pancasila state.

III. THE INTERRELIGIOUS MARRIAGE CASE

How is the belief in the One and Only God interpreted and articulated in constitutional cases? How has the Constitutional Court, as the most authoritative interpreter of the Constitution, viewed any implication of Article 29(1) for the religious character of the Constitution? In the following paragraphs, this paper offers an answer to these questions through a critical analysis of the Court's decision to hold the constitutionality of Article 2(1) of Law No. 1 of 1974 on Marriage (the Marriage Law).

3.1 Case Background

The Marriage Law sets the religious foundation of marriages in Indonesia. As provided in Article 2(1), the validity of marriage is determined by the respective religious laws of the marrying couples. The law is silent on the status of interreligious or interfaith marriages. Since the promulgation of the law, interreligious marriage has been subject to different, even conflicting, treatments by the government. The case brought before the Constitutional Court concerning the constitutionality of Article 2(1) was mainly motivated by the impact of this provision on the legitimacy of interreligious marriage.

Article 2 is the backbone of the Marriage Law, in matters relating to the validity of marriages. It differs substantially from its first draft. In the

[30] Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2002, Buku Lima*, 239 (Abdul Rachman Gaffar).
[31] Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima*, 435 (Gregorius Seto Harianto).

Marriage Law, the validity of a marriage is determined by its conformity with religious requirements; whereas the bill had adopted the civil marriage model and, as such, the validity of marriage was determined by being registered and performed according to the law (draft Article 2(1)). In terms of religion, draft Article 11(2) even provided that "differences of nationality, race, countries of origin, places of origin, religion/belief and descent are not impediments to marriage". This clearly meant that interreligious marriages would be legitimate. The final draft of the Marriage Law, however, deleted Article 11.[32] The provision on the validity of marriage was also changed, so that it covered not only mandatory registration but, most importantly, religious determination.

The Marriage Law shows strong religious influence in many of its provisions. The law, as its General Elucidation states, "contains elements and provisions of the laws of the respective religions and beliefs."[33] In Article 1, which differs slightly from its draft wording, the definition of marriage is linked to 'belief in the One and Only God' as the basis of a family. This would mean, as the elucidation of the article asserts, that "marriage is closely related to religion/spirituality, so that marriage has not only outer/physical aspects, but also inner/spiritual aspects, which also play an important role".

Article 2 not only requires marriage registration, but most fundamentally defers determination of the validity of a marriage to the dictates of religion and belief. It stipulates:

(1) A marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned;
(2) Every marriage shall be registered according to the legislation and regulations in force.

The elucidation of Article 2 states that, in line with the Constitution, there will not be a legitimate marriage performed outside the bounds of the laws of the respective religions and beliefs. Inclusive of the laws of the religions and beliefs are all pieces of legislation and regulations applicable to the respective religious believers and adherents to beliefs. As stipulated in the General Elucidation, the provision in this article constitutes one of

[32] On the controversy on draft Article 11, see Mujiburrahman, *Feeling Threatened: Muslim-Christian Relations in Indonesia's New Order* (Amsterdam University Press, 2006), 177–79.

[33] Law No. 1 of 1974 on Marriage, General Elucidation No. 3.

the fundamental principles underlying the law. By requiring conformity with religions and beliefs, the article rejects the bill's concept of marriage as being merely a civil relationship. It is this provision which was specifically drafted to accommodate Islamic demands.

Although the text provides for religious determination, as described above, the Marriage Law does not subject every aspect of marriage validity to religion alone. This is because the applicable laws of religion and belief remain constrained by state law.[34] Religions and religious laws vary, and there is a plurality of religious interpretations of those laws. Some interpretations may contradict the principles underlying the state law. The Marriage Law itself can be conceived of as a state limitation on these religious interpretations. For instance, the law limits the authority of religions, in cases concerning the validity of polygamy (Articles 4 and 5)[35] and of underage marriages (Articles 6 and 7).[36]

It has been disputed whether the laws of religion and belief alone determine the validity of a marriage, in accordance with Paragraph 1 of Article 2, or if its validity will also be determined, in line with Paragraph 2, by it being registered. The majority view is that the validity of marriage is determined by its compliance with religious laws, while the provision for marriage registration merely concerns an administrative requirement. Some scholars, however, consider the two paragraphs as inseparable, so that a marriage is legitimate only if it is consistent with the law of religion and belief, and officially registered.[37] In its recent decisions, the Constitutional Court has made it explicit that the validity of marriage may be determined only by its fulfilment of the requirements of religious laws (Paragraph 1).

[34] Sebastiaan Pompe, "Mixed Marriages in Indonesia: Some Comments on the Law and the Literature," *Bijdragen Tot de Taal-, Land- En Volkenkunde* 144, no. 2/3 (1988): 270.

[35] Article 4 stipulates that polygamy may only be exercised with the court's permission. Permission will be granted if a wife is unable to perform her duties as wife, suffers from physical defects or an incurable disease, and is incapable of having descendants. In Article 5, the requirements for polygamous marriage include: the approval of the wife or wives; the assurance that the husband will guarantee the necessities of life for his wives and their children; the guarantee that the husband shall act justly towards his wives and their children.

[36] Article 6 stipulates that marriage shall be founded upon agreement of the future spouses. A person who has not yet attained the age of 21 years shall obtain consent of their parent(s), guardian, or a family member. Article 7 sets the minimum age at 19 years for males and 16 years for females. The court may grant dispensation at the request of the parents.

[37] See Mohd. Idris Ramulyo, *Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam* [*Review of Some Articles of Law No. 1 of 1974 from the Perspective of Islamic Marriage Law*] (Jakarta: IHC, 1986), 92–95; Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London and New York: Routledge, 2013), 76.

For the Court, registration does not determine the validity of a marriage, as it is simply an "administrative obligation required by the law".[38]

By employing the general wording of religion and beliefs, the Marriage Law seems to accommodate the plurality of religions and beliefs existing in Indonesia. With this multi-faith accommodation, it seems reasonable to anticipate the likelihood of marriages between persons of different religions and beliefs. Nonetheless, no clear provision is made to address the legality of such marriages.[39] The withdrawal of draft Article 11, without an alternative provision, could only mean that interreligious marriages are not regulated. For many scholars, in the absence of such a provision, Article 66 would prevail. This article stipulates that in matters regulated by the Marriage Law, previous relevant laws, including the Dutch colonial era Regulation on Mixed Marriages (*Regeling op de Gemengde Huwelijken*, RGH), should be revoked. Since interreligious marriage is not regulated by the new law, the RGH would remain applicable.[40] Another scholar argues that Article 57, stipulating the rules for mixed marriages, regulated not only marriages between persons of different nationalities, but also interreligious marriages, and that the RGH would provide the binding rules of law in matters of interreligious marriages.[41] Many other scholars reject the legal vacuum thesis. They suggest that interreligious marriage has already been regulated by Article 2(1). Some of them maintain that this article completely prohibits interreligious marriages, while others consider the validity of such marriages inconclusive, as some religions regard such marriages as legitimate.[42]

[38] Judicial Review of Marriage Law, Decision of Constitutional Court No. 46/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia, 2012).

[39] Legal indeterminacies in the Marriage Law concerning Article 2(1) not only include the legal status of interreligious marriage, but also that of marriages between religious believers and adherents of local beliefs, and of marriages between atheists and believers. Marriages between atheists might not be protected under this law, unless the word 'beliefs' in the article is understood broadly to include all forms of belief, religious or otherwise.

[40] Sudargo Gautama, "Mahkamah Agung dan Keanekaragaman Hukum Perdata [The Supreme Court and the Plurality of Private Law]," *Hukum dan Pembangunan* 17, no. 2 (1987): 163–69; J.C.T. Simorangkir, "Peranserta Gereja/Warga Gereja dalam Pembangunan dan Penegakan Hukum di Indonesia dalam Hukum [The Role of Church/Church Members in the Development and the Law Enforcement in Indonesia in the Law]," in *Pelaksanaan Undang-Undang Perkawinan Dalam Perspektif Kristen* [*Implementation of the Marriage Law from the Christian Perspective*], eds. Weinata Sairin and Joseph Marcus Pattiasina (Jakarta: PT BPK Gunung Mulia, 1994), 64–66; Pompe, "Mixed Marriages in Indonesia: Some Comments on the Law and the Literature."

[41] Ichtijanto, *Perkawinan Campuran dalam Negara Republik Indonesia* [*Mixed Marriage in the Republic of Indonesia*] (Jakarta: Badan Litbang Agama dan Diklat Keagamaan Departemen Agama RI, 2003).

[42] The first view is widely held by many Muslim scholars and the Ministry of Religious Affairs. See Asmin, *Status Perkawinan Antar Agama Ditinjau dari Undang-Undang Perkawinan No. 1/1974* [*The Status of Interreligious Marriage According to the Marriage Law No. 1/1974*] (Jakarta: PT Dian Rakyat, 1986), 68; Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama* [*Marriage Law in Indonesia According*

With the promulgation of the Population Administration Law of 2006, the validity of interreligious marriage received statutory protection, although such a marriage must be approved, in advance, by a decree of the civil court.[43] This legal arrangement seems to be distinctive, compared to those of secular states, which impose no restriction on interreligious marriage, and other countries with the personal status system, whereby Islamic family law is formally enforced. In most Muslim countries, interreligious marriage is permitted between a Muslim man and a non-Muslim woman who belongs to *ahl al-kitāb* (People of the Book, generally referring to adherents to Judaism and Christianity) but not otherwise.[44] Although adopting the personal status system similar to that of Indonesia, Singapore and India have established civil marriage which would solemnize the marriages of different religions, including between Muslims and non-Muslims.[45]

Despite the fact that the current legal regime in Indonesia, particularly since the adoption of the Population Administration Law, does not prohibit interreligious marriage, there is no guarantee that all applications for this marriage will be registered. Recent studies have shown that some judges of civil courts will readily disapprove any application for the registration of an interreligious marriage.[46] It is against this practical uncertainty, in addition to the aforementioned normative ambiguity, that a 2014 challenge to the Marriage Law, submitted to the Constitutional Court, is better understood.

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to Legislation, Customary Law, Religious Law] (Bandung: Mandar Maju, 1990), 18–20. The second approach can be found in Rusli and R. Tama, *Perkawinan Antar Agama dan Masalahnya sebagai Pelengkap UU Perkawinan No. 1 Th. 1974* [*Interreligious Marriage and its Problem as an Addition to the Marriage Law No. 1 of 1974*] (Bandung: Shantika Dharma, 1984).

43 Law No. 23 of 2006 on Population Administration, elucidation of Art. 35(a).

44 Jamal J.A. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, 3rd ed. (Leiden and Boston: Brill, 2009), 85–86; Global Legal Research Directorate, *Prohibition of Interfaith Marriage* (The Law Library of Congress, 2015), https://www.loc.gov/law/help/marriage/prohibition-of-interfaith-marriage.pdf. Tunisia recently lifted the ban for interreligious marriage of a Muslim woman to a non-Muslim man. "Tunisia Lifts Ban on Muslim Women Marrying Non-Muslims," *Aljazeera*, September 14, 2017, https://www.aljazeera.com/news/2017/09/14/tunisia-lifts-ban-on-muslim-women-marrying-non-muslims.

45 See Noor Aisha Abdul Rahman, "Muslim-Non-Muslim Marriage in Singapore," in *Muslim-Non-Muslim Marriage: Political and Cultural Contestations in Southeast Asia*, eds. Gavin W. Jones, Chee Heng Leng, and Maznah Mohamad (Singapore: ISEAS, 2009), 283–317; Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2013), chap. 6, https://doi.org/10.1017/CBO9781139649612.

46 See, for instance, Judith Koschorke, "Legal Pluralism in Indonesia: The Case of Interfaith Marriages Involving Muslims," in *Legal Pluralism in Muslim Contexts*, eds. Norbert Oberauer, Yvonne Prief, and Ulrike Qubaja (Leiden, The Netherlands: Brill, 2019), 213–14, https://doi.org/10.1163/9789004398269_010; Mohamad Abdun Nasir, "Religion, Law, and Identity: Contending Authorities on Interfaith Marriage in Lombok, Indonesia," *Islam and Christian–Muslim Relations* 31, No. 2 (April 2, 2020): 131–50, https://doi.org/10.1080/09596410.2020.1773618.

3.2 Applicant's Argument

On 4 July 2014, Damian Agata Yuvens and others brought their application to the Constitutional Court to review the constitutionality of Article 2(1) of the Marriage Law. They argued that the Marriage Law, by confining the legitimacy of marriage to those taking place within, and as determined by, religions and beliefs recognized by the state, and by stipulating marriages performed outside those bounds as illegitimate, had coercively imposed the vision of the state regarding religion and belief. According to the applicants, the restrictive nature of the provision has forced some people to exploit legal loopholes use legal proceedings considered to be a form of legal fraud (*fraus legis facta*; *penyelundupan hukum*). The applicants applied for the conditional unconstitutionality of the impugned provision, so that the text of the article would read: "a marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned, as long as their interpretation is assigned to each party."[47]

The applicants proposed five arguments to support their application. First, the religious requirement for marriage validity contravened religious freedom as protected by the Constitution in Article 28E(1 and 2), Article 28I(1), and Article 29(2). They also argued that Article 2(1) of the Marriage Law had legitimized (impermissibly) the state as the true interpreter of religion in matters of marriage. In this way, the law was not consistent with the religious freedom enshrined in the Constitution, nor with the nature of the Pancasila state, as neither a secular nor a religious state. For the applicants, the state administration should not be part of the implementation of religion. Rather than it being a state matter, the solemnization of marriage should be at the behest of the persons willing to get married, in accordance with their conscience. The state duty regarding registration should not be conflated with religious interpretation and application. Viewed in this way, by the applicants, the state should not refuse to register marriage on the basis of religious considerations.[48]

Second, the restrictions on interreligious marriages, based on Article 2(1), violated the constitutional right to marry and to form a family, as

[47] Judicial Review of Marriage Law, Decision of Constitutional Court No. 68/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia, 2015).

[48] Judicial Review of Marriage Law, Decision No. 68, 16–21.

enshrined in Article 28B(1). By reference to international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the applicants pointed out that restrictions on marriage, on the basis of religion, were unacceptable. The national law of human rights should recognize religious restrictions on a marriage only to the extent which they were agreed to by the parties. By putting illegitimate restrictions on the rights of persons from different religions and beliefs to marry, the state violated its duty to protect the right of citizens to have legitimate marriages. To deny the legitimacy of interreligious marriages, according to the applicants, was to negate the legal consequences arising from such marriages, with regard to rights and responsibilities between spouses, and of children. Since interreligious marriage was unrecognized, children born from such marriage would remain socially stigmatized as being born out of wedlock.[49]

Third, according to the applicants, Article 2(1) enabled various interpretations, and this had resulted in conflicting norms, which failed to protect the constitutional right to the certainty of just laws (*kepastian hukum yang adil*) as established in Article 28D(1). The Constitution demands the protection of legal certainty, meaning that state laws should not be uncertain or ambiguous, in ways which would make them difficult to implement in practice, and should not create conflicting norms within the subject law, nor between this law and others. Article 2(1) could not provide such legal certainty. The article had given rise to a wide discretion in determining who had the authority to examine the conformity of marriage with religious requirements, and when a marriage could be considered valid. The validity of marriage could be determined by multiple, and possibly conflicting, interpretations, even within each religion or belief.[50]

Fourth, since Article 2(1) laid the basis for the state to discriminate against citizens of different religions, it violated the constitutional right to equality before the law, as guaranteed in Article 27(1) and Article 28D(1), and the right to freedom from discrimination, guaranteed in Article 28I(2). The impugned provision, which made different interpretations possible,

[49] Judicial Review of Marriage Law, Decision No. 68, 22–25.

[50] Judicial Review of Marriage Law, Decision No. 68, 26–35. The applicants made references to various interpretations within six recognized religions on the validity of interreligious marriage.

has been interpreted differently by marriage registrants, so there has been different treatment for different citizens; in some cases, registrars registered interreligious marriages, while in others they refused to do so.[51] Finally, the applicants argued that the limitation on rights provided by Article 2(1) was inconsistent with the provision of rights limitation, established in Article 28J(2) of the Constitution. The statutory limitation could be accepted in only two of four elements of the provision of rights limitation,[52] since it was embodied in a legitimate law and implemented in a democratic society. The article therefore violated the rights and freedoms of others, and did not meet just requirements, based upon considerations of morality, religious values, security, and public order.

In addition to the above-mentioned substantive aspects of Article 2(1), which for the applicants were unconstitutional, they challenged the article in respect of its formal aspects.[53] However, since the formal review argument was set aside by the Constitutional Court on the basis that the challenge was beyond the required time limit for a formal review,[54] it is not discussed here.

3.3 The Court's Decision

The Constitutional Court rejected the application and argued for the constitutionality of the religious determination in Article 2(1) of the Marriage Law. In a brief, unelaborated decision, the Court argued that, despite the constitutional recognition of the right to marry and procreate, the Constitution allows limitations on the exercise of that right through legislation (Article 28J(2)). In addition, for the Court, religion is a basis of the state, and the state itself is responsible for safeguarding the fulfilment of the rights of citizens, with regard to marriage and family. Although there was no disagreement

[51] Judicial Review of Marriage Law, Decision No. 68, 36–38.

[52] According to the applicants, among the elements of the rights limitation stipulated in Article 28J(2) of the Constitution, only two elements, namely 'provided by law' and 'implemented in a democratic society', were satisfied by Article 2(1) of the Marriage Law.

[53] The arguments of the applicants with regard to the formal aspects of the law include: implementation of the article has facilitated evasion of the law (*fraus legis*); the article did not satisfy the requirements of the legitimate rule of law; and implementation of the article on interreligious marriage was in contrast to its objective, as many persons willing to engage in interreligious marriage became apostates. Judicial Review of Marriage Law, Decision No. 68, 45–53. To support their application, the applicants submitted two experts and two witnesses. Judicial Review of Marriage Law, Decision No. 68, 60–72.

[54] Judicial Review of Marriage Law, Decision No. 68, 150. Following its decision on the review of the Supreme Court Law of 2009, the Constitutional Court stated the maximum required time for formal review of a statute to be considered by the Court is 45 days since the statute's promulgation. See Judicial Review of Supreme Court Law, Decision of Constitutional Court No 27/PUU-VII/2009 (The Constitutional Court of the Republic of Indonesia ,2010).

with respect to the judgment, Justice Maria Farida Indrati gave a separate argument in the form of a concurring opinion, which, putting aside her concluding judgment, in fact criticized the Marriage Law, particularly Article 2(1). Unlike the majority of the justices, Justice Indrati was concerned that the impugned provision had violated the rights of, particularly, those who would enter into interreligious marriages. Nonetheless, she rejected the application, for the reason that the conditional unconstitutionality the applicants proposed would give rise to legal uncertainty.[55]

The decision of the Court demonstrates the significance of religion in matters of marriage. However, as is argued below, the Court failed adequately to engage the arguments of the applicants. There are at least four points of criticism of the decision. First, the reliance the Court placed on merely the first principle of Pancasila, in legitimating Article 2(1), would indicate its support for religious supremacy. Second, the Court did not consider how the right to marry of non-religionists and people of non-recognized religions was to be protected. Third, it failed to address the main concern of the application, namely the validity of interreligious or interfaith marriages, resulting in the enduring uncertainty of their validity. Finally, the reference to the limitation clause, particularly the religious values, to justify the religious determination, is likely unsupported by the terms of religion (Islam) itself.

3.4 Analysis of the Court's Arguments

3.4.1 Religious Significance of Marriage

The Court began its arguments for the religiosity of marriage by referring to the fourth paragraph of the Preamble, and Article 29(1) of the Constitution, in which the phrase 'belief in the One and Only God' is entrenched as the state ideology. As the Court pointed out, this reference suggested the constitutional acknowledgment of religion. As a consequence, the state acknowledges that the acts of citizens would be closely related to religion.[56] In matters of marriage, religion was regarded to be the basis on which communities organize themselves, in relation to God, in order to implement God's will to maintain the continuity of the life of human

[55] Judicial Review of Marriage Law, Decision No. 68, 155-62 [6.1–6.6].
[56] Judicial Review of Marriage Law, Decision No. 68, 151 [3.12.2].

beings. It was the duty of the state to guarantee the performance of this religion-related act.[57]

Throughout the arguments, the Court emphasized the religious character of marriage. Marriage was also viewed as a constitutional right, the fulfilment of which required respect to be given to the same right of others. The state, through its laws, protected yet regulated the exercise of this right, so that its application would not result in conflict between rights-holders.[58] For the Court, the Marriage Law "has realized the principles contained in Pancasila and the 1945 Constitution and has accommodated all existing social facts".[59] Hence, in considering the nature of legitimate marriage, the Court would follow the marriage stipulations in this law. For instance, marriage was described as a relationship of body and soul, containing formal, social and spiritual aspects, which was founded on the 'belief in the One and Only God'. The Court also agreed that the validity of marriage is determined by religion, and that the role of the state is to guarantee its administrative legality.

The Court rejected the applicants' argument that the religious determination of marriage validity required the state to compel people to follow their respective religious laws. For the Court, since marriage has been regulated by legislation, what people have to do is to be "obedient and submissive, and not in conflict with, or in violation of, legislation".[60] This seemed to mean that what people are bound to follow is in fact state law, not religion *per se*. However, as the law legitimizes adherence to the dictates of religion or belief, in matters of marriage, the response of the Court became a mere circular argument.

The Court's arguments raise some critical issues. To associate the Pancasila state ideology with only its first principle of 'belief in the One and Only God' is undoubtedly erroneous, except if it is meant as being a part of the ideology. This first principle was relied upon by the Court to justify the religiosity of marriage. This raises a foundational problem of marriage: why this single principle, excluding all others, provides the basis for justifying

[57] Judicial Review of Marriage Law, Decision No. 68, 153 [3.12.5].
[58] Judicial Review of Marriage Law, Decision No. 68, 151 [3.12.2].
[59] Judicial Review of Marriage Law, Decision No. 68, 152 [3.12.3]. This statement is similar to that found in the Marriage Law. See Law No. 1 of 1974 on Marriage, General Elucidation, para. 3.
[60] Judicial Review of Marriage Law, Decision No. 68, 152 [3.12.4].

marriage. Marriage might also be approached from the point of Pancasila's second principle, 'just and civilized humanity', meaning that marriage is part of human rights and collective human expression. Marriage, as a human right, has been recognized internationally[61] and adopted by the Indonesian Constitution and the Human Rights Law.[62] The reference to only the first principle indicates judicial support of religious supremacy, an approach of strong religious constitutionalism.

On the basis of the first principle, the Court has restricted the scope of marriage to what is permitted by religion; there would be no valid marriage outside the bounds of religion. Nonetheless, the principle 'belief in the One and Only God' does not aspire to strong religiosity. If that were the case, all areas of life, public and private, would be regulated on the basis of religion. This principle, accordingly, should not be interpreted to invalidate all non-religious marriages. As is also argued below, the restriction on non-religious marriages would be unjustifiable, by the authority of religion itself.

The reliance the Court placed on religion brings up some critical points. First, the Court did not give a definition or criteria of what religion is, for the purpose of the validity of any marriage. Unlike its decisions in the Blasphemy Law Case[63] and the Local Beliefs Case,[64] the Court failed to address whether the word 'religion' should be inclusive. If the Court defers to the Marriage Law, and the existing practices of legitimate marriage, it would most likely cause a very restrictive concept of religion, to the effect that marriage would be valid only if it were conducted according to the practices of recognized religions.[65] The fact that the Court did not elaborate further on the use of religion and its signification seems to suggest this deference. If this is the case, the rights of believers of non-recognized religions, let alone those of non-believers, would be denied. In addition to violating the right to marry,

[61] "Universal Declaration of Human Rights" (GA Res. 217A (III), UN GAOR, UN Doc. A/810 (10 December 1948), Art. 16; "International Covenant on Civil and Political Rights" (opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 23.

[62] Constitution of the Republic of Indonesia 1945, Art. 28B(1); Law No. 39 of 1999 on Human Rights, Art. 10.

[63] Judicial Review of Blasphemy Law, Decision of Constitutional Court No 140/PUU-VII/2009 (The Constitutional Court of the Republic of Indonesia, 2010).

[64] Judicial Review of Population Administration Law, Decision of Constitutional Court No 97/PUU-XIV/2016 (The Constitutional Court of the Republic of Indonesia, 2017).

[65] As mentioned in the application, the religious organizations giving their submissions to the case represented six recognized religions. There was no representative from non-recognized religions or local beliefs appearing before the court.

such a restriction would be contrary to the constitutional right to non-discrimination, as provided by Article 28I(2).

Second, the Court's overemphasis on the role of religion in marriage not only delegitimizes non-religious marriage, but also undermines local beliefs-based marriage. By limiting marriage to religious marriage, the Court seemed to be suggesting that everyone, even a non-religious person, has to marry according to a religion. Here, like the first concern, Article 2(1) would severely limit religious freedom. In addition, despite its mention of belief (*kepercayaan*) together with religion, similar to the text of the Marriage Law (Article 2(1)), the Court refers to religion only, as a determinant of marriage validity, while ignoring local beliefs. It is not clear whether, for the Court, religion in marriage includes local beliefs.

Third, even though the Court dealt with the constitutionality of Article 2(1), it did not mention, let alone engage with, the main concern of the application and all the submissions, namely the validity of interreligious or interfaith marriages. By being silent on this matter, the Court seemed to maintain the existing ambiguity of the legal status of interreligious marriage, leaving it to the government to regulate, and consequently making it vulnerable to various restrictions or to being uncertain of protection. Although the Population Administration Law has facilitated the legalization of interreligious marriage applications, as discussed earlier, ordinary courts do not always grant approval. Some judges refuse to approve such marriages, because they take the view that Article 2(1) renders them illegitimate.[66] Here, the religious determination is understood as requiring the embrace of the same religion, of persons willing to marry, and, as such, prohibiting interreligious marriage to be conducted and registered. Even the Supreme Court in its recent decision easily dismissed an inter-religion marriage application on the basis of this provision, without considering its established precedent in the 1989 decision and the Population Registration Law.[67] In

[66] For instance, Decree of District Court of Ungaran No. 08/Pdt.P/2013/PN.Ung (The Supreme Court of the Republic of Indonesia, 2013); Decree of District Court of Blora No 71/Pdt.P/2017/PN Bla (The Supreme Court of the Republic of Indonesia, 2017).

[67] Supreme Court Decree No. 1977 K/Pdt/2017 (The Supreme Court of the Republic of Indonesia, 2017). Irrespective of this decision, many civil courts still give their approval for interreligious marriage applications. See, for instance, Decree of District Court of Surakarta No. 186/Pdt.P/2018/PN.Skt (The Supreme Court of the Republic of Indonesia, 2018); Decree of District Court of South Jakarta No. 1139/Pdt.P/2018/PN.Jkt.Sel (The Supreme Court of the Republic of Indonesia, 2019).

addition, in 2019, in compliance with a legal opinion (*fatwa*) of the Supreme Court, the General Director of the Population and Civil Registration of the Ministry of Home Affairs issued a circular addressed to all civil registries, directing them to dismiss any interreligious marriage application, because such marriages were unlawful.[68]

Fourth, the claim the Court made, regarding the completeness or otherwise of the Marriage Law, is contrary to the unresolved problem of interreligious marriage legitimacy, which has been debated since the promulgation of the Marriage Law. Such a claim not only ignores this enduring problem, granting no express protection of the right to marry a person of a different religion/faith, but also fails to acknowledge the weaknesses inherent in some of the provisions of the Marriage Law, as the Court itself has noted in some of its previous decisions. The Court, in some cases, has invalidated or made amendments to some provisions in the Marriage Law by using conditional unconstitutionality, such as in the Illegitimate Children Case, in which the Court held that Article 43(1) of the Marriage Law, which provided that a child born out of wedlock only has a civil relationship with his/her mother or the family of mother, was unconstitutional, unless it was interpreted as including the relationship of the child with his/her father and the family of his/her father, as can be proven by science and technology, or other legal evidence.[69] The Marriage Agreement Case[70] is also evidence of the Court's criticism of the Marriage Law. In this later case, the Court held that the provisions in Article 29 of the Marriage Law, concerning an unchangeable prenuptial agreement, were conditionally unconstitutional, so that the article should now be read as allowing modification of this agreement, during marriage.

3.4.2 Religious Marriage and Rights Limitation

In response to the arguments of the applicants regarding the limitation of rights created by the impugned provision of the Marriage Law, the Court limited itself to two issues of limitation, while other remaining issues were

[68] Letter of Director General of Population and Civil Registry No. 472.2/3315/DUKCAPIL on Explanation in Matters of Civil Registry, 2019.

[69] Judicial Review of Marriage Law, Decision of Constitutional Court No. 46/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia, 2012).

[70] Judicial Review of Marriage Law, Decision of Constitutional Court No. 69/PUU-XIII/2015 (The Constitutional Court of the Republic of Indonesia, 2016).

set aside without explanation. The two issues addressed were the limitations on the right to marry, and those on the right to religious freedom. Firstly, against the argument of the applicants that Article 2(1) restricted their right to establish a family through a legitimate marriage, in accordance with Article 28B(1) of the Constitution, the Court referred to the limitation clause (Article 28J(2)), to the effect that the limitation created by the impugned article was justified, as it was provided by a statute, made to protect rights and freedoms of others, and was consistent with considerations based on morality, religious values, safety and public order.[71] How these considerations could justify this limitation, however, was not further elaborated. The fact that the limitation was provided in a statute (the Marriage Law) seemed, for the Court, to be a sufficient ground for the legitimacy of the limitation.

The second issue of limitation concerned religious freedom. The Court rejected the argument that the impugned provision permitted the state to engage in undue interference with religion and belief, by dictating its own interpretation of religion and belief. Against this claim, the Court emphasized the complementary relation between religion and state, in matters of marriage, in that religion provided the basis for human activities in establishing a family through God-sanctioned marriage, while the state guaranteed their legal certainty and protection.[72] This, however, did not answer the concerns with the state's religious interference.

The state's recognition and regulation of religious marriage is arguably not inconsistent with freedom of religion.[73] What would raise a question of consistency is when religious marriage is the only form of marriage which the state recognizes. The state, in regulating religious marriage, unavoidably makes its own interpretation of what a valid marriage is, according to religion. In the case of different religious interpretations, considered to be legitimate in religious communities, the state would likely choose, from

[71] Judicial Review of Marriage Law, Decision of Constitutional Court No. 68/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia, 2015), 151 [3.12.3].

[72] Judicial Review of Marriage Law, Decision No. 68, 152-3 [3.12.5].

[73] On justification of religious marriage, see Ayelet Shachar, "Faith in Law? Diffusing Tensions Between Diversity and Equality," in *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, ed. Joel A. Nichols (Cambridge: Cambridge University Press, 2012), 341; Gideon Sapir and Daniel Statman, "Religious Marriage in a Liberal State," in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford: Oxford University Press, 2014), 269–82, https://doi.org/10.1093/acprof:oso/9780199660384.003.0015.

various religious interpretations, one which is considered representative of all, or suitable for meeting state policies. This is precisely what has been achieved by the regulations of Islamic marriage, and its bureaucratization, through the Ministry of Religious Affairs. In this sense, the claim, that the state would dictate its own religious interpretation, seems to be justified. The state acts not only as a protector and guarantor of religious marriage, but also as the ultimate determinant of its legitimacy. On the other hand, this religious marriage exclusivism either deprives non-religious believers of their right to marriage, or requires them to perform religious marriages, against their consciences. Accordingly, to be consistent with the concept of religious freedom, the policy of religious marriage needs to be relaxed. As the United Nations Human Rights Committee, in its General Comment No. 19, on the Family, has stated: "the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages."[74] The Indonesian legal realities have in fact caused some relaxations to be made to religious marriage exclusivism, through the registration of marriages between persons of local beliefs,[75] a fact that the Constitutional Court in this case failed to acknowledge.

In the two arguments mentioned above, the Court gave emphasis to the role of religion in the limitation of rights. Although it is not the sole consideration for the limitation of the right to marry, the consideration of 'religious values' is likely, in an examination of the whole of the arguments the Court has made, to constitute the most important point of reference. However, the Court did not elaborate on what religious values, in matters of marriage, should look like. It also did not fairly appeal to religious reasoning, in arguing for the constitutionality of the impugned law. The Court seemed to assume that marriage was embedded in every religion, and that all religions would likely be in agreement on this matter.

In other cases concerning the constitutionality of some provisions of the Marriage Law, the Court employed religious reasoning, either limited to Islamic legal arguments, or in comparative religious perspectives. The use

[74] Human Rights Committee, "General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses" (39th Sess., UN Doc. CCPR/C/21/Rev.1/Add.2 (27 July 1990), para. 4.

[75] Law No. 23 of 2006 on Population Administration.

of exclusively Islamic reasoning is evident in the Polygamy Case.[76] Despite the fact that the Marriage Law regulates polygamy in general, encompassing any person whose religion or belief allows polygamous marriage, the Court limited its legal reasoning to Islamic law, relying on the Qur'an and Muslim juristic interpretation.[77] On the other hand, in the Marriageable Age Case 1, the Court used comparative religious arguments in its holding for the constitutionality of the provision of marriageable age (Article 7(1) of the Marriage Law). In its argument that the minimum age for marriage is indeterminate, and as such open to different settlements, the Court referred to principles and provisions in Islamic law and Hinduism.[78] These religious approaches are different from the other, purely secular, approach the Court took, for example, in reviewing the constitutionality of the Marriage Law's provision on illegitimate children, as outlined in Article 43(1). In this latter case,[79] the Court merely referred to the argument of correctness and fairness, conditionally to invalidate the impugned provision.

The case under discussion, similarly to the former, religious approach made, demonstrates that the religious consideration could be acceptable in a constitutional argument. The main problem is how such consideration remains consistent with constitutionalism. In the matter of marriage validity, the Court has so far accepted, exclusively, the religious determination. Nevertheless, the question is whether religion itself necessitates the fulfilment of religious requirements, for a marriage to be religiously legitimate. The fact is that this is not the case. In Islam, for instance, the majority of Muslim jurists do not require such religiously sanctioned marriage to be valid according to Islamic law. A marriage conducted among non-Muslims, either People of the Book (*Ahl al-Kitāb*)[80] including Jews and Christians, or among pagans/

[76] Judicial Review of Marriage Law, Decision of Constitutional Court No. 12/PUU-V/2007 (The Constitutional Court of the Republic of Indonesia, 2007). In this case, the impugned provisions are Articles 3(1)(2), 4(1)(2), 5(1), 9, 15, and 24 of the Marriage Law, all of which regulate the requirements for polygamous marriage.

[77] Judicial Review of Marriage Law, Decision No. 12, 91-6 [3.15]. The Court referred to two chapters of the Qur'an: al-Rūm: 21 and al-Nisā': 1, 3, 129, and to the religious views of M. Quraish Shihab, a professor in Qur'anic sciences at State Islamic University, Jakarta. On this case, see Simon Butt, "Islam, the State and the Constitutional Court in Indonesia," *Pacific Rim Law & Policy Journal* 19 (2010): 287–96.

[78] Judicial Review of Marriage Law, Decision of Constitutional Court No. 30-74/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia, 2015).

[79] Judicial Review of Marriage Law, Decision of Constitutional Court No. 46/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia, 2012). In this case, in addition to the provision on illegitimate children, the application reviewed the provision on marriage registration (Article 2(2)).

[80] The term '*Ahl al-Kitāb*' (People of the Book) traditionally refers to Jews and Christians. Early Muslim authorities included Sabeans (*ṣābi'ah*) and Magians/Zoroastrians (*majūs*). Abū al-Ḥasan 'Alī ibn Muḥammad ibn Habīb al-

polytheists (*mushrikūn*), or even non-religionists, can be justified, and so its validity will be maintained if they convert to Islam.[81] The limitation on the right to marry, on the basis of religion, is therefore not supported by religious law itself, at least as interpreted by the majority of Muslims jurists.

Likewise, the consideration of religious values which restricts marriage between persons of different religions, might not be justified by religion itself. Religious views on the validity of interreligious marriage vary, as evident from the statements submitted by religious organizations during the proceedings of the case. More than that, within one religious tradition itself there exists a multiplicity of views. In Islamic law, for instance, the validity of interreligious marriages has been disputed ever since the early period of Islam. The majority of Muslim jurists since the classical period, and the legal practice in modern Islamic countries, as mentioned earlier,[82] legitimize marriages between Muslim men and non-Muslim women of *Ahl al-Kitāb*. There is only a minority view, associated with ʻAbd Allāh ibn ʻUmar (d 693 CE), a companion of the Prophet, and some scholars of the *Imāmiyyah* (Twelver Shia), which prohibits Muslims from marrying non-Muslims, either men or women.[83] This minority view, albeit with different reasons, is in fact the basis of fatwa, against interreligious marriage, issued by many Islamic organizations in Indonesia, such as Nahdlatul Ulama, Muhammadiyah and the Indonesian Ulema Council (MUI).[84] In a fatwa issued in 2005, the MUI

Māwardī, *Al-Ḥāwī al-Kabīr fī Fiqh al-Imām al-Shāfiʻī* [*The Large Container in the Jurisprudence of Imam Shafiʻī*], vol. 9 (Beirut: Dār al-Kutub al-ʻIlmiyyah, 1994), 223–26; Muwaffaq al-Dīn Abū Muḥammad ʻAbd Allāh ibn Aḥmad ibn Muḥammad Ibn Qudāmah, *Al-Mugnī* [*The Enricher*], vol. 7 (Beirut: Dār al-Kitāb al-ʻArabī, 1983), 501–3. In later periods, some Muslim scholars included Hindus, Buddhists and Confucians. Muḥammad Rashīd Riḍā, *Tafsīr al-Qurʼān al-Ḥakīm (Tafsīr al-Mannār)* [*Commentary on al-Qurʼan (al-Mannār Commentary)*], vol. 6 (Cairo: Dār al-Mannār, 1947), 187–90.

81 On the opinions of Muslim jurists on the validity of non-Islamic marriages, see Ibn Qudāmah, *Al-Mugnī*, 7:531; Ibn al-Humām Kamāl al-Dīn Muḥammad ibn ʻAbd al-Wāḥid, *Sharḥ Fatḥ al-Qadīr* [Commentary on Fatḥ al-Qadīr], vol. 3 (Beirut: Dār al-Kutub al-ʻIlmiyyah, 2003), 390–93; ʻAbd al-Karīm Zaydān, *Aḥkām al-Żimmiyyīn wa al-Mustaʻminīn fī Dār al-Islām* [Laws on Non-Muslims and Asylum-Seekers in the Muslim Territory] (Beirut: Muʻassasah al-Risālah and Maktabah al-Quds, 1982), 356–67.

82 See note 31 above.

83 al-Māwardī, *Al-Ḥāwī al-Kabīr fī Fiqh al-Imām al-Shāfiʻī*, 9:221–22; Abū al-Walīd Ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid* [*The Beginning for the One Who Exercises Independent Reasoning and the End for the One Who Would Limit Himself*], 6th ed., vol. 2 (Beirut: Dār al-Maʻrifah, 1982), 44. On different views amongst Twelver Shia scholars regarding marriage of Muslim men to women of *Ahl al-Kitāb*, see Muḥammad Jawād Mughniyyah, *Al-Fiqh ʻalā al-Mażāhib al-Khamsah* [*Islamic Law According to Five Schools of Law*], 10th ed., vol. 2 (Beirut: Dār al-Tayyār al-Jadīd, 2008), 48–49.

84 Muhamad Ali, "Fatwas on Inter-Faith Marriage in Indonesia," *Studia Islamika: Indonesian Journal for Islamic Studies* 9, No. 3 (2002): 1–33; Suhadi Cholil, "The Politico-Religious Contestation: Hardening of the Islamic Law on Muslim-Non-Muslim Marriage in Indonesia," in *Muslim-Non-Muslim Marriage: Political and Cultural Contestations in Southeast Asia*, eds. Gavin W. Jones, Chee Heng Leng, and Maznah Mohamad (Singapore: ISEAS, 2009), 139–58.

held that interreligious marriage, including a marriage between Muslim men and women from *Ahl al-Kitāb*, is "*ḥarām* [prohibited] and unlawful".[85] With regard to marriage between Muslim women and non-Muslim men, despite the assumed consensus of Muslim jurists in the past on its prohibition,[86] the validity of this marriage is currently contested by some scholars, arguing that the reasons for the prohibition no longer prevail.[87]

The legal pluralism within Islamic law makes the argument for outlawing interreligious marriages, on the basis of the religious values consideration, tenuous. This is in addition to the plurality of views within religious traditions other than Islam, in Indonesia, of the status of interreligious marriage, many of which consider such marriage legitimate.[88] Instead of limiting interreligious marriage, religious consideration could therefore provide justification for its validity. This stance would be principally consistent with the constitutional principles of human rights, particularly the rights to marriage and religious freedom, and with the fact that there are no legitimate grounds for rights limitations, in accordance with Article 28J(2).

IV. CONCLUSION

This paper has demonstrated how Article 29(1) was made and understood by both the makers of the original Constitution and by the drafters of the amended Constitution. As has been argued, the phrase 'belief in the One and Only God' is a general reference to religion. This would mean that Article 29(1) concerns all religions, without any implied exclusion of non-monotheistic religions. This article affirms what is called the middle way of state-religion relations, encapsulated in the Pancasila state, which is located between an exclusively secular state and a religious or theocratic state. This means the Pancasila state does not endorse the supremacy of religion (and religious law) found in religious constitutionalism. In such a state, there should be no official

[85] Fatwa of the Indonesian Ulema Council No. 4/MUNAS VII/MUI/8/2005 on Interreligious Marriages (28 July 2005).

[86] Many classical Muslim jurists discussed the legitimacy and preservation of the marriage of a woman converting to Islam to a non-Muslim man. See Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003), 161–70.

[87] Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Oxford: Oneworld, 2006), 14–21; Siti Musdah Mulia, "Promoting Gender Equity Through Interreligious Marriage: Empowering Indonesian Women," in *Muslim-Non-Muslim Marriage: Political and Cultural Contestations in Southeast Asia*, eds. Gavin W. Jones, Chee Heng Leng, and Maznah Mohamad (Singapore: ISEAS, 2009), 255–82.

[88] This is demonstrated in various submissions to the case from religious organizations.

religion(s). Restricting the definition of religion to only a few state-recognized religions would therefore be constitutionally unjustified.

The Constitutional Court, as the constitutionally most authoritative interpreter of the Constitution, has referred to the phrase 'belief in the One and Only God' in some of its decisions. In the Interreligious Marriage Case, the Court held the constitutionality of the provision of religious marriage exclusivism. The majority of the justices in this case relied on the belief in the supremacy of religion in matters of marriage. No attempts were made to balance the principle of 'belief in the One and Only God' with other fundamental values and principles of the Constitution. As a consequence, no consideration was given to the right to marry of non-religionists and people of non-recognized religions. It has also been argued that even if religion, Islam in particular, is employed in the Court's reasoning, the result would be consistent with the principle of human rights protection in the Constitution.

The Court's interpretation of Article 29(1) in the Interreligious Marriage Case has brought strongly religious overtones to the Constitution. Its arguments would lead to the adoption of the supremacy of religion, contrary to what the makers and drafters of the Constitution intended. The case underlies a tension in Indonesian constitutionalism, between the Constitution as it ought to be understood and its interpretation.

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Housing as a Human Right within an Era of International Exceptionalism

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Abstract

The right to adequate housing is an internationally recognized human right, yet it has been incontrovertibly desecrated by a lack of recognition, disproportionately affecting vulnerable groups. Economic, social, and cultural rights have encountered many challenges in an ever-increasing era of international exceptionalism and challenges arise in the protection of these rights. The right to housing is achieved in two ways: as a normative right and as a derivative right encompassed within economic, social, and cultural rights. This article introduces: (1) the normative development of economic, social, and cultural rights as recognized human rights, and their regulatory implementation through international instruments; (2) the concept of individuals as right-holders and duty-bearers of economic, social, and cultural rights; (3) understanding how the restriction of the right to housing leads to the violation of other human rights, including (a) the right to life, (b) the right to freedom from discrimination, and (c) the right to humane treatment – and the types of vulnerable groups that face the most discrimination, such as indigenous persons and women; and (4) protection against forced evictions, through an examination of the jurisprudence of the Inter-American System, European Court of Human Rights, and African Court on Human and Peoples' Rights.

Keywords*:* Indigenous Peoples, Gender-based Discrimination, Regional Mechanisms, Right to Adequate Housing.

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I. INTRODUCTION

The evolution of economic, social, and cultural rights is a development that has been met with acceptance, although it has been highly criticized because of concerns that vulnerable groups face a violative lack of recognition. While an ever-increasing level of international exceptionalism has developed in terms of state parties declining to recognize economic, social, and cultural rights as fundamental basic human rights, recognizing and establishing adequate housing as a basic human right could ultimately lead to enhanced protections of other rights and eliminate secondary violations of other internationally recognized rights. The objective of this article is to seek a better understanding of the concept of establishing housing as a human right, and to identify the types of groups that are most affected when the right is breached; as well as to ascertain ways in which the protection of the right to adequate housing can be achieved in order to effect change on an international level.

II. THE CONCEPT OF HOUSING AS A BASIC HUMAN RIGHT

International acceptance of adequate housing as a human right has progressed, particularly through regulatory implementation via international instruments. Regional mechanisms have also prescribed the development of housing as a human right, and established a precedent within their respective mechanisms. Certain international instruments explicitly declare that adequate housing is a protected human right that all persons have the right to enjoy; while other instruments, although not explicit, incorporate the right through a broader meaning.

2.1. International Instruments and Regional Mechanisms

2.1.1. Universal Declaration of Human Rights

In 1948, the Universal Declaration of Human Rights (UDHR) was a stepping stone in the progressive acknowledgement that adequate housing is a right afforded to all individuals. Specifically, Article 25 provides for the right to an

adequate standard of living, which explicitly includes housing.[1] Established as one of the earliest instruments to protect and promote human rights with an explicit reference to the right to adequate housing, the UDHR was followed by similar instruments.

2.1.2. International Covenant on Economic, Social, and Cultural Rights

Subsequent to the creation of the UDHR, in 1966 the International Covenant on Economic, Social and Cultural Rights (ICESCR) created an added layer of protection in the recognition of the right to adequate housing. Article 11(1) provides:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[2]

The right to adequate housing is explicit within the ICESCR and provides for the "continuous improvement of living conditions" for all.[3] Furthermore, the Covenant places an obligation upon State Parties to adhere to the "realization of this right".[4]

2.1.3. Committee on Economic, Social and Cultural Rights, General Comment No. 7

The realization of adequate housing as a human right was continued and further explained in 1997 through the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR or the Committee). The Committee provides an expanded definition of the right to adequate housing and further explores forced evictions in its General Comment No. 7. First, the Committee notes that most forced evictions occur in times of armed conflict and mass

[1] Universal Declaration of Human Rights, December 10, 1948, Art. 25, https://www.refworld.org/docid/3ae6b3712c.html.
[2] International Covenant on Economic, Social and Cultural Rights, December 16, 1966, *United Nations Treaty Series* vol. 993, p. 3, Art. 11(1), https://www.refworld.org/docid/3ae6b36c0.html.
[3] Ibid.
[4] Ibid.

displacement due to violence.[5] Forced evictions also occur during development projects and in land disputes.[6] Regardless, the Committee notes that forced evictions can only be justified if done so for lawful reasons, such as failure to pay rent.[7] Furthermore, all legal remedies must be available to the individual prior to being removed from his or her home.[8]

The Committee lends particular importance to the fact that while forced evictions may be lawful and reasonable in certain situations, in general, a State has an obligation to uphold the individual's right to housing in the form of refraining from forcibly removing the individual from his or her home without lawful justification. The Committee takes the concept of housing as a human right a step further than both the UDHR and ICESCR, by expanding the definition of the right to include an explanation of how the right is breached.

2.2. Regional Mechanisms

Protection of the right to housing has been adopted in various forms by different regional mechanisms, including the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the American Declaration on the Rights and Duties of Man, and the European Convention on Human Rights.

2.2.1. African Charter on Human and Peoples' Rights

Article 14 of the African Charter on Human and Peoples' Rights (African Charter) provides for the protection of the right to housing implicitly through the recognition of the individual's right to property.[9] The right to property is an explicit right within Article 14 of the African Charter and may only be infringed upon in the interest of public need.[10]

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5 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions, May 20, 1997, E/1998/22, par. 6, https://www.refworld.org/docid/47a70799d.html.

6 Ibid, par. 7.

7 Ibid, par. 11.

8 Ibid.

9 "African Charter on Human and People's Rights," June 1981, entered into force October 21, 1986, *African Commission on Human and Peoples' Rights,* Art. 14, https://www.achpr.org/legalinstruments/detail?id=49.

10 Ibid.

The African Charter's recognition of the right to housing is implied through Article 14's right to property; however, it is important to note the limited situation in which the individual may lose this right: in the interest of public need. This provides the State with the power to determine when and how the interest of the public can be measured in terms of certain property, giving credence to the unfortunate fact that the right to housing is a derogable right.

2.2.2. European Convention on Human Rights

The European Convention on Human Rights (European Convention) requires the specific protection of the right to housing, outlined in its Article 8(1). Within the European Convention, an individual has the right to respect for his private and family life, home and correspondence.[11] The right to housing is explicit within Article 8(1) and it is implicit in numerous other articles within the European Convention, including the right to life.

2.2.3. Revised European Social Charter for the Council of Europe

The European System of human rights protection also explicitly provides for the right to housing in Article 31 of the Revised European Social Charter for the Council of Europe, which states: "Everyone has the right to housing."[12]

2.2.4. American Declaration on the Rights and Duties of Man

In 1948, the American Declaration on the Rights and Duties of Man (American Declaration) was the first international instrument to provide for the protection of the individual's basic human rights. Although not legally binding upon all States, the Inter-American System for the protection of human rights, through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, has proven that the American Declaration is binding upon all members of the Organization of American States.

Articles 8 and 9 of the American Declaration offer the most protection in terms of the right to housing for the individual. Article 8 provides that all

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, *Council of Europe*, https://www.refworld.org/docid/3ae6b3b04.html.

[12] European Social Charter (Revised), May 3, 1996, *Council of Europe,* Art. 31, https://www.refworld.org/docid3ae6b3678.html.

persons have the right to have a residence and move freely about the State for which he or she is a national.[13] Furthermore, Article 9 declares that every individual has the right to the inviolability of his or her home.[14] Separately, these two articles protect the individual in choosing where to reside within the territory of the State and to move freely. Together, it can be inferred that the right to housing is encompassed in these protections and the obligation of the State is to not infringe upon a person's decision of where to live.

2.2.5. American Convention on Human Rights

Adopted in 1969, the American Convention on Human Rights (American Convention) is an international instrument applied within the Inter-American System. Within the Convention, Article 7 protects the right to property for all individuals.[15] Similar to the African Charter, the American Convention offers the limited exception in which a State party may contravene its obligation to protect this right: if just compensation is provided, and in times of public utility.[16] The right to housing is implied within the meaning of the American Convention's acknowledgment of the right to property, specifically, as it is applied through the jurisprudence arising from the Inter-American System.

2.2.6. Charter of the Organization of American States

Article 34 of the Charter of the Organization of American States provides that the elimination of extreme poverty, equality, and equitable distribution of wealth and income are all basic objectives.[17] These aims can be achieved in various ways, including, "adequate housing for all sectors of the population".[18]

2.3 Adequate Housing as a Normative Right

There are certain human rights that are internationally recognized as guaranteed rights. These normative rights attach to the individual as basic rights

[13] American Declaration of the Rights and Duties of Man, May 2, 1948, *Commission on Human Rights (IACHR)*, Art. 8, https://www.refworld.org/docid/3ae6b3710.html.
[14] Ibid, Art. 9.
[15] American Convention on Human Rights, Pact of San Jose, November 22, 1969, *Organization of American States (OAS),* Art. 7, https://www.refworld.org/docid/3ae6b36510.html.
[16] Ibid.
[17] "Charter of the Organization of American States," April 30, 1948, Art. 34, https://www.refworld.org/docid/3ae6b3624.html.
[18] Ibid, Art. 34, Section K.

and the State may not deprive people of such rights without just compensation. To achieve adequate housing and to ensure the protection of the individual, it is imperative to recognize housing as a normative right – one that is explicitly guaranteed through specific laws and applied in practice. The explicit recognition of these rights through national and international instruments can assist in ensuring the right is absolute. The international instruments that have been established thus far, have guaranteed many rights for the individual and have placed certain obligations on States. Ensuring that the protection of the right to housing achieves recognition as a normative right, coupled with explicit protection through international norms and practice, can help it to become a right guaranteed in the most basic form.

2.4 Adequate Housing as Derivative Right

The second way in which housing as a human right can be achieved is as a derivative right through other recognized rights. The protection can derive from the identification and protection of similar rights, including but not limited to, civil and political rights, the right to life, rights of the child, the elimination of discrimination and the right to be free from cruel, degrading, and inhuman treatment. The idea that other rights can encompass the right to adequate housing is not a new phenomenon, but is one that is seemingly not internationally accepted. This could be due to institutional discrimination, lack of resources, or other types of inequities that individuals are subjected to within their State of nationality. However, there are ways in which the right to adequate housing can be derived from other protected rights.

First, it is necessary to identify the types of groups or individuals that are most vulnerable and likely to be subjected to discrimination in terms of housing. Second, instituting governmental programs or resources, if available, can be useful in creating programs to help protect absolute rights. This may include enhanced training for governmental officials. It can also include developing programs and resources for minority groups. States may have instruments and laws in place for protecting internationally recognized rights, such as the right

to life; however, understanding that a lack of adequate housing can lead to a breach of other guaranteed rights is an essential realization for all to understand. Only through the recognition that certain rights encompass other rights and that a dereliction of one can lead to an ever-increasing negligence of other rights, will housing be recognized as an essential human right.

III. INDIVIDUAL RIGHTS AND DUTIES OF THE STATE

Perhaps one of the most basic notions of human rights that has developed over the history of international human rights law is that of the individual as a right-holder and States as duty-bearers; that an individual possesses certain basic human rights, while it is the duty of the State to protect such rights. While an individual is guaranteed certain rights, a State must either make those rights available to the individual or ensure those rights are not infringed upon by the State itself or third parties. Direct state action in the restriction of a human right is a violation, while the omission of protection itself is enough to hold a State accountable.

3.1. Forced Evictions

While the right to adequate housing is not always explicitly stated within an international instrument, it can be implicitly recognized. In such cases, a State may be held accountable for not only its inaction in providing adequate housing for its citizens, but also in its direct interference with the individual's right through forced evictions. A number of cases have been decided through regional mechanisms that have recognized that forced evictions are a violation of human rights. These cases provide color as to the ways in which forced evictions have a negative impact on the individual and the obligation of the State to protect individuals from forced evictions.

3.1.1. African System

3.1.1.1. Centre on Housing Rights and Evictions v. Sudan

In 2010, the African Commission on Human and Peoples' Rights (COHRE or the African Commission) rendered its decision as it relates to the violation of human rights through forced evictions. Of the two communications submitted before the African Commission, the second is applicable to the issue of forced evictions. The Centre on Housing Rights and Evictions brought a petition before the African Commission, alleging that two armed groups had formed in the Darfur region of Sudan to protest the lack of development within the region.[19] In response, the State formed its own armed militia group, which targeted civilians and caused hundreds to be forcibly removed from their homes and villages, when the State bombed and raided the villages.[20]

Upon consideration of the allegation of forced eviction, the African Commission held that the State of Sudan violated Article 27(2) of the African Charter.[21] Specifically, the African Commission quantified that had the State's forcible eviction of the civilian population within Darfur been a genuine effort as "collective security" or any other legitimate ground, the forced evictions may have been permissible.[22] However, no such justification could be found and the African Commission therefore held that the State failed to uphold its obligation to protect its citizens.[23]

3.1.1.2. The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria

Prior to the African Commission's ruling in *COHRE v. Sudan*, in 2002 it similarly found that the destruction of homes of the Ogoni community by the State of Nigeria against its citizens was a human rights violation. In its final decision, the African Commission first addressed the duties of the State in terms of its obligations to the individual by stating:

[19] Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, 279/03-296/05, (African Commission on Human and Peoples' Rights, May 2009).
[20] Ibid, pars. 11-14.
[21] Ibid, par. 166.
[22] Ibid.
[23] Ibid, par. 229.

> "Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question."[24]

In its analysis of the alleged violation by Nigeria, the African Commission directly applied Article 14 of the African Charter and the implicit protection of adequate housing found in Article 18(1).[25] Article 14 of the African Charter states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."[26] The African Commission recognized the implicit protection of the right to adequate housing within Article 18(1), which provides: "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."[27] Most notably, the African Commission stated:

> "At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes

[24] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (The Ogoni Case), par. 44 (African Commission on Human and People's Rights, Comm. No. 155/96 (2001), May 27, 2002).

[25] Ibid.

[26] African Charter on Human and Peoples' Rights.

[27] Ibid, Art. 18, Section 1.

> further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace – whether under a roof or not."[28]

The African Commission held that the State of Nigeria failed in its obligation, when it destroyed the homes of the Ogoni community and moreover when it shot and killed the citizens who returned to the village to rebuild their homes.[29] It is clear from the African Commission's final judgment that the State is under the minimum obligation not to destroy the homes of its citizens and to not inflict force or injury upon an individual attempting to rebuild his or her home. The African Commission set a clear precedent in upholding Article 14 of the African Charter and to hold the State to an obligatory standard of respect and protection of the individual's right to property.

3.1.2 European System

3.1.2.1. Connors v. United Kingdom

In 2004, the European Court of Human Rights (ECHR or the Court) issued a judgment against the United Kingdom, in part, finding the United Kingdom had violated Article 8 of the European Convention,[30] which states that all persons have the right to respect for his or her family life and home.[31] This case involved the forced eviction of a family of gypsies by the government of the United Kingdom. Specifically at issue was whether the forced eviction of the applicant and his family was proportionate and necessary, given the alleged nuisance caused and minor infractions allegedly committed by the applicant and his family; and whether a fair opportunity to be heard was given prior to the eviction, which occurred over five hours and involved police officers, police dogs, and a police helicopter.[32]

In its analysis, the ECHR first acknowledged that an interference with an individual's rights can only be necessary if there is a "pressing social need" and it

[28] The Ogoni Case, par. 61.
[29] Ibid, par. 62.
[30] Connors v. The United Kingdom, 66746/01 (Council of Europe: European Court of Human Rights, May 27, 2004).
[31] Ibid.
[32] Ibid, par. 28.

is proportionate with a legitimate aim.[33] The Court further stated that a margin of appreciation must be applied when there is an interference of the individual's rights and a legitimate governmental aim, and went as far as to purport that national courts are better situated than international courts in determining the aim.[34] However, in determining the aim, the margin of appreciation will be more narrow "where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights".[35] The Court also stated that the margin of appreciation is wide in situations involving the application of economic and social policies, and that in issues such as housing, the national authorities are more attuned to evaluate the local needs and conditions, such as the need to restrict an individual's rights.[36]

The Court made important note of the fact that the applicant and his family were gypsies and deserved special consideration because of their vulnerable status as a minority.[37] Additionally, supplementary procedural safeguards were deemed necessary in determining the scope of the margin of appreciation.[38] The applicants in this particular case sought judicial review upon eviction and were denied this right, leaving no other avenue or opportunity to appeal their case.[39] The ECHR ultimately held that there was no reasonable justification for the forced eviction of the applicant and his family, particularly because the Government failed to provide reasons for the eviction and that in the broader context, the conditions in England during the time of this case tended to show that there are many impediments faced by the gypsy community.[40]

The ECHR's finding that the United Kingdom violated Article 8 of the European Convention provides particular color to the fact that forced evictions without proportionality, justification, or due process are a violation of the right

33 Ibid, par. 81.
34 Ibid, par. 82.
35 Ibid, par. 82; citing Dudgeon v. the United Kingdom, judgment of October 22,1981, Series A no. 45, p. 21, Section 52, Gillow v. the United Kingdom, judgment of November 24, 1986, Series A, no. 104, Section 55 (European Court of Human Rights, May 27, 2004).
36 Connors v. The United Kingdom, par. 82.
37 Ibid, par. 84.
38 Ibid, par. 92.
39 Ibid.
40 Ibid, par. 95.

to housing. The European Convention's provision of the right to housing and the Court's analysis exemplify the obligation of the State to respect the right, and also provide for the limited situation in which the right may be limited.

3.1.3. Inter-American System

3.1.3.1. Maria Mejia v. Guatemala

The Inter-American Commission (the Commission) in 1996 issued a ruling on a case involving the forced displacement of an indigenous population and the death of Maria Mejia, a Guatemalan national and member of the Parraxtut Segundo community. The decision was one of the first within the Inter-American System to apply Article 22 of the American Convention and address forced eviction. This particular case was brought against the State of Guatemala and alleged that in 1982, the Guatemalan government created Civilian Autodefense Patrols (PACs) to relocate the indigenous population and eliminate all suspicious persons.[41] Refusal by the Parraxtut Segundo community to participate in the PACs led to 39 members of the community being threatened and harassed, causing them to live in fear and they were forced to leave their homes.[42]

Among the various rights breached, including the right to life, right to humane treatment, and the prohibition of slavery and servitude, the Inter-American Commission held that the State of Guatemala violated the applicants' right to freedom of movement and residence under Article 22.1 of the American Convention.[43] Specifically, the Commission held that the actions taken by Guatemalan officials in blocking the road when the displaced Parraxtut Segundo community members had attempted to return to their homes was a violation of their right to freely choose their place of residence.[44]

The case of *Maria Mejia* was crucial in the recognition of housing as a human right within the Inter-American System of jurisprudence, as the case was decided directly within the plain meaning of Article 22 of the American

[41] María Mejia v. Guatemala, Report N. 32/96 - Case 10.553, par. 1 (Inter-American Commission on Human Rights, October 16, 1996).
[42] Ibid, par. 60.
[43] Ibid, par. 64.
[44] Ibid, par. 65.

Convention, which provides for the freedom of movement and residence. It can be implied that freedom of residence can encompass the right to housing through the recognition that an individual has the right to choose where he or she lives and the State is under the obligation not to restrict this right and to respect the choice of the individual. The Commission in this case went even further to hold that a State violates this right when, through its agents, the State forcibly evicts individuals from their home through violence and threats of violence, as well as when the State takes measures to restrict the individual's access to the home.

IV. SUBSEQUENT VIOLATION OF OTHER RIGHTS

A State's failure to uphold its duty to protect the rights of the individual has a more fluid effect on vulnerable groups of people and can, in turn, have secondary effects upon other rights of the individual. Additionally, vulnerable groups tend to be most affected by a State's lack of recognition of the right to adequate housing and suffer from its effects disproportionately. Indigenous populations are among the vulnerable groups most affected when a State fails to provide adequate housing and are most often the victims of forced evictions and homelessness than other types of groups. Women are also disproportionately affected when adequate housing is not provided and are at risk of forced evictions and lack of protection when it comes to securing housing. While indigenous populations and women are among the most vulnerable groups in terms of having access to and protection of the right to adequate housing, successes have been made in the form of regional mechanisms.

General Comment No. 7 of the UN Committee on Economic Social and Cultural Rights provides the strongest recognition of how other rights can be affected when restricting an individual's right to adequate housing. Particularly, the Committee states:

> "The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions

> frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions."[45]

4.1. Right to Life

Article 3 of the Universal Declaration of Human Rights provides that all persons have the right to life, liberty, and security of person.[46] The right to life is a basic human right and is internationally recognized. The right encompasses more than the explicit definition of the term; specifically, it is violated when other rights are breached. An individual's lack of access to adequate housing due to discrimination can violate the right to life. For instance, if a woman is denied housing or is not provided the same opportunities as her male counterpart, arguably, her right to life has been violated. Lack of access to adequate housing can lead to homelessness, causing even more difficulty in maintaining adequate living conditions.

A person's life expectancy can be measured against the availability and access to certain basic resources in order to survive. One of the resources necessary to live is adequate housing and an adequate standard of living. Therefore, lack of access to adequate housing can negatively impact a person's right to life, which women and minority groups are confronted with on a disproportionate level.

4.2. Right to not be subjected to cruel, inhuman or degrading treatment

Article 5 of the Universal Declaration of Human Rights provides that all persons have the right not to be subjected to cruel, inhuman or degrading treatment.[47] Barriers to access of adequate housing can be a form of cruel and inhuman treatment. Without access to adequate housing, the individual does not have the opportunity to have an adequate standard of living, resulting in inhuman treatment.

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45 CESCR, *General Comment No. 7, Article 11.1*, par. 4.
46 Universal Declaration of Human Rights, Article 3.
47 Ibid, Article 5.

4.3. Right to be free from discrimination

Article 2 of the Universal Declaration of Human Rights holds that all persons are entitled to the rights set forth within the Declaration without distinction of any kind, such as race, sex, language, color, religion, political opinion, birth, property, or social origin.[48] This all-inclusive right to be free from discrimination provides a protective barrier against discrimination in any form and against any person, and provides for the right to enjoyment of the rights within the Declaration. The statement that all persons are entitled to the rights within, regardless of sex, provides an explicit example of the intent to protect women from any form of discrimination. Not providing adequate housing to a woman on the basis of her gender and status as a woman, is a form of direct discrimination, yet one to which women are still subjected. Furthermore, indigenous groups should be protected from discrimination as well, given that Article 2 prohibits discrimination based on a person's religion or status at birth.

4.4. Right to a standard of living adequate for health and well-being

Article 25 of the Universal Declaration of Human Rights provides for the right to "a standard of living adequate for the health and well-being of himself and his family".[49] This right includes food, clothing, housing and medical care, among other subsets of rights.

5. VULNERABLE GROUPS

5.1. Indigenous Populations

Through an examination of cases, regional mechanisms have been imperative in recognizing housing as a basic human right and have acknowledged situations in which that right has been violated by a State. One of the key challenges in gaining international recognition of housing as a basic human right is the unparalleled differences between populations within a State. Different types of

[48] Ibid, Article 2.
[49] Ibid, Art. 25..

individuals are affected disproportionately more than others groups of people, which is also dependent upon the advances of different States. Furthermore, as seen through jurisprudence of the various regional mechanisms, there is no universal definition of 'indigenous peoples'. Nevertheless, recognition of housing as a human right for all, includes indigenous populations.

5.1.1 European Roma Rights Centre v. Greece

The European Committee of Social Rights (ECSR) in 2005 transmitted a decision on the merits of a complaint involving indigenous populations, specifically the Roma community within Greece. The complaint related to the Roma people's right to housing within the State. The petitioners alleged that the laws within the State of Greece discriminated against the Roma community, particularly in relation to housing rights, and that the Roma people suffer from forced evictions on a disproportionate level.[50] Due to the legislative discrimination against the Roma community, the petitioners argued the State had violated Article 16 of the European Social Charter, which provides for the right of the family to social, legal and economic protection.[51] The State violated the right to housing through the lack of homes available to meet the needs of the Roma community, lack of resources for Roma community members who choose to exercise the Roma lifestyle, and the increased number of systematic forced evictions of the Roma people.[52]

The ECSR stated that the civil and political, as well as economic, social, and cultural rights are encompassed within the right to housing.[53] The right to housing means the right to an actual home, as well as access to essential aspects of the home, including electricity.[54] A State's failure to uphold its obligation to provide housing that meets a minimum standard is in violation of the obligation to promote the right of families to adequate housing.[55]

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[50] European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 11 (European Committee of Social Rights, June 8, 2005).

[51] "European Social Charter," Article 1, opened for signature October 18, 1961, *European Treaty Series* no. 163, https://rm.coe.int/168007cf93. Also citing, European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 11.

[52] European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 17.

[53] Ibid, par. 24.

[54] Ibid, par. 24.

[55] Ibid, par. 42.

In its decision on the merits, the ECSR made it apparent that the right to housing is inherent within civil and political rights, as well as economic, social, and cultural rights. Also of importance, is the obligation that a State has to provide a minimum standard of care when it comes to housing, in addition to an awareness that indigenous communities are among the types of vulnerable groups that are systematically discriminated against, particularly in the right to housing.

5.1.2. Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya

In 2010, the African Commission on Human and Peoples' Rights (African Commission) decided the State of Kenya violated a petitioner's right to property, among other rights, when it forcibly removed the indigenous Endorois community from its land and had not provided adequate compensation.[56] The African Commission was tasked with determining whether the Endorois community within Kenya was an indigenous population, thereby requiring special protection, or whether it was a sub-group of a larger tribe, which would differentiate it from that of an indigenous group.[57] In its analysis, the African Commission stated:

> "The African Commission, nevertheless, notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems.... The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms."[58]

Relying upon Articles 19 and 24 of the African Charter and the UN Working Group on Indigenous Populations' definition, the African Commission found that

[56] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (The Endorois Case), 276/2003 (African Commission on Human and Peoples' Rights, February 4, 2010).

[57] Ibid, par. 145.

[58] Ibid, par. 148.

the Endorois community was in fact an indigenous population that must have special protection.[59] The African Commission also analyzed whether or not the State of Kenya had violated the property rights of the indigenous population under Article 14 of the African Charter. The African Commission looked to its own jurisprudence, specifically the *Ogoni* case, in which 'property rights' were deemed to include access to one's property, to not have one's property invaded, and the right to possession and control of such property.[60] By and through its analysis, the African Commission held that the State of Kenya had a duty to not only respect the right to property, but also the right to protect it.[61] Of particular importance was the African Commission's reliance of its decision in the *Ogoni* case, stating:

> "Similarly, in *The Ogoni case 2001* the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14."[62]

Additionally, the African Commission made note of the fact that the term 'indigenous peoples' does not have a universal definition and that "the relationships between indigenous peoples and dominant or mainstream groups in a society vary from country to country".[63] This is an important concept provided by the African Commission, as it tends to argue that because there is no universal definition of 'indigenous persons', a case-by-case analysis must be taken into account when defining a particular vulnerable group. It seems to suggest that a particular State must look to its own citizens and that what defines an indigenous person may vary between States due to the differences that each State possesses.

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59 Ibid, pars. 152-162.
60 Ibid, par. 186. Also citing, The Ogoni Case.
61 The Endorois Case, par. 191.
62 The Ogoni Case. Also citing, "The Right to Adequate Housing," Art. 11, Section 1 of the Covenant: forced evictions, par. 4. UN Doc. E/C.12/1997/4 (1997).
63 The Endorois Case, par. 147.

5.1.3. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua

The case of the Awas Tingni community was one of the first cases that involved an indigenous population, decided on by the Inter-American Court of Human Rights (IACHR). The decision, delivered in 2001, also set a precedent within the Inter-American System regarding State obligations to protect the individual's right to property. The Awas Tingni is an indigenous community located within Nicaragua and its people speak Sumo (also known as Mayagna).[64] The State of Nicaragua violated their right to judicial protection, right to private property, right to life, right to privacy, freedom of conscience and religion, freedom of association, right to the family, freedom of movement, and right to participate in government, under the American Convention.[65]

The State's violation of the Awas Tingni community's right to property was a result of the State's grant of logging on the ancestral lands of the Awas Tingni, which they used for traditional practices since inhabiting the land in 1940.[66] The IACHR applied Article 21 of the American Convention in its conclusion that the State of Nicaragua violated the Awas Tingni community's right to property. According to the IACHR's judgment, all persons have "the right to the use and enjoyment of his property" and the only time in which a person may be deprived of this right is in the situation of "public utility or social interest".[67]

Significantly, the IACHR noted that international human rights instruments cannot be read to have the same meaning as domestic law, and that human rights treaties must adapt and change over time to meet the needs of the individual.[68] Furthermore, it said special attention must be paid to the rights of indigenous communities, as their land is more than a physical aspect, it is also spiritual, and customary law must be taken into account in protecting the property rights of indigenous communities.[69]

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[64] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (The Awas Tingni Case), (Inter-American Court of Human Rights, August 31, 2001).

[65] Ibid, par. 156.

[66] Ibid, par. 140(b), (h).

[67] Ibid, par. 143. Also citing, "American Convention on Human Rights," Art. 21, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica (November 22, 1969).

[68] The Awas Tingni Case, par. 146.

[69] Ibid, pars. 149, 151.

The analysis of the IACHR and the judgment of the Court to find that the State failed its obligations under the American Convention to protect the rights of the Awas Tingni indigenous population, particularly as it related to their right to property, set a precedent within the Inter-American System of jurisprudence for property rights, namely housing rights of indigenous communities. This case also signified that one of the reasons why indigenous persons face discrimination in terms of the right to housing, is that the State may fail to realize an indigenous community's customary practices and the importance of their spiritual connection to their land.

5.2. Women

In addition to indigenous populations, women are also negatively affected by a lack of adequate housing on a disproportionate level. While various international instruments that provide guidance on the concept of housing as a human right do not explicitly state that it applies to women, the right does in fact encompass women as a protected class of persons in terms of receiving and protecting the right to housing, particularly in instruments that state 'all' persons have certain rights. Furthermore, various instruments were created to protect women, including the Convention on the Elimination of All Forms of Discrimination Against Women. However, women are still discriminated against, even in terms of adequate housing. This is due to the fact that women continually face barriers to access. Discrimination in the forms of lack of educational opportunities, access to land, healthcare, and employment, can all lead to the lack of adequate access to housing for women.

Institutional discrimination is one of the strongest forms of discrimination against women and can lead to secondary violations of other rights, including the right to life, right not to be subjected to cruel, inhuman or degrading treatment, and right to be free from discrimination. General Comment No. 7 of the UN Committee on Economic, Social and Cultural Rights states:

> "Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups

> are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless."[70]

The UN Office of the High Commissioner for Human Rights in 2012 published a study on woman and right to adequate housing, which examined the relationship between adequate housing and living standards. Significantly, it found:

> "Women face discrimination in many aspects of housing, land and property on the basis of their gender, which is often compounded by other factors such as poverty, age, class, sexual orientation or ethnicity. Numerous testimonies from the regional consultations highlight that intersectional discrimination represents a key obstacle to the realization of the right to adequate housing, as it often leads women to live in inadequate housing or in segregated communities without basic services such as safe drinking water, sanitation or electricity. Women living in extreme poverty or under occupation, indigenous and tribal women, widows, divorced or separated women, women head of households, girls, elderly women, women with disabilities, migrant women, domestic workers, and lesbian, bisexual and transsexual women are particularly vulnerable."[71]

The study also found that discrimination can be found in the form of "exclusionary policy development".[72] This point is notable, as although various international instruments were created explicitly to protect women and protections for women can be implicitly implied in others, a lack of policy development can also affect women on a disproportionate level.

It is important to recognize that women are subjected to innumerable forms of discrimination which have secondary effects. Both direct and indirect failures to provide adequate housing or access to housing is a form of discrimination and among its consequences are violations of other guaranteed rights. Protections for women have been implemented within international instruments and regional mechanisms. However, it is important for enforcement of the protections to

[70] CESCR, *General Comment No. 7, Article 11.1*, par. 10.

[71] UN Office of the High Commissioner for Human Rights, *Women and the Right to Adequate Housing* (OHCHR, 2012), p. 36. (2005), https://www.ohchr.org/Documents/publications/WomenHousing_HR.PUB.11.2.pdf.

[72] Ibid, p. 37.

take place. For example, in the Protocol to the African Charter on Human and Peoples' Rights, Article 16 outlines specific protections for women. Within the text of the Charter, it states that:

> "Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing."[73]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically defines what constitutes 'discrimination' against a woman, including any exclusion based on her sex for the purpose of impairing the enjoyment of her rights.[74] Women must be guaranteed the same rights as men in terms of "ownership, acquisition, management, administration, and enjoyment and disposition of property",[75] which, by virtue of the text, requires equal protection of the right to property as men enjoy.

Given that there are protections for women through national, regional, and international instruments, it seems there should be no valid reason for the discrimination of women to still be abundantly present, yet women still face ever-increasing discrimination. Women play an important role within their respective societies; therefore, it is imperative for women to be treated equally, especially when it comes to housing rights.

VI. COMMONALITIES AND DIFFERENCES AMONGST REGIONAL SYSTEMS

6.1. Commonalities

Each of the three respective regional systems on human rights has in some way adopted a form of protection of the right to housing through various instruments. The African System has established through jurisprudence that the State has a minimum duty not to infringe upon an individual's right to

[73] "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," Art. 16, African Union, July 11, 2003, https://refworld.org/docid/3f4b139d4.html.

[74] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), December 18, 1979, United Nations, Treaty Series, vol. 1249, Art. 1, https://www.refworld.org/docid/3ae6b3970.html.

[75] Ibid, Art. 16(h), https://www.refworld.org/docid/3ae6b3970.html.

property. The European System has established that the right to housing is inherent within the right to the family; and that forced evictions are a violation of an individual's right to housing. The Inter-American System has held through jurisprudence that a State is in violation of its obligations and duties to the individual when it restricts the right to access of the individual's home.

6.2. Differences

While the regional mechanisms contain similarities in their attempt to protect the individual in terms of housing, whether through rights of the family, property rights, the right to move freely, or through protection against forced evictions, those systems also have their differences. One of the main distinctions between the regional mechanisms and their corresponding instruments is whether protection is guaranteed through explicit terms or is implicit within other rights.

The African Charter on Human and Peoples' Rights appears to address the right to housing implicitly through the protection of an individual's right to property. The European Convention on Human Rights provides for the explicit protection of the right through Article 8 of the Convention and also implicitly through various other articles. The American Convention on Human Rights explicitly provides for the protection of the right to property. While each of the instruments attempts to address the right to housing in some form, each varies in terms of implicit versus explicit recognition.

VII. COMPARISON OF STATE APPROACHES TO HOUSING RIGHTS

7.1 The United States

The United States has a long history of examining the role of the federal government in providing housing. The right to housing is not explicitly written within the Constitution; however, the United States has taken efforts to provide for this right by passing various federal acts and policies that attempt to provide housing protections. Some of those policies have fallen short and it is

important to note the consequences of not adequately providing for the right to housing. When housing rights are not provided, it can affect other human rights, as stated by Mayra Gómez and Bret Thiele:

> "Without it, employment is difficult to secure and maintain, health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired, and social relationships are frequently strained."[76]

7.1.1 Affordable Housing

Affordable housing continues to be a longstanding topic of research in the United States, with various state and federal programs being implemented to assist individuals with securing affordable housing. To understand how to develop solutions to the affordable housing issue, it is important to define 'affordability', for which the UN has determined, "housing is not adequate if its cost threatens or compromises the occupants' enjoyment of other human rights".[77]

One essential concern with developing affordable housing is the income gap that exists between the rich and the poor in the United States and the ability for low income individuals to obtain housing. In her article, "Housing: Commodity versus Right", Mary Pattillo states:

> "Those with the greatest resources are able to buy or rent the best housing in the best locations, with each income stratum down the ladder buying successively lower-quality housing in worse locations (with the important caveat of the distorting effects of discrimination). In theory, the market should produce enough to satisfy the demands of those throughout the socioeconomic spectrum. However, housing problems do not arise because of a lack of supply. At the end of 2012, there were nearly 18 million vacant housing units in the United States (US Census Bur. 2012)."[78]

Affordable housing continues to be an issue in the United States, most notably when it comes to inequities that exist between individuals economically.

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[76] Mayra Gómez and Bret Thiele, "Housing Rights Are Human Rights," *Human Rights* 32, no. 3 (2005), p. 2–24. http://www.jstor.org/stable/27880484.

[77] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 21/Rev.1*, 2009, https://www.refworld.org/docid/479477400.html.

[78] Mary Pattillo, "Housing: Commodity versus Right," *Annual Review of Sociology* 39 (2013), p. 509–31. http://www.jstor.org/stable/43049647. Citing, US Census Bureau, *Residential Vacancies and Homeownership in the Fourth Quarter 2012*. News Release, Jan. 29, US Census Bureau News, Washington, DC. http://www.census.gov/housing/hvs/files/qtr412/q412press.pdf.

While various federal instruments have been created in an effort to provide housing fairness, such as the Fair Housing Act of 1968, the main compliance mechanism – the sanction of withholding US Department of Housing and Urban Development funds – has rarely been attempted and may be inconsequential.[79]

Discrimination is also a problem in affordable housing in the United States. According to Lincoln Quillian, it is difficult to measure discrimination, partly "because of the incentives for perpetrators to hide discrimination".[80]

This can be true when it comes to affordable housing and the disparate treatment between individuals, even when federal policies are created to address housing. Assistant Professor Emily Bergeron states in her article, "Adequate Housing is a Human Right":

> "These decades-old discriminatory federal policies created a foundation for economic inequality, decreasing opportunities for upward mobility for those living in segregated neighborhoods. For example, though African American incomes average about 60 percent of white incomes, African American wealth is about 5 percent of white wealth. As middle-class families derive wealth from home equity, this disparity is clearly attributable to twentieth-century federal housing policy."[81]

7.1.2 Evictions

As with affordable housing, evictions are problematic in the United States. As discussed in previous sections of this article, forced evictions are a widespread problem internationally. An eviction of an individual can provide further negative consequences, such that it can be difficult for the individual to find future adequate housing. In his article "Eviction and the Reproduction of Urban Poverty", Matthew Desmond states:

> "When evicted tenants do find subsequent housing, they often must accept conditions far worse than those of their previous dwelling. Because many landlords reject applicants with recent evictions, evicted tenants are pushed

[79] Dan Immergluck, "Commentary: Encouraging Housing Equity," *Cityscape* 19, no. 2 (2017), p. 129–36. http://www.jstor.org/stable/26328330.

[80] Lincoln Quillian, "New Approaches to Understanding Racial Prejudice and Discrimination." *Annual Review of Sociology* 32 (2006), p. 299–328. http://www.jstor.org/stable/29737741.

[81] Emily Bergeron, "Adequate Housing is a Human Right," *Human Rights Magazine* 44, no. 2 (2019). https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/adequate-housing-is-a-human-right.

> to the very bottom of the rental market and often are forced to move into run-down properties in dangerous neighborhoods."[82]

The consequences of an eviction can have immediate and subsequent negative effects on an individual who is already in a vulnerable situation. Evictions will continue to be an issue as long as affordable housing and systematic discrimination and inequities exist within the United States. Even presently, evictions are on the rise. The global COVID-19 pandemic brought brief housing relief to Americans when the federal administration implemented an eviction moratorium, making it unlawful for landlords to evict a tenant for late rent payments during the pandemic. However, although the global pandemic is still present, the US Supreme Court voted to end the eviction moratorium on August 26, 2021, thereby failing to extend protection against eviction for individuals unable to pay their rent due to the pandemic, furthering the ongoing crisis of evictions in the United States.

7.2 Poland

7.2.1 Evictions

Poland has also seen a rise in evictions amid concerns over the issue of affordable housing. In his article, "The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experiences", Bogumil Terminski pointed out that the issue of evictions had raised the attention of the UN Economic Commission for Europe, which noted:

> "In countries with economies in transition where social protection has declined considerably, there is a strong need to address the situation of tenants, as housing markets are becoming increasingly commercialized. In Poland, the rents and service charges are too high for poor people. Notwithstanding the housing allowances, some households cannot afford such expenditures, which, in extreme cases, lead to evictions. There has been an increase in evictions in Poland."[83]

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[82] Matthew Desmond, "Eviction and the Reproduction of Urban Poverty," *American Journal of Sociology* 118, no. 1 (2012), p. 88–133. https://doi.org/10.1086/666082.

[83] Bogumil Terminski, "The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experiences," *Revista Latinoamericana de Derechos Humanos* 22, no. 2 (2011): p. 219, https://www.corteidh.or.cr/tablas/r31406.pdf.

Similar to the United States, Poland has experienced an increase in evictions in what seems to be largely due to housing affordability and the economic gap between individuals.

7.3 Germany

7.3.1 Affordable Housing

Germany has addressed affordable housing through the implementation of federal programs that assist individuals with obtaining housing through funding distributed to the individual, and with vouchers that provide direct payments from the federal government.[84] Germany has also transitioned to 'cooperative housing', a concept described by Kathryn Reynolds in her article, "Creating Permanent Housing Affordability: Lessons From German Cooperative Housing Models". She defines the concept as, "many different forms of housing, ranging from for-profit cooperative owner-occupied housing to affordable cooperative housing to cohousing."[85]

VIII. CONCLUSION

The recognition of economic, social, and cultural rights has developed through the creation of international instruments implementing such rights. However, an era of ever-increasing international exceptionalism, through failure of state recognition and implementation, has created challenges to the protection of the rights. Among the economic, social, and cultural rights facing challenges is the right to adequate housing; however, it can be achieved through both a normative and derivative framework. Direct and indirect failure to recognize and protect the right to adequate housing has various consequences, and its effects are most inflicted upon minority groups, such as indigenous populations and women.

Implementation of the right to housing through the jurisprudence of regional systems has brought success in the form of international dialogue. An analysis

[84] Kathryn Reynolds, "Creating Permanent Housing Affordability: Lessons From German Cooperative Housing Models," *Cityscape* 20, no. 2 (2018), p. 263–76, https://www.jstor.org/stable/26472178.
[85] Ibid, p. 263–76.

of case law from the various regional mechanisms provides evidence that each of the various systems seeks guidance from cases decided in other regional systems when determining an appropriate analysis of each case. Further, it provides examples to the international community of the ways in which the individual is a holder of these rights, but also infers it is a State's duty and obligation to protect and respect such rights. The key to continuing the pursuit of protection of the right to housing for all is through international dialogue, state accountability, and eradication of institutional discrimination.

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Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law

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Abstract

This study examines the constitutionality of Indonesia's Anti-Blasphemy Law, which has been challenged unsuccessfully at the Constitutional Court on three occasions, in 2009, 2012, and 2018. While the Court has acknowledged the law's provisions are open to multiple interpretations, it insists on maintaining the law as it is, on the grounds that the right to religious expression is not absolute, as freedom and rights are restricted under Article 28J of the 1945 Constitution. The Court believes that canceling the law would create a dangerous legal vacuum. The ambiguity of the Court's decisions on the constitutionality of the Anti-Blasphemy Law is illustrated in recent blasphemy cases that have not been explored in previous studies. This study uses a doctrinal legal approach to examine why the Anti-Blasphemy Law is flawed and to analyze to what extent the 'particular constitutionalism' approach influenced the Court's decisions when declaring the constitutionality of the law. As such, the Court's misinterpretation of the core principles of the competing rights – the right to religious freedom and the right to freedom of expression – and its standard limitation, have been ignored. The findings of this study show that in dealing with the Anti-Blasphemy Law, the Court has a narrow and limited recognition of human rights law. The Court's

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fear of revoking the Anti-Blasphemy Law is based only on assumptions and is less supported by facts. The Court has failed to realize that the implementation of the flawed Anti-Blasphemy Law in various cases has triggered public disorder, with people taking justice into their own hands.

Keywords: Constitutional Court, Constitutionality of Law, Indonesian Anti-Blasphemy Law, Religious Expression, Standard Limitation of Human Rights.

I. INTRODUCTION

The objective of developing International Human Rights Law (IHRL) is to encourage all states to respect, protect, and fulfill the human rights of their citizens.[1] The practices of some countries are still far from compatible with international law.[2] Under the umbrella of IHRL and the right to freedom of religion or beliefs (FoRB), everyone expects their state to respect their right to seek, embrace, change, and manifest their own choice of religions or beliefs without facing any interference either in public or in private. In terms of the right to freedom of expression (FoE), citizens expect their government to respect their expression of religious teachings and thoughts without unnecessary limitations.[3] However, in many countries across the world,[4] the existence of anti-blasphemy laws has led law enforcers to unjustly limit the right to religious expression.

Indonesia's Anti-Blasphemy Law[5] (the IABL) is flawed because it is not in line with human rights law. Also, it is ambiguous on what constitutes religious defamation. Moreover, it lacks a legitimate limitation of freedom of expression. Instead, it places excessive limitations on religious freedom. These limitations are then used to restrict the rights of minority religious groups, on the pretext of

1 The United Nations drafted the Universal Declaration of Human Rights (UDHR) in 1948 to be a common standard of achievement for all peoples and all nations after the atrocities of two world wars. See OHCHR, "International Law," OHCHR, 2021, https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx.

2 Malcolm Langford, "Critiques of Human Rights," *Annual Review of Law and Social Science* 14, no. 1 (October 13, 2018): 69–89, https://doi.org/10.1146/annurev-lawsocsci-110316-113807; Eric A. Posner, *The Twilight of Human Rights Law* (Oxford, UK: Oxford University Press, 2014).

3 Full respect and protection of human rights were among the aspirations of Indonesian citizens following the downfall of authoritarian President Soeharto in 1998. Therefore, IHRL was adopted and embedded in the 1945 Constitution.

4 According to the United States Commission on International Religious Freedom, 71 countries still enforce anti-blasphemy law. See USCIRF, "Respecting Rights? https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf.

5 The IABL was enacted in 1965 as Law Number 1/PNPS/ 1965 on Prevention of Abuse and/or Blasphemy toward Religion.

maintaining religious harmony. In most blasphemy cases in Indonesia, the police arrest people who are considered to have defamed one of the established, state-recognized religions, or they arrest followers of minority religious groups suspected of defiling or deviating from the recognized religions.[6] The criminalization of unorthodox religious groups and the government's reluctance to revoke Islam-oriented regional regulations are at odds with the state's official platform of religious pluralism.[7] The government and its supporters believe that censorship of insulting opinions and criticism are justified by IHRL since the right to FoE is not an absolute right.[8] However, the IABL, which limits the right to FoE, is often too restrictive, ambiguous, and discriminative. Instead of preventing hate speech, the law threatens the essence of the fundamental rights to freedom of speech and religion, and even jeopardizes democratization.

This study examines the constitutionality of the IABL, which featured in three decisions of the Constitutional Court: No. 140/PUU-VII/2009, No. 84/PUU-X/2012, and No. 76/PUU-XVI/2018. While the Court has acknowledged the IABL contains provisions with multiple interpretations, it insists on maintaining the law by arguing it is constitutional and aligned with Article 28J of Indonesia's 1945 Constitution. Article 28J states:

1. Every person shall respect human rights of others in the order of life of the society, nation, and state.
2. In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society.

In view of Article 28J, the Constitutional Court has said that as the right to religious expression is not an absolute right, it could be limited in order to

[6] According to Andreas Harsono, more than 150 people have been punished under the IABL. Andreas Harsono, "Indonesia to Expand Abusive Blasphemy Law," Human Rights Watch, October 31, 2019, https://www.hrw.org/news/2019/10/31/indonesia-expand-abusive-blasphemy-law.

[7] Tim Lindsey and Butt, Simon, "State Power to Restrict Religious Freedom: An Overview of the Legal Framework," in *Religion, Law and Intolerance in Indonesia* (London: Routledge, Taylor & Francis Group, 2016).

[8] See the arguments by the government and religious organizations, when agreeing to maintain the IABL, in Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-/2009; No. 84/PUU X/2012; No. 56/PUU-XVI/2017 (The Constitutional Court of the Republic of Indonesia 2017).

maintain respect for the rights of others and to protect public order.[9] Also the Court believes that revoking it would create a dangerous vacuum of law.[10]

The conundrum concerning the IABL is that although flawed, is was declared constitutional by the Constitutional Court. If the IABL is constitutional, why does the Court acknowledge the law is flawed? The Court has been unwilling to repeal the IABL based on an assumption that social disorder would erupt if people commit blasphemous acts and there is no IABL under which they can be charged. Therefore, the Court has decided the IABL should be kept until a new bill is ready. The Court did not consider that Indonesia already has a Criminal Code to maintain public order and prevent unlawful acts in society.

Although there are previous studies about the IABL, the ambiguity of the Constitutional Court's decisions on the constitutionality of the law has resulted in new legal precedents that have not been widely discussed. Indonesia has adopted IHRL and ratified the United Nations International Covenant on Civil and Political Rights (ICCPR) and its derivative documents,[11] but this study will analyze how the Constitutional Court has applied those norms and principles fully and precisely during its reviews of the IABL.

II. METHOD

This doctrinal legal study uses a qualitative approach to examine the Constitutional Court's decisions that upheld the constitutionality of the IABL while also recognizing its flaws. This study begins by examining whether the concept of intersection between the rights to FoE and FoRB and the concept of legitimate limitation of human rights has been fully enshrined in the Court's decisions. It also considers to what extent the Court's decisions on the constitutionality of the IABL have been influenced by the misinterpretation of the core principles of FoRB and FoE and their legitimate limitation. Failure to recognize the core

[9] See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009 (p. 305); No. 84/PUU X/2012 (p. 142–145); No. 76/PUU-XVI/2018 (p. 35) (The Constitutional Court of the Republic of).

[10] See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009 (p. 304); No. 84/PUU X/2012 (p. 142); No. 76/PUU-XVI/2018 (p. 33) 2017 (The Constitutional Court of the Republic of Indonesia 2017).

[11] Indonesia adopted the ICCPR through Law No. 12 of 2005.

principle of non-discrimination in respecting religious freedom and its standard limitation has allowed the state to impose excessive limits on such rights.

III. ANALYSIS AND DISCUSSION

3.1. Intersection between the right to FoRB and FoE

The provisions of the IABL that limit the right to religious expression fall into the intersection between the right to FoE and FoRB. Religious expression can be restricted by the state when it is considered to violate the rights or freedoms of others. This is in line with ICCPR Article 19(3), which states: "The exercise of the rights … carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."

Religious expression can also be restricted by the state when it is considered harmful or involves spreading hatred that advocates discrimination. This is covered in ICCPR Article 20(2), which states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

The right to FoRB is a fundamental right of every person and is guaranteed by Article 18 of the Universal Declaration of Human Rights (UDHR), as well as Article 18 of the ICCPR, UN Human Rights Committee (UNHRC) General Comment No. 22 on Article 18 of the ICCPR, and the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (Resolution 36/55).[12] The core values of the right to FoRB under Article 18 of the ICCPR can be observed in General Comment No. 22 and Resolution 36/55. The ICCPR and its derivative documents do not stand merely as legally binding norms but also as a common standard that is adopted by civilized nations.

[12] The UN General Assembly reinforced the right to FoRB with the adoption of General Comment No. 34 on freedoms of opinion and expression. Paragraph 48 of GC No. 34 states: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3 …."

According to Heiner Bielefeldt, religious freedom is, in principle, a universal right inherent in every human being and it cannot be revoked, as neglecting this right will result in the neglect of other rights.[13] Bielefeldt explains that the right to FoRB has two dimensions, namely the internal dimension and the external dimension.[14] The internal dimension includes the right to choose, leave, and depart from other religions; under Article 4(2) of the ICCPR, the state is not allowed to derogate such rights. The external dimension covers the right to worship, teach, and the observance of religion, which the state is allowed to limit within the framework of Article 18(3) of the ICCPR. However, these restrictions have to be in a strict and clear arrangement, and cannot reduce the essence of fundamental rights or discriminate against certain religious groups.[15] Under Article 18(3), restrictions on freedom of religion or beliefs are only permissible if "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Such restrictions should also fulfill a proportionality test. The legitimate standard of limitation is vital to be understood to avoid excessive limitation of rights, as will be elaborated on in the next section.

In a democratic society, it is essential to fully respect and protect the right to FoE,[16] which is protected for everyone, everywhere.[17] At the international level, it is protected under the UDHR[18] and the ICCPR[19], particularly in Article 19 and Article 20 of the latter. Both the UDHR and ICCPR have been adopted as a common standard of achievement of human rights protections for all people in all nations.[20] Other instruments are the UN Human Rights Committee

[13] Heiner Bielefeldt, "Freedom of Religion or Belief—A Human Right under Pressure," *Oxford Journal of Law and Religion* 1, no. 1 (April 1, 2012): 15–35, https://doi.org/10.1093/ojlr/rwr018.

[14] Ibid., 21.

[15] Ibid., 23.

[16] Emily Howie, "Protecting the Human Right to Freedom of Expression in International Law," *International Journal of Speech-Language Pathology* 20, no. 1 (January 2, 2018): 12-15, https://doi.org/10.1080/17549507.2018.139261.

[17] International Center for Not-for-Profit Law, "The Right to Freedom of Expressions: Restriction on Fundamental Rights," *Global Trends in NGO Law* Vol.6, 1; See also UN General Assembly Resolution 59(1), December 14, 1946.

[18] See Resolution 217 A (III) of December 10, 1948.

[19] The ICCPR was adopted by General Assembly Resolution 2200A (XXI) of December 16, 1966, entered into force March 23, 1976, and has been ratified by 165 countries, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[20] The right to FoRB and FoE are protected in all regions, such Europe, see Article 10 of the European Convention on Human Rights; in America, see Article 9 of the American Convention on Human Rights; in Africa, see Article 13 of the African Charter on Human and People's Rights; in Asia, see Article 22 Paragraph on Civil and Political

(UNHRC) General Comment No. 34 on freedoms of opinion and expression. These documents embody all values, concepts, principles, standards, and rules that have been ratified and practiced by the international community,[21] including Indonesia.

Article 19 of the UDHR and Article 19(1) of the ICCPR both acknowledge the right to freedom of opinions.[22] This freedom is elaborated upon in ICCPR Article 19(2), which states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

According to Scanlon, the word "freedom" means that every person has the autonomy to decide independently what they should believe and what they should do.[23] Thus, government actions that censor one's thoughts, opinions, or beliefs expressed through various media are contradictory to Article 19 of the ICCPR, unless IHRL permits a valid reason. Government suppression of opinions and beliefs is especially concerning if it only targets political rivals or minority groups through repression or criminalization. This is because the freedom "to seek, receive, impart information or ideas in all kinds" is protected equally and only can be limited under ICCPR Article 19(3) and Article 20(2) and (3).

The restriction of FoRB is similar to the limitation of the right to FoE, so the two will intersect in their application.[24] On the one hand, protecting the right to FoE would strengthen exercising FoRB.[25] On the other hand, both rights could also interlock in tension and limit each other.[26] Moreover, the right to FoE

Rights of the ASEAN Declaration on Human Rights; and in Middle East, see Article 32 of the Arab Charter on Human Rights.

21 Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2006).

22 Article 19(1) of the UDHR states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19(1) of the ICCPR states: "Everyone has the right to hold an opinion without any interference."

23 Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1, no. 2 (1972): 204–26.

24 Alice Donald and Erica Howard, "The right to freedom of religion or belief and its intersection with other rights," *ILGA-Europe*, January 2015; Asma T. Uddin, "Provocative Speech in French Law: A Closer Look at Charlie Hebdo," *FIU Law Review* 11, no. 1 (September 22, 2015), https://doi.org/10.25148/lawrev.11.1.14.

25 Donald and Howard, "The right to freedom of religion."

26 Anshuman A. Mondal, "Articles of Faith: Freedom of Expression and Religious Freedom in Contemporary

is a precondition to the enjoyment of other rights,[27] in which the limitation of FoE should not breach other rights such as FoRB,[28] since a state is permitted to exercise restrictions through its domestic law,[29] such as anti-blasphemy laws.[30]

The IABL, like anti-blasphemy laws in several countries, was inherited[31] from a former colonial power.[32] Such laws have long been used to restrict hate speech and insults against religious artifacts, holy personages, customs, and beliefs.[33] In practice, the IABL tends to limit the right of religious minorities to express their beliefs and teachings, which is incompatible with IHRL. First, according to UNHRC General Comment No. 34, blasphemy laws are incompatible with the ICCPR unless, as per ICCPR Article 20(2) they are limited to preventing "incitement to discrimination, hostility or violence".[34] The limitation should only be permissible if applied to the external dimension of the FoRB.[35] However, prosecuting people because their religion or belief is considered deviant violates the internal dimension of their rights guaranteed in Article 18 of the ICCPR.[36]

Multiculture," *Islam and Christian–Muslim Relations* 27, no. 1 (January 2016): 3–24, https://doi.org/10.1080/09596410.2015.1114240.

27 Howie, "Protecting the Human Right."

28 Philippe Schmitter and Terry Karl, "What Democracy Is...and Is Not"," *Journal of Democracy* 2, no. 3 (January 1970): 75–88.; Howie, "Protecting the Human Right," 2.

29 Julie Fraser, "Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law," *The International Journal of Human Rights* 23, no. 6 (July 2019): 974–92, https://doi.org/10.1080/13642987.2019.1577539.

30 *Black's Law Dictionary* defines blasphemy as: "Any oral or written reproach maliciously cast upon God, His name, attributes, or religion .... It embraces the idea of detraction, when used towards the Supreme Being, as "calumny" usually carries the same idea when applied to an individual ...." (155–56).

31 For example, Pakistan's blasphemy law was inherited from that codified by the British colonial government in India in 1860. See also W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Second edition, Aspen Select Series (New York: Wolters Kluwer, 2019).

32 Durham and Scharffs, *Law and Religion*.

33 David Nash and Chara Bakalis, "Incitement to Religious Hatred and the 'Symbolic': How Will the Racial and Religious Hatred Act 2006 Work?" *Liverpool Law Review* 28, no. 3 (2007): 349–75.

34 Article 20(2) states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

35 According to Article 18(1) of the ICCPR, the right to freedom of religion or beliefs is divided into two dimensions. One dimension is related to the right to hold and change religion. This right is also known as the *forum-internum*, in which no one or no state can interfere with the liberty of any person to hold or choose the religions or beliefs. The second dimension is the right to manifest the religions or beliefs or known as *forum-externum.* For example, everyone has the right to practice, worship, teach, and observe the religions or beliefs, either alone or in society, either private or public and could be a subject of such limitation under Article 18(3).

36 Article 18(1) states that every person has the right to embrace religion according to their beliefs. This article is broadly interpreted to include the right to determine a religion, leave a particular religion, convert to a religion, or not even have a religion. Heiner Bielefeldt, a UN special rapporteur on FoRB, cites the rights stipulated in Article 18(1) as an internal dimension that functions absolutely, meaning the state cannot limit it. The principle of religion without coercion is at the core of Article 18(1).

The right of a person to manifest or to express his or her religious thought may be subject to limitation under Article 18(3) or Article 19(3), but the state does not have to criminalize the person, except when the expression falls under Article 20(2) and (3), constituting incitement to discrimination, hostility, or violence.[37]

Jeroen Temperman has emphasized that while the right of expression is protected by the ICCPR, IHRL does not recognize the right to one's religion and belief being always protected from criticism, ridicule, or insult, or the right to have one's religious feelings respected.[38] Nevertheless, in *Otto-Preminger-Institut v. Austria*, the European Court of Human Rights concluded it was a legitimate aim to protect the right not to insult others in their religious feelings.[39] The state is permitted to intervene in FoE if such expression is intended against the religious feelings of others.[40] In this sense, the case of *Otto-Preminger-Institut v. Austria* should be considered incompatible with ICCPR Article 20(2), and the perpetrator should not be punished.[41]

Moreover, the 2012 Rabat Plan of Action, which concerns the prohibition of national, racial or religious hatred, recommends that ICCPR state parties, when limiting religious expression, consider six aspects: context, speaker, intent, content, extent and likelihood of incitement to hatred.[42] This approach aims to

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[37] Article 20 states: "(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." UNHRC General Comment No. 22 states: "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR state: "No limitation referred to in the Covenant shall be applied for any purpose other than for which it has been prescribed." In most Western countries, the violation of the right to FoE is usually submitted to the civil court rather than the criminal court. See also Article 4A of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which states that States Parties: "Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."

[38] Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L Rev* 3 (2011): 729.

[39] *Otto-Preminger-Institut v. Austria*, 11/1993/406/485, Council of Europe: European Court of Human Rights, 23 August 1994, http://www.echr.coe.int/echr/ application number 13470/8).

[40] Ibid., 14.

[41] Jeroen Temperman, "Freedom of Expression," 735–736; Dmitry Kuznetsov, "Freedoms Collide: Freedom of Expression and Freedom of Religion in Russia in Comparative Perspective," *Russian Law Journal* 2, no. 2 (2015): 75, https://doi.org/10.17589/2309-8678-2014-2-2-75-100.

[42] Amy Shepherd, "Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR," *Utrecht Journal of International and European Law* 33, no. 85 (2017): 62–83, https://doi.org/10.5334/ujiel.405.

protect the right of individuals from harmful speech that advocates violence or discrimination against people of a certain race, religion or ethnicity, as guaranteed in Article 20. Obviously, from a human rights perspective, an individual is a rights holder.[43] Therefore, Bielefeldt emphasizes that respecting everyone's human dignity is crucial in protecting human rights. This requires equal treatment of everyone regardless of race, religion, gender, and other social determinants.[44]

To achieve a balance between FoRB and FoE, the application of anti-blasphemy laws should be directed from merely protecting religious symbols or feelings to protecting individuals' rights from incitement of hatred. Whether the IABL is focused on preventing the incitement of hatred against the individual will be discussed further. Moreover, it is important to legitimately and proportionally apply the standard limitation of the right to FoE, in order to prevent excessive limiting measures that could negate other fundamental and essential human rights.

3.2. Legitimate and Proportional Limitation of FoRB Intersecting with FoE

Since the IABL corresponds with government measures to limit religious expression, this study focuses only on examining standards for limiting FoE. Unlike the right to FoRB, the right to FoE is not an absolute right.[45] A state is permitted to exercise discretion of restrictions through its domestic law.[46] However, the restriction itself must be strict with clear interpretation, regulated by law, and used for the purpose stated in the agreement.[47] Therefore, when a person needs to manifest their religion or beliefs, that person cannot be punished because of his/her belief, imagination, or thought, except if the religious expression of the person advocates incitement of hatred against other religions or beliefs (Article 20(3)) or endangers other people's lives or safety. The permissible scope of legal

[43] Bielefeldt, "Freedom of Religion or Belief," 23.
[44] Ibid.
[45] Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* 26, no. 1 (2010): 183–236.
[46] Fraser, "Challenging State-Centricity and Legalism."
[47] Julie Frances Debeljak, "Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006," *Melbourne University Law Review* 32, no. 2 (2008): 422–69; Durham and Scharffs, *Law and Religion*.

limitations of FoE is described in both Article 19(3)[48] and Article 20(3) of the ICCPR and explained further by the UN Economic and Social Council through the adoption of the Syracuse Principles on the Limitation and Derogation Provisions in the ICCPR,[49] as adopted by the UN General Assembly through UNHRC General Comment No. 22.[50] These principles aim to avoid misinterpretation by state members by helping them understand the provisions when adopting them into domestic laws.

Summarizing Article 19(3), the Syracuse Principles, and UNHRC General Comment No. 22, Durham and Scharffs have noted four stages that a court must carry out when seeking to limit a person's right to freedom of religion and expression. The limiting policy should pass those four stages of testing respectively and thoroughly, and when a policy fails the test, the defendant should be released.[51] The four stages are outlined below.

Stage I. The restrictions on freedom of religion and expression must be set out in law. This requirement consists of a formal element and a qualitative element. A formal element requires the state interference be legally authorized.[52] Legally authorized means that the law is enacted by law-making bodies, through a legitimate process, and not contradictory with the respective state's constitution. Most importantly, the limitation on the right should "be compatible with the objects and the purpose of the Covenant".[53]

Stage II. The restrictions are only for violations committed in public. The explanation of this aspect can be found in the six points of 2011 Rabat Plan of

[48] Article 19(3) of the ICCPR provides FoE's limitation clause: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security or of public order, or of public health or morals."

[49] See the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, UN Doc. E/CN.4/1985/4, Annex (1985).

[50] See "UN Human Rights Committee, General Comment 22(48)," adopted by UNHRC on July 20, 1993. UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

[51] Durham and Scharffs, *Law and Religion*.

[52] W. Cole Durham, Jr, "Religious Freedom in a Worldwide Setting: Comparative Reflections," in *The Proceedings of the 17th Plenary Session on Universal Rights in a World of Diversity: The Case of Religious Freedom 29 April-3 May 2011* (Vatican City: Pontificia Adacemia Scentiarum, 2012).

[53] See "UNHRC General Comment No. 22(9)."

Action.[54] First, the court should consider first the status or position of the speaker in society, particularly when he or she speaks in public, whether the speech is intentionally targeted to certain groups. Second, the court should consider the speaker's intention, meaning the action requires a relationship between the object, speech subject, and the audience. Third, whether the likelihood or imminence of incitement happens, which means that some degree of risk of harm must be identified.[55] Fourth, 'public' means the speaker cannot be punished if the expression is done in a private space. Fifth, the speech should be considered as public nature, which means that "the statements circulated in a restricted environment or widely accessible to the general public". Sixth, the context should be prevalent with social and political conditions when the speech was delivered and shared.

Stage III. The restrictions must meet the 'necessity test' with at least one of the following objectives: (a) maintaining public order; (b) protecting people's morality; (c) protecting public health; (d) protecting and respecting the rights of others. Durham notes that although the limitation must be tested on a case by case basis, the state cannot breach the fundamental right of "freedom of thought, conscience and religion", and the state cannot prefer to only protect a certain religion by imposing arbitrary punishment to hold back the right to manifest one's religion.[56] Importantly, the limitation grounds should be strictly related only to the enumerated grounds and with clear interpretation.[57] The extended limitation grounds that are not stated in Article 19(3) or Article 20(2) may not be invoked to justify a limitation.[58]

[54] In an effort to end discrimination against minority religions, the UN of General Assembly in 2013 adopted the Rabat Plan of Action (RPA) on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination hostility, or violence. (see UN General Assembly A/HRC/22/17/Add.4).

[55] RPA, 11.

[56] Durham, "Religious Freedom in a Worldwide Setting".

[57] Ibid., 374; "UNHRC General Comment No. 22(48)."

[58] See also Article 9(2) of the European Convention on Human Rights and Article 8 of the Asian Declaration of Human Rights (ADHR). The articulates that a state can only limit such rights if the limitation has been determined by the statute made by legislation to guarantee basic human rights and freedoms and respect the rights of others. The limitation must be considered as one of the conditions, namely (a) protecting national security; (b) taking care of public order; (c) protecting public health; (d) protecting public morals; (e) achieving community welfare. Compared with the limitation requirements contained in the ICCPR, the criteria of limitation in the ADHR seems more lenient because it adds another aspect of "achieving public welfare" as one of the considerations that can be used to make restrictions. Meanwhile, the AHRD does not provide a concrete definition. Thus, this loose limitation can be interpreted broadly by each country. Therefore, the extended limitation in the ADHR by adding the aim of "achieving community welfare" is not in line with the Article 19(3) of the ICCPR.

Stage IV. The restrictions must meet the 'proportional test', which means the restrictions should guarantee equal treatment to everyone through proportional application of punishment and must not be prone to discrimination against other minority groups.

In sum, FoE is indeed a non-absolute right. However, the right to FoE is fundamental for every human being and essential in a democratic society. Therefore, the right to FoE can be limited only by a strict requirement, having necessary and certain purpose, without any means to discriminate against others, following the steps of legitimation limitation under IHRL, and without any means to reduce the essential rights that are protected under Articles 18, 19, and 20 of the ICCPR. Whether or not these standard limitations have been fully adopted by the IABL and followed by the Indonesian Constitutional Court will now be discussed further by examining the flaws in the law.

3.3. Is the 1965 Anti-Blasphemy Law Flawed?

A flawed law is one that has a shortfall in terms of its content and the process by which it was made. The flawed law has a presumption of legality before it is repealed by the legislative body or revoked by the constitutional court if its substance is contradictory to the constitution of the country. Indonesia's 1945 Constitution has been amended four times, and arguably the most important amendment was the adoption of IHRL,[59] now embedded in more than 10 provisions of the Chapter IV on Human Rights. Historically, the IABL was formed in 1965, when the 1945 Constitution had not adopted human rights legal norms, and until now, the law's content has not changed. Consequently, the norms of IHRL embedded in the 1945 Constitution were not used as the basis for reference in the formation of the IABL. The following explanation will further emphasize why the IABL is considered a flawed law.

[59] Many authors indicate that IHRL is embedded in the provisions of the 1945 Constitution because Indonesia has ratified 9 out of 10 of the core international human rights instruments, such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), CERD, the Convention Against Torture (CAT), the Convention on the Elimination of All Forms of. Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the Committee on Migrant Workers (CMW). See Jimly Asshiddiqie, "Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today," *Constitutional Review* 1, no. 2 (March 28, 2016): 1, https://doi.org/10.31078/consrev121.

First, the main objective of the IABL is to protect religions rather than protecting 'religious people' themselves, so that punishing individuals who adhere to a religion or belief is considered normal, rather than allowing religions to be criticized. Although the core principles of FoRB are articulated in Articles 28D, 28E, 28I, 29 of the 1945 Constitution, the IABL contains different values and norms. According to Article 29 of the 1945 Constitution, Indonesia is a country based on "Belief in the One and Only God". Article 1 of the IABL interprets this as homogeneous religion,[60] in which no one should encourage any person to have no religion or to interpret the religious teaching of the main religions differently. Meanwhile, Article 18 of the UDHR and Article 18 of the ICCPR protect the rights of a person to have no religion or belief in their own religion. Various cases decided under the IABL merely punished someone who insulted religious symbols or followed different teachings of the main religions, instead of punishing the incitement of hatred. Therefore, the IABL would not comply with IHRL since it is merely protecting the religious system or the personal feelings of others.[61]

Second, the IABL has no clear conception of what is defined as defaming religion.[62] The ambiguous concept laid down in the law's Article 1 defines defaming religions in broad terms. At least five actions could be considered blasphemy: (a) insulting a religion; (b) persuading someone to be a non-believer; (c) disturbing a religious ritual or making noise near a house of worship; (d) insulting a cleric while leading a ritual; (e) criticizing the teaching of religion, including criticizing other religious practices. The IABL is articulated under Law No. 1/PNPS/1965 in correlation with Articles 156A and 157 of the Indonesian Criminal Code. In 2008, Indonesia enacted the Electronic Information and Transactions Law (ITE Law), which included two articles subsequently used in some blasphemy cases. Article 28(2) of the ITE Law prohibits dissemination of "information aimed at causing hatred or hostility". Article 45A(2) of the ITE Law can also be used to

[60] Tim Lindsey and Helen Pausacker, *Religion, Law and Intolerance in Indonesia* (London: Routledge, Taylor & Francis Group, 2017).

[61] Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech."

[62] See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2010, 298 and 304 (The Constitutional Court of the Republic of Indonesia 2010).

criminalize hate speech against religion. Nonetheless, the latter article is rarely implemented by the courts.

As previously mentioned, according to the Rabat Plan of Action, to qualify as incitement of hatred, an act has to be considered in terms of the six-part threshold test: (1) social and political context, (2) status of speaker, (3) intent to incite the audience against a target, (4) content of the speech, (5) extent of its dissemination, and (6) likelihood of incitement to hatred.[63] So only a leader who is speaking in public in the context of a public meeting and intentionally delivering a speech to advocate the audience to attack another person based on hatred of his or her religion or race can be accused of hate speech. In practice, Indonesian courts focus on criminalizing actions or speech that qualify as blasphemy under Article 1 of the IABL, instead of focusing on hate speech. The five actions that can be considered forms of blasphemy under the IABL are focused on protecting "the feelings of the main religions' followers". Being insulted or not will depend on the feelings of the people. Therefore, the interpretation of each form depends on the subjectivity of the judge who interprets the action. Each form can be loosely interpreted.[64]

For instance, in East Kalimantan in 2017, Balikpapan District Court sentenced a doctor named Otto Rajasa to two years in jail for "disseminating hatred and hostility" in a social media post. Rajasa had written a Facebook post that criticized a mass rally staged by Muslims in Jakarta against the city's then-Governor Basuki 'Ahok' Tjahaja Purnama, whose political rivals had accused him of blaspheming Islam. Rajasa was convicted under Article 28(2) of ITE Law, under which it is prohibited to "disseminate information aimed at causing hatred or hostility". However, there is no clear definition of 'hatred or hostility'. The phrase is too ambiguous and could be interpreted subjectively by the authorities. The court failed to prove whether Rajasa's post could be categorized as a dangerous expression that had advocated religious hatred to incite hostility or violence, as referred to in Article 20 of the ICCPR.

[63] RPA.

[64] Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7, no. 1 (2012), https://doi.org/10.1515/1932-0205.1391.

In another case, East Jakarta District Court in 2017 sentenced Ahmad Musadeq, a leader of a group called the Fajar Nusantara Movement (*Gerakan Fajar Nusantara,* Gafatar), to five years in jail for blasphemy against Islam. Gafatar had been deemed a deviant sect and banned in 2016 because it combined elements of Islam, Christianity and Judaism. Musadeq was convicted under the Criminal Code's Article 156A(a) which carries a maximum five-year term for any person who "deliberately in public gives expression to feelings or commits an act … abusing or staining a religion, adhered to Indonesia." He was also convicted under the Criminal Code's Article 55(1) on perpetrating or provoking a punishable act; and Article 64(1) on multiple crimes and misdemeanors. The court's decision to convict Musadeq aimed to "protect public order" by punishing those who espouse teachings deemed not in line with orthodox religions. There have been numerous cases in Indonesia of people being charged for alleged hate speech or blasphemy, based on ambiguous provisions, and then severely punished.

The Constitutional Court has confirmed the vagueness of the IABL. In its Decision No. 140/PUU-VII/2009, the Court stated: "The substance of the Law on the Prevention of Blasphemy on Religion [….] in terms of the form of regulation, formulation, and legal principles needs to be refined."[65] The Court further noted: "The need for revision of the Law on Prevention of Blasphemy of Religion, both within the formal scope of legislation, as well as in substance, in order to have material elements that are more clarified so as not to cause misinterpretation in practice."[66] The exact same view was echoed in two other decisions, No. 76/PUU-XVI/2018 and No. 84/PUU-X/2012. The Constitutional Court believes the law in question does not limit the right to belief but limits religious expression in public that is considered hostile or abuses or desecrates the religions adhered to in Indonesia. Nevertheless, the word 'abuse' or 'blasphemy' is often used to declare as heretical, religious teachings that have different interpretations from the six major religions recognized in Indonesia. In cases involving Muslim minority groups, such as Ahmadiyya and Shia, which were the applicants of

[65] Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009, 298 (The Constitutional Court of the Republic of Indonesia 2009).

[66] Ibid., 304.

judicial reviews No. 76/PUU-XVI/2018 and No. 84/PUU X/2012 respectively, the Constitutional Court believes the IABL is used to respect and protect religions from such 'deviations'. The Court said an authoritative ulema (Muslim leader) can decide whether such teachings are deviant or not. Unlike the Rabat Plan of Action, under the IABL anyone can be ensnared with a blasphemy charge, even though they are not an important figure and their speech was not delivered with the intention of influencing followers to hate other religious groups and commit acts of violence against them.

Third, the IABL contains discriminative norms since the law is only applicable or targeted at persons belonging to minority religious groups. The Elucidation of Article 1 of the IABL states the term 'religions' means the six main religions recognized by the government: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. Article 1 has been understood by law enforcement that the law only protects those main religions. Therefore, religions outside those six are often excluded from legal protection. In blasphemy cases in Indonesia, more than 150 people coming from minority religious groups have been criminalized and convicted under the IABL.[67]

The Constitutional Court, in its decisions No.140/PUU-VII/2009, No. 84/PUU X/2012 and No. 76/PUU-XVI/2018, repeatedly stated the IABL does not prohibit a person from having beliefs that are different from other religions or beliefs, but what is limited is when those beliefs are expressed in public or disseminated to others. The Court believes that under Article 28J of the Constitution and under IHRL, the manifestation of religious expression can be limited by law. It is true that limitations of FoRB and FoE are also applicable in IHRL, specifically under Article 18(3) and Article 19(3) of the ICCPR. However, the Constitutional Court ignores that FoRB consists of two aspects, the internal dimension (*forum-internum*) that cannot be limited in all circumstances, and the external dimension (*forum-externum*) that can be limited. The Court has narrowly interpreted Article 28J of the Constitution as not differentiating between the internal and external dimensions, in which the state can limit both. This

[67] Harsono, "Indonesia to Expand Abusive Blasphemy Law."

interpretation becomes problematic since the standard limitation of religious expression is not regulated clearly in either the Constitution or the IABL. The four stages of testing legitimate and proportional limitations under UNHRC General Comment No. 22 on Article 18 of the ICCPR, i.e., legitimacy test, necessity test, proportionality test, and non-discriminatory test,[68] are beyond the Court's consideration.

Indeed, the Constitutional Court's consideration is highly ambiguous and contradictory because, on the one hand, the Court says the IABL respects every person's right to a different belief or religion. Yet the Court appears to have overlooked that weaknesses in law enforcement cannot be separated from weakness of legal substance.

In cases of blasphemy, the government is not neutral. This non-neutrality arose when the government, through the Ministry of Law and Human Rights, asked the Indonesian Ulema Council (MUI) to issue a fatwa on heresy against Gafatar. It was also evident when the government issued a letter banning Gafatar on the grounds that its dissemination, interpretation, and activities had deviated from Islamic teachings. From the perspective of permissible limitation of the right to FoE, particularly the legality test, Durham (2012) indicates that neutrality is a condition that must be met to fulfill the legality test. However, since there is no such limitation standard mentioned in the IABL, in dealing with Gafatar, the legality test is not examined. As a result, Gafatar leaders have been convicted by various courts.

The blasphemy cases against the Gafatar leaders applied Article 156A of the Criminal Code, finding them guilty of deliberately and publicly expressing feelings or committing actions "abusing or staining a religion, adhered to Indonesia".[69] If Gafatar had disturbed public order by applying coercive rules on its adherents to follow new teachings and abandon their previous teachings, then the courts should have proved such actions. So, the courts have not moved from the main goal of protecting the feelings of the followers of the majority religions, and

[68] Durham and Scharffs, *Law and Religion*.

[69] See Banda Aceh District Court Decision No. 80/Pid.B/2015/PN Bna on defendant T. Abdul Fatah Bin T. Muhammad Tahib; Jantho District Court Decision No. 03/Pid.C/2015/PN-Jth of 6 February 2016.

have never considered the feelings of Gafatar followers. In this case, the courts failed to understand the difference between the *forum-internum* and *forum-externum* on the right to FoRB. The courts should have stopped hearing the cases and declared the defendants not guilty. However, this has never happened in blasphemy cases in Indonesia, although in some politically charged cases, police have frozen investigations.[70]

3.4. Rethinking the Constitutionality of the IABL

3.4.1. Using Universal Constitutionalism to Protect Fundamental Rights

Considering the arguments behind the flaws of the IABL, this section elaborates on why the constitutionality of the IABL needs rethinking. In general, the constitutionality of a statute or a law is the condition that laws adopted by parliament follow an applicable constitution, or the condition in which a particular norm is determined valid under the constitution.[71] When the content of a law violates or contradicts the constitution, it is unconstitutional. Usually, the judicial branch, such as the constitutional court or supreme court, interprets laws and determines if a statute or law is unconstitutional through the mechanism of judicial review. According to various literature, Indonesia's Constitutional Court tends to use the Austrian model based on Hans Kelsen's theory.[72] According to this model, a statute of law reviewed by a constitutional court aims to examine if the law made by the legislative body is in line with the country's constitution. On this matter, the Indonesian Constitutional Court is authorized to decide that a law is null and void in part or in its entirety, invalidating its decisions on all individuals and institutions.[73]

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[70] Police issued a Cessation of Investigation Order in a case of alleged blasphemy by Sukmawati Soekarnoputri, a daughter of founding President Sukarno because there was insufficient evidence. The complainants claimed their religious feelings were hurt by a poem in which Sukmawati compared Indonesian traditions to Islamic traditions. See Karina M. Tehusijarana, "Police End Probe into Blasphemy Allegations against Sukmawati," The Jakarta Post, June 17, 2018, https://www.thejakartapost.com/news/2018/06/17/police-end-probe-into-blasphemy-allegations-against-sukmawati.html.

[71] See Julian Arato, "Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations," *International Journal of Constitutional Law* 10, no. 3 (2012): 627–59, https://doi.org/10.1093/icon/mor079.

[72] Asshidiqie, "Constitutional Adjudication and Democracy." See also Julian Arato, "Constitutionality and Constitutionalism," 627–659. In addition to the Austrian model, there is the American model, in which the Supreme Court carries out constitutional review. A third model is the French model, in which the validity of law is determined by the Constitutional Council.

[73] Asshidiqie, "Constitutional Adjudication and Democracy," 1–2.

The state is obliged, through its law and system, to treat everyone equally without any interference or limitation or other conditions that impair any individual's enjoyment of rights.[74] In Indonesia, the principles of non-discrimination and equality are guaranteed explicitly by the 1945 Constitution through Articles 27, 28I, 28D and 28H.[75] Therefore, there is no doubt that both principles are the core human rights principles to be considered by the Constitutional Court when examining human rights cases.

In the past, the Constitutional Court made several landmark decisions that upheld the principles of non-discrimination and equality. Notably, in Decision No. 97/PUU-XVI/2016, the Court declared certain provisions of the Civil Administration Law to be conditionally unconstitutional because they had restricted followers of traditional beliefs from obtaining compulsory identity cards and family cards. The Court stated that "restrictions on the basis of beliefs that result in different treatment between citizens are discriminatory actions".[76] This consideration was similar to previous decisions, namely No. 070/PUU-II/2004 (on the Law on the Establishment of West Sulawesi Province), No. 27/PUU-V/2007 (on the prohibition of public officials becoming city council chairpersons), and No. 024/PUU-III/2005 (on the Law on Regional Government). Another discriminatory provision was annulled in Decision No. 011-017/PUU-1/2003, in which the Court stated the General Election Law's Article 60G banning former members of the Indonesian Communist Party from participating in elections was a form of discriminative policy contradictory to Article 27 and Article 28D of the 1945 Constitution. In Decision No. 006/PUU-IV/2006, the Court stated that Article 2C and Article 3 of the Truth and Reconciliation Commission Law were contradictory to the Constitution because they discriminated against victims of the past human rights violations since such victims could not demand their right of compensation and rehabilitation until they were willing to forgive the

[74] Louis Henkin, ed., *Human Rights*, 2nd ed., University Casebook Series (New York, NY: Thomson Reuters/Foundation Press, 2009).

[75] Luthfi Widagdo Eddyono, "The First Ten Years of The Constitutional Court Of Indonesia: The Establishment Of The Principle Of Equality And The Prohibition Of Discrimination," *Constitutional Review* 1, no. 2 (2016): 119–46.

[76] Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 97/PUU-XIV/2016, 53 (The Constitutional Court of the Republic of Indonesia 2016).

perpetrators of the violations. Conversely, in the cases challenging the IABL, the Court put aside the core principle of non-discrimination. The Court argued that as long as the restriction on the right to religious expression is carried out through law, then the restriction is legitimate,[77] without considering whether such restrictions lead to discriminatory treatment of certain religious groups. In this sense, the Court has applied the 'particular constitutionalism' approach, which interprets the human rights norms embedded in the Constitution in a narrow sense.

Unlike several decisions in which the 'universal constitutionalism' approach was applied, in the judicial reviews of the IABL, the Court repeatedly said that religious expression is not an absolute right and the IABL is a valid law to limit such right. The Court noted that it "only examines the contents of the law against the 1945 Constitution".[78] The Court also said: "The Law for the Prevention of Blasphemy of Religion is still needed and does not conflict at all with the protection of human rights as regulated in the 1945 Constitution."[79] The decision relies on the Article 28J of the 1945 Constitution and limits itself to communicating with the IHRL that Indonesia has adopted. The Court did not consider the flaws of the IABL that were sufficient grounds to declare it unconstitutional.

3.4.2. Strict Limitation of Rights to Ensure no Fundamental Right is Violated

The Constitutional Court has stated the IABL "threatens anyone who publicly expresses hostility toward other religions or expresses different teachings to the main religions". However, as elaborated earlier, the scope of blasphemy is so wide that it has become too generic and a common tool for criminalizing religious minorities. The criminalization becomes apparent when it involves religious minorities because the government or the majority religion feels attacked by critics from minority groups.

[77] Ibid., 277–279, 288.
[78] Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/ PUU/2010, 294 (The Constitutional Court of the Republic od Indonesia 2010).
[79] Ibid.

3.4.3. Repealing IABL: A Boon, not a Vacuum, for Human Rights and Democracy

Moreover, considering the provisions of Article 18(3) and Article 20(2) and (3) of the of the ICCPR, the IABL should focus on religious expressions that encourage discrimination against other religious groups, rather than focusing on imposing restrictions on beliefs. The different religious beliefs between Islam and Protestantism, between Protestantism and Catholicism, between Islam and Hinduism, are a form of diversity that has long been accepted by Indonesia because of its social diversity. The diversity of schools of thought within a religion can also be accepted by society without making it an excuse to punish minority or unorthodox religious groups. The state does not need to limit its citizens' beliefs, since the six main religions have grown because of the freedom of their followers to choose, embrace, and practice their beliefs without sanction or punishment from the state.

There is no doubt that hate speech against any religion should be banned, and the perpetrator should be punished. UNHRC Resolution No. 16/18 of 2011,[80] as a correction of the Resolution of Anti-Defamation (of Islam) of 2009,[81] emphasizes that any intolerant acts toward any religions or beliefs, without distinction, should be addressed by every member state, while, all religions and beliefs should be treated equally. The Universal Periodic Review of the UNHRC has recommended that Indonesia "introduce legislation to repeal the blasphemy law of 1965". However, from what we have considered above, Indonesia is still hesitant to declare the IABL is unconstitutional or needs revision. As a member of the Organization of Islamic Cooperation, which initiated Resolution 16/18, Indonesia should intensify its efforts to implement the resolution. Combating blasphemy is only meant to protect religions or religious symbols, rather than protecting the rights of individuals. Ultimately, Indonesia should take immediate steps to

[80] In 2011, the United Nations Human Rights Council (UNHRC) adopted Resolution 16/18 to combat intolerance and discrimination on the basis of religion or belief. Resolution 16/18 "corrected" the 1999 UNHRC Resolution on Defamation of Religion by putting the rights of individuals at the center of the protection regime.

[81] Waves of Islamophobia in European and American countries prompted Muslim countries to oppose sentiment-based hatred toward Islam. The change of nomenclature to a Resolution Against Blasphemy was finally agreed by Muslim countries, where the basic idea should be to fight hatred against Islam and hatred against other religions.

repeal the IABL and amend its draft Criminal Code by shifting the criminalization of blasphemy into the criminalization of incitement to discrimination, hostility, and violence, in line with international standards.

VI. CONCLUSION

The Indonesian Constitutional Court seems to have applied the 'particular constitutionalism' approach when reviewing the IABL. There is no doubt that this approach caused the Court to limit itself from openly interpreting the human rights provisions laid down in the 1945 Constitution. As a result, the core values, general principles, and norms of IHRL were not fully adopted. By declaring the constitutionality of the IABL, the Court ignored the fact that the flawed IABL could be used to limit all kinds of religious expression and criminalize people from minority religions outside the six state-recognized religions. The Court seems to have ruled out the two basic core values in the right to FoRB, namely the principle of non-derogable right of the *forum-internum* freedom, and the principle of non-discrimination. The Court's omission of both principles in its decisions on judicial review of the IABL have led to the Court to repeatedly affirm the constitutionality of the law, even after IABL caused discriminative and repressive law enforcement against minority religious groups and triggered interreligious conflict.

The findings of this study illustrate the flawed IABL opens space for the politicization of law enforcement. The absence of indicators regarding defamation of religions and the absence of a standard limitation of the right to religious expression cause law enforcement officers to freely interpret the character of the two according to the development of socio-political interests in Indonesia. As a result, the planned revision of the original law is stagnant, while the number of blasphemy cases handled by police and the courts continues to rise. It seems to have escaped the Constitutional Court's attention that the IABL itself is a main cause of religious tension, public disorder, and horizontal conflict that accompany law enforcement against blasphemy. Moreover, the argument for maintaining the IABL to avoid a legal vacuum is weak. The universal constitutionalism approach,

which has been successfully applied by the Constitutional Court, should be redoubled in reviewing the IABL, so the fundamental right of the people to be treated indiscriminately is not degraded on the pretext of protecting public order.

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Socio-Economic Origins Of Constitutional Review In Central Asia: Political Economy And Politico-Historical Context As Defining Factors

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Abstract

This article pursues two main objectives. First, to identify the main factors behind the establishment of constitutional review in Central Asia. Second, to define how those factors have shaped the institutional design of constitutional courts. In doing so, this article revisits standard theories of comparative constitutional law in terms of the origin of judicial review. While the insurance theory dominates the present global discourse on judicial review, it cannot completely and accurately account for the origin of constitutional review in Central Asia. Rather, this article conveys that the main impetus and motivation behind the establishment of constitutional courts and their institutional designs has been the economic interests of Central Asian states, determined by the region's political and historical context.

Keywords: Central Asia, Constitutional Review, Constitutionalism, Judicial Review, Constitutional Courts.

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I. INTRODUCTION

Why do governments and legislative bodies willingly establish a system of constitutional review to which they themselves are then subjected? Comparative constitutionalists have developed numerous theories to explain the motives of drafters in forming constitutional courts. In recent global discourse, there has been a notable shift from the normative/institutionalist approach to a more theoretical and comparative approach when analyzing the origin of the judicial review.[1] Different models and theories on the origin and operation of judicial review have emerged, such as the rights-based[2] and rule of law hypothesis,[3] the ideational approach,[4] theories on internationalization and modernization,[5] and the hegemonic preservation theory.[6] There is also the diffusion theory, which holds that countries seek to emulate one another in adopting particular institutions. Thus, a global proliferation of comparative constitutional norms can force or foster states to establish constitutional courts either by coercion, competition or learning.[7] Others have ascribed the origin of judicial review to politicians seeking to transfer responsibility from political branches to the judiciary.[8] Finally, there is the insurance theory, which links the establishment of constitutional courts to the fundamentals of the electoral market or to the competitiveness of political parties.[9] Insurance theory dominates the current global discourse on the origin of judicial review and has been tested in a number of third-wave democracies. This article therefore undertakes a study of the constitutional courts of Kyrgyzstan,

1 Erin F. Delaney and Rosalind Dixon, "Introduction," in *Comparative Judicial Review*, eds. E. Delaney, R. Dixon (Camberley: Edward Elgar Publishing, 2018), 1-4; Tom Gerald Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge: Cambridge University Press, 2017); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

2 Martin Shapiro, "The Success of Judicial Review," in *Constitutional Dialogues in Comparative Perspectives*, eds. Sally J. Kenney, William M. Reisinger and John C. Reitz (Great Britain: Palgrave Macmillan, 1999), 204.

3 Shapiro, "The Success."

4 Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989).

5 Andrew Harding and Penelope Nicholson, *New Courts in Asia* (Oxfordshire: Routledge, 2010).

6 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2009).

7 Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics, and Organization* 30, no. 3 (2014): 587-622.

8 Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002).

9 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

Kazakhstan, Uzbekistan and Tajikistan, employing a comparative legal analysis approach[10] in combination with elements of contextual qualitative political,[11] political economy,[12] historical,[13] and geopolitical analysis.[14]

1.1 Insurance Theory Revisited

The political account for constitutional review was developed by Martin Shapiro, who pioneered much of the scholarship on comparative constitutional law. His work paved the way for the development of other theories in this field, especially Ginsburg's insurance theory. Therefore, before revisiting Ginsburg's insurance theory, it is worth briefly reviewing Shapiro's approach to the origin of judicial review.

First, Shapiro claims that effective judicial review can be constructed only in states which have a history of rule of law commitment. He describes the origin of constitutional courts based on three primary propositions. First, the federalism proposition, where he argues that for federal states such as the USA, it was crucial to create a third party for resolving disputes between state governments and the federal government.[15] This hypothesis was later confirmed by the experience of

[10] Oliver Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," *Brooklyn Journal of International Law* 32 (2007): 408-412; Mathias Siems, *Comparative Law* (Cambridge University Press, 2014), 31-40. For more on comparative methodology in law see Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing, 2014); Maurice Adams, Jaakko Husa and Marieke Oderkerk, *Comparative Law Methodology: Volumes I and II* (Cheltenham: Edward Elgar Publishing, 2017); Pier G. Monateri, *Methods of Comparative Law* (Edward Elgar Publishing, 2012), 291; David Law, "Constitutions," in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 376.

[11] For more on contextual political analysis methodology, see Robert E. Goodin and Charles Tilly, *The Oxford Handbook of Contextual Political Analysis* (Oxford: Oxford University Press, 2006). See also Charles Tilly and Robert E. Goodin, "Overview of Contextual Political Analysis it Depends," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin, (Oxford: Oxford University Press, 2011); Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, "Overview of Law and Politics the Study of Law and Politics," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin (Oxford: Oxford University Press, 2011).

[12] Barry R. Weingast and Donald A. Wittman, "Overview of Political Economy, the Reach of Political Economy," in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin (Oxford: Oxford University Press, 2011); Antonio Nicita and Simona Benedettini, "Towards the Economics of Comparative Law: The Doing Business Debate," *in Methods of Comparative Law*, ed. Pier G. Monateri (Edward Elgar Publishing, 2012), 291.

[13] For examples of contextual historical analysis of politics, see Douglas E. Ashford, "Historical Context and Policy Studies," in *History and Context in Comparative Public Policy*, ed. Douglas E. Ashford (Pittsburgh: University of Pittsburgh Press, 1992), 27-38; James Mahoney and Daniel Schensul, "Historical Context and Past Dependence," in *The Oxford Handbook of Contextual Political Analysis*, eds. Robert E. Goodin and Charles Tilly (Oxford: Oxford University Press, 2006).

[14] Goodin and Tilly, *The Oxford Handbook*.

[15] Shapiro, "The Success," 204.

Germany, which, according to Shapiro, was receptive to judicial review because of its longstanding tradition of *Rechtsstaat* (rule of law).[16]

His next proposition is grounded on the notion of diffusion or separation of powers between branches. He argues that the Constitutional Council established under France's Fifth Republic was created to safeguard the transition to the separation of powers system.[17] According to Shapiro, the main reason for establishing the Constitutional Council was keeping the Parliament in check.[18] This proposition was supported by Otto Pfersmann, who stated: "It was not introduced to protect rights and liberties or a distribution of competences between a center and decentralized entities. Instead, it was conceived of as a strictly preventive check on legislation, to prevent Parliament from overstepping its limited competences."[19]

Shapiro's final proposition is grounded in the rights-based approach. Under this approach, he believes the majority of states, including Spain, Italy, and Israel, adopted constitutional review mechanisms for protection and enforcement of constitutional rights.[20]

Ginsburg describes Shapiro's hypothesis and account for the emergence of constitutional review as the "ideational account of judicial review".[21] He states that in the ideational approach, the constitutional review becomes a dependent variable while rights become an independent variable. According to Ginsburg, Shapiro's approach puts judges as guardians of the public interest. In Ginsburg's words, "If courts succeed, they generate greater demands for constraining government, leading them to become, inevitably, deeply involved in policy-making."[22] Thus,

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16 Shapiro, "The Success," 179.

17 Shapiro, "The Success," 197.

18 Sophie Boyron, *The Constitution of France: Contextual Analysis* (Oxford: Oxford University Press, 2013), 150; Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 220; John Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992), 120; Martin A. Rogoff, *French Constitutional Law: Cases and* Materials (Durham: Carolina Academic Press, 2011), 156; Andrew Knapp and Vincent Wright, *The Government and Politics of France* (London: Routledge, 2001), 320.

19 Otto Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective," *European Constitutional Law Review* 5 (2010): 224.

20 Shapiro, "*The Success,*" 204.

21 Tom Ginsburg, "The Global Spread of Constitutional Review," in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford: Oxford University Press, 2010), 88.

22 Ginsburg, "The Global Spread," 89.

he claims that a rights-based argument is not sufficient to explain the political accounts for the logic of constitutional review. "The rights hypothesis is a demand-side theory that posits judicial review as an institutional response to societal forces."[23] This demand-side argument, according to Ginsburg, is extremely difficult to assess due to its unspecified nature.

Therefore, Ginsburg claims that in order to objectively assess the logic behind the adoption of constitutional review across the regions, it is better to adopt an institutionalist approach. According to Ginsburg, institutions matter and choices of institutional design are not random.

Ginsburg has termed this approach the insurance theory. Under this theory, the ruling power, at the constitution-drafting phase, has concerns over the durability of its tenure. In an effort to protect their future positions, parties tend to create judicial review as an insurance or alternative mechanism for their powerholding purposes.

While the theory might sound simple, the basic argument has preconditions regarding the nature of the regime and circumstances surrounding the constitution-drafting phase. First, when one party controls the drafting process and when there is a high potential of this party staying in power, drafters prefer to choose a weaker court.[24] Second, when the drafting process is controlled by two or more parties in a more or less equal position and there is no certainty as to who is going to win power – they will most likely establish a strong court. This hypothesis has been tested by Ginsburg in his book, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*.[25]

Current discourse on global judicial review indicates the insurance theory "seems to perform better than many alternatives in a range of circumstances".[26]

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[23] *Ibid*.

[24] Ginsburg, *Judicial Review*, 22-26.

[25] Ibid, 23-25.

[26] Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" *Journal of Law and Politics* 30 (2014): 350-65; Rosalind Dixon and Tom Ginsburg, "Constitutions as Political Insurance: Variants and Limits," in *Comparative Judicial Review*, eds. Erin Delaney and Rosalind Dixon (Camberley: Edward Elgar Publishing, 2018), 1-4; Rosalind Dixon and Tom Ginsburg, "The Forms and Limits of Constitutions as Political Insurance," International Journal of Constitutional Law 15 (2017): 988-1012; Brad Epperly, "The Provision of Insurance? Judicial Independence and the Post-Tenure Fate of Leaders," *Journal of Law and Courts* 1 (2013): 250-75; George Tridimas, "Constitutional Judicial Review and Political Insurance," *European Journal of Law and Economics* 29 (2009): 90-100.

A number of constitutional law scholars have tested the applicability of the insurance theory in different countries and deemed it one of the most accurate theories to explain the expansion of judicial review across the globe.[27] For instance, Hendrianto applied it to Indonesia,[28] Gatmaytan applied it to the courts of the Philippines,[29] Finkel applied it in the contexts of Mexico, Argentina and Peru,[30] and Volcansek in the context of Italy.[31]

On the other hand, a number of scholars have criticized the insurance theory, claiming it does not provide a compelling and accurate explanation of the origin and expansion of judicial review. Such scholars questioned the application of the insurance theory in the setting of non-democratic, authoritarian states.[32] Inclan argues that in the context of Mexico, judicial review is more a form of political legitimacy for a regime, while the application of insurance theory in Mexico cannot reveal such nuance but rather leads to a misleading understanding of the role of judicial review.[33] Moreover, Hilbink maintains the insurance theory does not take into account the ideational factor, which in her opinion is among the key factors of judicial review in Chile.[34]

When considering the reasons behind the establishment of constitutional review, one should be careful to avoid oversimplifying the facts. It is difficult to ascertain the precise reasons behind the establishment of constitutional courts; it depends on a range of factors such as political context, existence of

[27] Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge: Cambridge University Press, 2014); Lee Epstein, Jack Knight and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review* 35 (2001): 115-120.

[28] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018); Simon Butt, Melissa Crouch and Rosalind Dixon, "The First Decade of Indonesia's Constitutional Court," *Australian Journal of Asian Law* 16 (2016): 2-6.

[29] Dante Gatmaytan, "Judicial Review of Constitutional Amendments: The Insurance Theory in Post-Marcos Philippines," *Philippine Law and Society Review* 1 (2011): 75-85.

[30] Jodi Finkel, *Judicial Reform as Political Insurance: Argentina, Peru and Mexico in the 1990s* (Notre Dame: University of Notre Dame, 2008).

[31] Mary Volcansek, "Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance," *West European Politics* 33 (2010): 281-95.

[32] Kirk Randazzo, Douglas Gibler and Rebecca Reid, "Examining the Development of Judicial Independence," *Political Research Quarterly* 69 (2016): 584-91.

[33] Silvia Inclan, "Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?" *Political Research Quarterly* 62 (2009): 754-63.

[34] Lisa Hilbink, *Judges Beyond Politics in Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2008).

plurality, recent history of rule-of-law practice, external influences, the timing of the formation, demands by civil society, globalization and modernization. Any one of these elements or the occurrence of two or three of them could be a triggering mechanism for the establishment of judicial review and the choice of institutional model for these courts.

This article concurs with the main tenets of critics of the insurance theory and contends that the insurance theory does not completely and accurately account for the reasons behind the creation of Central Asian constitutional courts. In order fully comprehend this process, a wider and complex approach shall be applied, taking into consideration nuances that are unique to these states and the region. Accordingly, this work suggests that broader socio-economic, politico-historical reasons, transitional constitutionalism and predominantly the political economy were the defining factors in the establishment of these courts.

II. DISCUSSION

2.1 Political Economy and Politico-Historical Context as the Defining Factors of the Emergence of Central Asian Constitutional Courts.

Historical Context

Throughout Central Asian history, there was no classical interpretation of the nation-state as it is usually understood in Europe. In general, when an elite was formed among khanates or emirates, it never depended on a single ethnicity; hence historians describe Central Asian realms as "polyethnic societies".[35] Under the empire of Imperial Russia, all of Central Asia was united under a single colonial administrative unit, which was named Turkestan. When the Bolsheviks seized power in Russia, subsequent fear of pan-Turkism[36] and pan-Islamism

[35] Yuriy Kulchik, Andrey Fadin and Victor Sergeev, *Central Asia After the Empire* (London: Pluto Press, 1999), 2-4; Peter Roudik, *The History of the Central Asian Republics* (Connecticut: Greenwood Publishing Group, 2007).

[36] Pan-Turkism is defined by historians as an "idea of political, cultural and ethnic unity of various Turkic peoples who often shared historical, cultural, and linguistic roots in common". See Dagikhudo Dagiev, *Regime Transition in Central Asia: Stateness, Nationalism and Political Change in Tajikistan and Uzbekistan* (Oxfordshire, Routledge, 2013).

prompted the Soviets to split Turkestan into different territorial units. Thus, the present five states of Central Asia were born. However, historians have noted the boundaries of the political map were drawn artificially arbitrarily without due consideration of ethnic, cultural roots or historical roots, and without "sufficient knowledge nor consistent conceptual framework for their national policy".[37] Division was predominantly made to prevent the emergence of a single united Turkestan or pan-Turkism, while suppressing any ideological movements united under the Turkist idea.[38]

Another fear of the Soviet rule was of pan-Islamism. As already mentioned, the Turkic groups in Central Asia did not associate themselves in the classical concept of an ethnicity-based nation-state; instead, religious affiliation was a major determinant. Historians have noted that "religious affiliation in conditions of polyethnicity was the basis of self-identification for local communities".[39] Therefore, following the creation of the Soviet regime, the practice of Islam in Central Asia came under tight control. However, political scientists and historians have noted that during the Soviet occupation of Afghanistan, the Soviet Union deliberately used the Muslim population, especially citizens from the Tajik Soviet Republic and "the government-controlled Muslim establishment to penetrate the Arab-Islam world".[40] It has been argued that this maneuver of the Soviet Union aided the creation of Islamic movements, notably the politicization of Islam in Central Asia, especially in Tajikistan, which went on to become one of the main factors of the Tajikistani Civil War. Thus, these flawed decisions during the Soviet Union's rule of Central Asia and at the foundation of these states created an "incoherent sense of stateness"[41] that would have a tremendously detrimental effect, after these states gained independence following the fall of the Soviet Union.

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[37] Kulchik *et al*, *Central Asia After the Empire*, 5.

[38] The Soviets named these movements the Basmachi movement. The Bolsheviks killed the movement's main leader, Enver Pasha, while its other leaders fled to Afghanistan. See Dagiev, *Regime Transition*.

[39] Kulchik *et al*, *Central Asia After the Empire*, 2-4.

[40] Lena Jonson, *Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam* (London: I.B. Tauris, 2006), 45-55.

[41] Dagiev, *Regime Transition*.

Transitional Context

Scholars have noted that in order to understand the constitutional landscape, it is important to look beyond the formal texts of the originally adopted constitutions and see how they were drafted.[42] Clearly, the process of constitution-making matters and is of utmost importance in the context of political transformation in Central Asia. The transitional period after the collapse of the Soviet Union was not smooth in Central Asia. Transitional constitutionalism in Central Asia reveals that farther beyond the Eastern European and Baltic states,[43] the transition from communism to democracy[44] seemed to be more technical and far less driven by national liberation and democratization movements.[45] The transition in Central Asia reflected the continued strength of "subnational clan identities and patronage networks".[46] Existing literature on history and political science suggests the 'revolution from below' never occurred in Central Asia, unlike in Eastern European states. Put simply, the change in Central Asia mostly reflected a top-down approach.[47] Thus, transition tended to be left to the hands of influential

[42] Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal* 45 (1995): 364–86; Justin Blount, Zachary Elkins and Tom Ginsburg, "Does the Process of Constitution-Making Matter?" in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), 33-56; Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001).

[43] David Mason, *Revolution and Transition in East-Central Europe* (London: Routledge, 1996); George Schopflin, "The End of Communism in Europe," *International Affairs* 66, no. 3 (1990); Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge: Cambridge University Press, 2010); David R. Cameron and Mitchell A. Orenstein, "Post-Soviet Authoritarianism: The Influence of Russia in Its 'Near Abroad'," *Post-Soviet Affairs* 28, no. 1 (2012).

[44] Cass R. Sunstein, "Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe," *Constitutional Political Economy* 2 (1991): 375-85.

[45] Claus Offe, "Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe," *Social Research* 58 (1991): 866-89; Michael McFaul, "The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Post-communist World," *World Politics* 54, no.2 (2002): 220-39; Bunce Valerie, "Rethinking Recent Democratization: Lessons from Post-communist Experience," *World Politics* 55, no. 2 (2003): 168-85; Russell Bova, "Political Dynamics of a Post-Communist Transition: A Comparative Perspective," *World Politics* 44, no. 1 (1991): 114-25; Mark R. Beissinger, *Nationalist Mobilization and the Collapse of the Soviet Union* (Cambridge: Cambridge University Press, 2002), 72-75.

[46] Sally Cummings, *Power and Change in Central Asia, Politics in Asia* (London: Routledge, 2002); John Anderson, *Kyrgyzstan: Central Asia's Island of Democracy?* (London: Routledge, 1999); Kathleen Collins, "Clans, Pacts, and Politics in Central Asia," *Journal of Democracy* 13, no. 3 (2002): 127-152; Asel Murzakulova and John Schoeberlein, "The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology," *Europe-Asia Studies* 61, no. 7 (2009); Eugene Huskey and Gulnara Iskakova, "Narrowing the Sites and Moving the Targets," *Problems of Post-Communism* 58, no. 3 (2011). For an overview of the constitutional framework of Central Asian states, see Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (London: Bloomsbury Publishing 2017).

[47] Uuriintuya Batsaikhan and Marek Dabrowski, "Central Asia – Twenty-Five Years after the Breakup of the USSR," *Russian Journal of Economics* 3. no. 3 (2017): 296-301.

figures within regime elites and clan elites.[48] The constituent assemblies of Central Asian states comprised sitting Supreme Soviets (deputy parliaments from Soviet rule)[49] and these assemblies were led by the sitting leaders of the Soviet Central Asian republics (*partiyno-sovetskaya nomenklatura*),[50] namely, the old establishment and Soviet political elite. Evidently, all the reforms were headed and carried out by political forces that were the part of the old Soviet regime.[51]

The historical past and early transition processes of Central Asian states shaped the internal and external political and economic outlooks of these states, directly impacting the design of constitutional courts that emerged in the region.

2.1.1. Subsequent Politico-Legal Landscape of Post-Soviet Central Asia

Foreign Policy

Foreign policies of Central Asian states have generally depended on two factors. First, on the states' abilities to direct or determine security of their borders in their initial years of independence. Second, on the political economy and economic landscape. While Uzbekistan and Kazakhstan were able to build

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48 Kathleen Collins, *Clan Politics and Regime Transition in Central Asia* (Cambridge: Cambridge University Press, 2006), 210-215; Gregory Gleason, *Central Asia's New States* (Colorado: Westview Press, 1997); Beissinger, *Nationalist Mobilization and the Collapse of the Soviet Union*, 72-75.

49 With the exception of Tajikistan, where the Civil War delayed its constitution-making process for 4-5 years and the final text of the Constitution was adopted as a consensus document between conflicting parties. *Konstitucia Respubliki Tajikistan* [Constitution of The Republic of Tajikistan], November 6, 1994, was adopted by referendum.

50 *Zakon Respubliki Uzbekistan o Poryadke vvedenia v deitstvie Konstitucii Respubliki Uzbekistan* [Law of the Republic of Uzbekistan on the Procedure for introduction of the Constitution of the Republic of Uzbekistan], December 8, 1992, No. 725, adopted by the Supreme Soviet of the Republic of Uzbekistan; *Postanovlenie Verhovnogo Soveta Respubliki Kyrgyzstan o sozdanii rabochei gruppy po podgotovke proekta novoi Konstitucii* [Resolution of the Supreme Soviet of the Republic of Kyrgyzstan on establishment of a working group to develop a draft of the new Constitution], May 15,1991; *Konstitucia Kyrgyzskoi Respubliki* [Constitution of the Republic of Kyrgyzstan], May 5, 1993, adopted by the Supreme Soviet of the Kyrgyz Republic; *Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan ob obrazovanii konstitucionnoi kommussii* [Resolution of the Supreme Soviet of the Republic of Kazakhstan on establishment of a constitutional assembly], December 15, 1990; *Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan o naznachenii Nazarbayeva N.A. Predsedatelem Konsticionnoi Kommissii* [Resolution of the Supreme Soviet of the Republic of Kazakhstan on the appointment of N.A. Nazarbayev as chairman of the Constitutional Assembly], December 15, 1991; *Konstitucia Respubliki Kazakhstan* [Constitution of the Republic of Kazakhstan], January 28, 1993, adopted by the Supreme Soviet of the Republic of Kazakhstan.

51 Ruti Teitel, "Post-Communist Constitutionalism: A Transitional Perspective," *Columbia Human Rights Law Review* 26 (1994): 175-79; Stephen Kanter, "Constitution Making in Kazakhstan," *International Legal Perspectives* 5 (1993): 64-66; John Anderson, "Constitutional Development in Central Asia," *Central Asian Survey* 16, no. 3 (1997); Ashurboy Imomov, "*Razvitie Konsepsii Konstitucii Suverennoi Respubliki na opyte Tadjikistana* [The Development of the Concept of Constitution of the Sovereign Republic based on the Experience of Tajikistan]," *Sovestskoe Gosudarstvo i Pravo* 11 (1991): 18; Scott Newton, "Transplantation and Transition: Legality and Legitimacy in the Kazakhstani Legislative Process," in *Law and Informal Practices: The Post-Communist Experience*, eds. Denis Galligan and Marina Kurkchiyan (Oxford: Oxford University Press, 2003), 152-65.

armies and exercise control of their own borders, such security measures proved to be more challenging for Kyrgyzstan and Tajikistan. Hence, in its early independence, Kyrgyzstan signed a border cooperation agreement with Russia, while Tajikistan's civil war resulted in a heavy presence of Russian military services at its border. These situations later shaped the two states' respective foreign policies. Kazakhstan followed a multi-vector foreign policy,[52] which featured a constant balancing act between historical and traditional relations with Russia and important economic partnerships with China. To a certain degree, Kazakhstan's long-serving first president Nursultan Nazarbayev, who held office from 1990 to 2019, considered Kazakhstan as a bridge between Asia and Europe. Kyrgyzstan, during the presidency of Askar Akayev (1990–2005), adopted his Great Silk Road foreign policy doctrine,[53] centered on the concept of mutual dependence and the development of "mutually advantageous international cooperation"[54] in the Silk Road region. Tajikistan in 2002 declared an "open door" policy that included "broad and constructive cooperation with all states and entities of international relations"[55] while preserving its national interests and sovereignty.[56] Turkmenistan's foreign policy doctrine is enshrined in its constitution, which reflects the "positive neutrality" doctrine adopted by the 1995 UN General Assembly Resolution on the "Permanent Neutrality of Turkmenistan".[57] Uzbekistan under Islam Karimov

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52 *Strategia Stanovlenia I Razvitiya Kazakhstana kak suverennogo gosudarstva* [Strategy of the Establishment and Development of Kazakhstan as a sovereign state], May 16, 1992, adopted by the President of the Republic of Kazakhstan; *Konsepsia Vneshnei Politiki Kazakhstana* [Concepts of Kazakhstan's Foreign Policy], 1995, adopted by the President of the Republic of Kazakhstan; Sally Cummings, "Eurasian Bridge or Murky Waters between East and West? Ideas, Identity and Output in Kazakhstan's Foreign Policy," in *Ideology and National Identity in Post-Communist Foreign Policies*, ed. Rick Fawn (London 2004), 139-155.

53 Askar Akayev, *Diplomatia Shelkovogo Puti: Doktrina Prezidenta Kyrgyzstakoi Respubliki* [The Silk Road Diplomacy: The Doctrine of the President of the Kyrgyz Republic], (Bishkek, 1999); Eugene Huskey, "National Identity from Scratch: defining Kyrgyzstan's role in World Affairs," in *Ideology and National Identity in Post-Communist Foreign Policies*, ed. Rick Fawn (London 2004), 111-138.

54 Askar Akayev, "President of Kyrgyzstan: Our foreign policy doctrine is the Great Silk Road," *EIR* 26, no. 15 (1999), https://larouchepub.com/eiw/public/1999/eirv26n15-19990409/eirv26n15-19990409_049-president_of_kyrgyzstan_our_fore.pdf.

55 Avaz Yuldoshev, "Tajikistan Pursues Open-Door Policy, Says Tajik Leader," *Asia-Plus*, published 26 April 2013, https://asiaplustj.info/en/news/tajikistan/power/20130426/tajikistan-pursues-open-door-policy-says-tajik-leader.

56 Lena Jonson, *Tajikistan in the New Central Asia" Geopolitics, Great Power Rivalry and Radical Islam* (London: I. B Tauris, 2006), 59-61.

57 Resolution A/50/80 of the United Nations General Assembly of 12 December 1995 "A Permanent Neutrality of Turkmenistan" stipulated the following: "(1) Recognizes and supports the of permanent neutrality, declared by Turkmenistan; (2) Calls upon States Members of the United Nations to respect and support this status of Turkmenistan and also to respect its independence, sovereignty and territorial integrity."

opted for a self-reliance foreign policy doctrine, based heavily on respect and recognition of national sovereignty.[58] As this article will show, these elements of foreign policy direction also have some reflection of the institutional design of the Central Asian states.

Political Economy

In Central Asia, the political economy was the main factor in the origin and choice of models for their constitutional courts. Central Asian states under the Soviet Union were part of the Soviet State planned economy.[59] Being a landlocked region, Central Asia did not have much interaction with the rest of the world and mainly played the role of a supplier in the Soviet economy, providing raw materials, cotton, minerals and energy resources.[60] Among those materials, cotton was the predominant commodity; thus, historians and political scientists have described the Soviet economic policy toward Central Asia as a "white gold cotton dictatorship".[61] Central Asia was substantially financed by Moscow for its cotton production; however, the Soviets simultaneously used "repressive command methods to enforce the monoculture status of cotton" that later caused extreme ecological problems regarding water balance and the disappearance of the Aral Sea, a lake that was located between Kazakhstan and Uzbekistan.

After the demise of the Soviet Union in 1991, the Central Asian states not only had to build their respective nation-states but also had to develop their own economic systems and policies. As this article will reveal, there is a strong link between the institutional design of Central Asian constitutional courts (and the emergence of judicial review) and the choice of economic systems and political economy approaches that were pursued by each of these states.

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58 Annette Bohr, *Uzbekistan: Politics and Foreign Policy* (London: Royal Institute of International Affairs, 1998).

59 For detailed descriptions of the Soviet economy, see Richard Ericson, "The Classical Soviet-Type Economy: Nature of the System and Implications for Reform," *Journal of Economic Perspectives* 5 (1991): 11-20; Gregory Gleason, *The New Central Asian States* (Colorado: Westview Press, 1997); Gregory Gleason, *Markets and Politics in Central Asia* (London: Routledge 2003); Richard Pomfret, *The Economies of Central Asia* (New Jersey: Princeton University Press, 1995). Richard Pomfret, *The Central Asian Economies in the Twenty-First Century* (New Jersey: Princeton University Press, 2019).

60 Pomfret, *The Central Asian Economies*, 4.

61 Kulchik *et al*, *Central Asia After the Empire*, 2-4.

In the field of international political economy, scholars have identified four main different approaches that states can pursue: Marxist, liberal-pluralist, realist, and domestic politics.[62] In the post-Soviet era, Central Asian states have tended to pursue a combination of the realist and domestic politics approaches.

Prior to World War I, much of the international political economy was dominated by empires, usually led by hereditary or oligarchic elites. These empires justified their pursuit of expansion and exploitation of colonial resources as a means to promote their particular civilizations, arguably resulting in a Marxist approach in terms of control over capital, labor and profits. Following World War I, the economic system of Soviet Union was predominantly based on the Marxist approach.[63] The liberal-pluralist approach to international political economy can be observed in the US-Europe relationship and in the North Atlantic region, which predominantly center on financial stability as well as liberal free market ideas.[64] The realist approach holds that "hegemonic power can ease the achievement of collective goods or trade".[65]

In the absence of such hegemonic power, states will typically choose short-term bilateral agreements rather than becoming involved in long-term, strategic and broad commitments. Stated simply, their economic strategy is indicative of the realism that surrounds them. In the final decade of the 20th century, when Central Asia's independent states emerged, there was no such hegemonic power. Russia was preoccupied with handling its own domestic political and economic reforms, and among Central Asian states there was no evident hegemon among the leaders. Consequently, it has been argued, Central Asian states opted for a realistic perspective on international political economy,[66] adopting economic policies that were sporadic and not comprehensive, mostly balancing between Russia, China and other potential partners.

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[62] Martin Spechler and Dina Spechler, "The International Political Economy of Central Asian Statehood," in *Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia*, ed. Emilian Kavalski (2010), 72-73; Robert Gilpin, *The Political Economy of International Relations* (New Jersey: Princeton University Press, 1987), 12-13.

[63] Spechler and Spechler, "The International Political Economy," 72-73.

[64] Ibid, 73-74.

[65] Ibid.

[66] Ibid.

Finally, the domestic politics approach suggests that international trade can shape the political development of a country, such as enhancing the powers of domestic regimes if there are available natural resources, which can lead to the 'natural resources trap'.[67] Therefore some Central Asian states, due to the availability of natural resources, choose to retain a command economy, as access to international trade has enabled these regimes to consolidate and strengthen their power.[68]

Thus, considering these various approaches to international political economy, economic choices and perspectives of the Central Asian states can be considered in a spectrum ranging from most liberal to least liberal.

Kyrgyzstan is known for having adopted one of the most liberal economic systems. This is because, unlike its neighboring countries, it lacks natural resources and materials that it could extract and export itself. Clearly, there was an urgent need to attract international investment and to achieve that, Kyrgyzstan had to begin liberalizing its economy and legal system. Thus, following recommendations of the World Bank and the International Monetary Fund, Kyrgyzstan adopted liberal reforms in the economic sector. Those reforms were reflected in the reorganization and liquidation of enterprises, also known as PESAK,[69] in the agricultural economy, also known as APEAK,[70] and the reorganization of the financial market, also known as FINSAK.[71] This liberal approach to the economic system also impacted the development of the politico-legal landscape of Kyrgyzstan, which was one of the most liberal in Central Asia.

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67 Ronald Rogowski, *Commerce and Coalitions* (New Jersey: Princeton University Press, 1989).

68 Spechler and Spechler, "The International Political Economy," 72-73.

69 *Postanovlenie Pravitelstva Kyrgyzskoi Respubliki o merah po demonopolizacii ekonomiki i podderjski predprenimatelstva v Respublike Kyrgyzstan* [Resolution of the Government of the Kyrgyz Republic on measures to demonopolize the economy and support entrepreneurship in the Republic of Kyrgyzstan], August 25, 1992, No. 421.

70 *Ukaz Prezidenta Respubliki Kyrgyzstan ob osobennostyah razgosudarstvlenia i privatizacii sovhozov I drugih gosudarstvennyh, kommunalnyh, selskohozyastvennyh predpriyatiy v Respubliki Kyrgyzstan* [Decree of the President of the Kyrgyz Republic on the peculiarities of the privatization of state farms and other state (communal) agricultural enterprises in the Republic of Kyrgyzstan], January 13, 1992, No. УП-10.

71 *Ukaz Prezidenta Kyrgyzskoi Respubliki o razrabotke ekonomicheskoi strategii razvitia Kyrgyzskoi Respubliki na period do 2005 goda I indakativnogo socialno-ekonomicheskogo plana na 1996-1996 gody* [Decree of the President of the Kyrgyz Republic on the development of an economic development strategy of the Kyrgyz Republic up to 2005 and an indicative social and economic plan for 1996-1998], December 29, 1995; *Postanovlenie Pravitel'stva Kyrgyzskoi Respubliki ob agenstve po reorganizacii bankov i rekonstruksii dolgov pri Ministertste Finansov Kyrgyzskoi Respubliki* [Regulation of the Government of the Kyrgyz Republic on the Agency for the Reorganization of Banks and Restructuring Debt with the Ministry of Finance of the Kyrgyz Republic], February 19, 2002, no. 87.

Furthermore, it also influenced the establishment of one of the region's most empowered constitutional courts, which enjoyed expansive institutional design and competencies.[72]

The second Central Asian state that also opted for the liberal economic system is Kazakhstan. In contrast to Kyrgyzstan, Kazakhstan is rich in oil and gas resources; however, after the fall of the Soviet Union, Kazakhstan lacked sufficient capacity for extracting these natural resources. It therefore also had to commence liberalization of its economic and legal policies to attract investors. Similar to Kyrgyzstan, it established a constitutional court with substantially broad powers and competencies. Despite that liberal foundation, rising oil prices meant that Kazakhstan enjoyed "energy driven booms"[73] and the privatization of state assets resulted in the formation of an "autocratic economy, dominated by oligarchs".[74] This change of the political landscape, manifested in the consolidation of power by Nazarbayev, led to the 1995 transformation of the Constitutional Court of Kazakhstan into the less powerful and more façade-like Constitutional Council. Thus, the choice of institutional design of the Constitutional Court in Kazakhstan was also predominantly driven by the economic interests and approaches of Kazakhstan to political economy.

Uzbekistan initially pursued the least liberal economic system, opting to maintain a state command economy. This was justified by the factor that unlike Kazakhstan and Kyrgyzstan, Uzbekistan under the Soviet regime was a leading supplier of cotton. Given that cotton, unlike oil or gas, is easily produced and exported without needing to attract investors, Uzbekistan chose to retain its state command economy.[75] Therefore, Uzbekistan had no economic motive to undertake

[72] More detailed analysis of the institutional design is discussed in the next section.

[73] Pomfret, *The Central Asian Economies*, 4.

[74] Pomfret, *The Economies of Central Asia*; Pomfret, *The Central Asian Economies*, 70-75; Karla Hoff and Joseph Stiglitz, "After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies," in *American Economic Review* 94, no. 3 (2004), 754-60; Carol Kerven, Sarah Robinson, Roy Behnke, Kanysh Kushenov and E.J. Milner-Gulland, "A pastoral frontier: From chaos to capitalism and the re-colonisation of the Kazakh rangelands," *Journal of Arid Environments* 127 (2016), 110-18.

[75] Bakhodyr Muradov and Alisher Ilkhamov, "Uzbekistan's Cotton Sector: Financial Flows and Distribution of Resources" (Open Society Eurasia Program Working Paper, 2014); EJF, *White Gold – The True Cost of Cotton: Uzbekistan Cotton and the Crushing of a Nation* (London: Environmental Justice Foundation, 2005).

liberalization of its economic and politico-legal systems. Consequently, of all Central Asian states, Uzbekistan created the least powerful constitutional court.

Tajikistan is in the center of this spectrum, mainly because of the civil war that broke out once it had become an independent state. The Tajikistani Civil War put on hold the entire process of constitution-making, economic policies and the creation of a constitutional court.[76] After the Civil War had concluded with the assistance of international parties, a constitution was drawn up that also created a constitutional court. As Tajikistan's economy was severely damaged after the war, it became imperative to liberalize its economy and woo investors. Yet the tide of political change across Central Asia and the former Soviet Union that paved the way toward more authoritarian presidentialism also had an impact on the institutional design of the Tajik Constitutional Court. Accordingly, Tajikistan established its Constitutional Court with comparatively fewer powers than those of Kazakhstan and Kyrgyzstan, but relatively more powers than the Constitutional Court of Uzbekistan.

2.1.1.1 Institutional Design of Central Asian Constitutional Review Mechanisms

A comprehensive picture of the institutional designs of Central Asian constitutional courts is outlined in the following series of tables.[77] These tables also reflect subsequent institutional adjustments to these courts, made either via constitutional amendment or amendments to the respective laws on constitutional courts.

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[76] Isaac Scarborough, "Economic Causes of Strife in Tajikistan," Voices on Central Asia, March 20, 2018, https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan; Bakhtiyor Sobiri, "S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane [Eyes Wide Shut: Long Echoes of the Tajik Civil War]," Open Democracy, 22 June 2017, https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan.

[77] Gretchen Helmke and Julio Rios-Figueroa, *Courts in Latin America* (Cambridge: Cambridge University Press, 2011); Anja Seibert-Fohr, "Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region," Max Plank Institute series on comparative and international law (2012): 307-40; Ginsburg, *Judicial Review*; Mark Ramseyer, "The Puzzling Independence of Courts: A Comparative Approach," *The Journal of Legal Studies* (1994): 721; John Bell, *Judiciaries within Europe* (Cambridge: Cambridge University Press, 2006); Linda C. Keith, "Judicial Independence and Human Rights Protection around the World," *Judicature* 85 (2000): 193-97; Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *The American Journal of Comparative Law* 57 (2009), 103-120.

Composition of Central Asian Constitutional Courts				
	Number of Justices	**Organizational Structure**	**Appointment**	**Dismissal**
Kyrgyzstan Constitutional Chamber*	11 judges,** 40-70 years old, higher education in law, minimum of 15 years' professional legal experience.***	Chairperson (elected among judges), deputy chairperson and 9 judges. Judge rapporteurs designated for each case by Chairperson.**** Apparatus of the Chamber.	Appointed by Parliament upon submission by the President, based on proposal by the Council of Judges.***** Appointed for an initial term of 7 years, which may be renewed, allowing tenure until mandatory retirement age.******	A judge may be dismissed by not less than two-thirds of votes of the deputies of Parliament upon submission by the President, based on proposal by the Council of Judges.*******

* De f*acto and de jure,* by the letter of both the Kyrgyzstan Constitution and the Constitutional Law on the Constitutional Chamber of the Supreme Court, the Constitutional Chamber is an autonomous court that does not report to the Supreme Court in any way. See Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic], June 13, 2011, No. 37, Articles 2, 3, 11.

** Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic], June 13, 2011, No. 37, Article 5.

*** Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic*], 27 June 2010, Article 97 (2); Konstitucio*nnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic], July 9, 2008, No. 141, Article 15 (1).

**** Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Article 5.

***** Constitutional Law on the Status of Judges in the Kyrgyz Republic, Article 15.

****** Ibid. According to the Venice Commission, "setting probationary periods can undermine the independence of judges, as they may feel under pressure to decide cases in a certain manner," European Commission for Democracy through Law (Venice Commission), Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, Opinion no. 480/2008, CDL-AD(2008)039, p. 4, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)039-e.

******* Constitutional Law on the Status of Judges in the Kyrgyz Republic, Article 25 (2); Constitution of the Kyrgyz Republic, Article 97 (1). A Kyrgyzstan Constitutional Chamber judge may be subject to early dismissal in the following cases: "on the judge's own application; health grounds (attested by a medical commission); appointment to another court or position; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge, confirmed by decisions of the Council of Judges; activity incompatible with the office of a judge; political party membership, promotion of any political party; registration as a candidate for Presidency, registration as member of a political party that is participating in Parliamentary elections, or registration as a candidate for local self-governance body representative elections." Constitutional Law on the Status of Judges in the Kyrgyz Republic, July 9, 2008, No. 141, Article 26 (2).

Composition of Central Asian Constitutional Courts				
	Number of Justices	**Organizational Structure**	**Appointment**	**Dismissal**
Kazakhstan Constitutional Council	7 members + all ex-Presidents are *ex officio* life members.* Minimum age of 30, higher education in law, minimum 5 years' professional legal experience.**	Chairperson (appointed by President), 6 members. Rapporteurs designated for each case by Chairperson.*** Apparatus of the Council.	Chairperson and two members of Council are appointed by President, two members by the upper house of Parliament and two by the lower house of parliament for a term of 6 years.****	Chairperson may be dismissed by the President, other members by the respective bodies that appointed them, on grounds listed in Article 15 of the Constitutional Law.*****
Tajikistan Constitutional Court	7 judges, 30-65 years old, lawyers with minimum 10 years' professional legal experience.******	Chairperson (elected among judges), deputy chairperson and 5 judges. Judge rapporteurs designated for each case by the Chairperson******* Apparatus of the Court.	Appointed by Parliament upon submission by the President.******** Appointed for a term of 10 years.*********	A judge may be dismissed by Parliament upon submission by the President on grounds listed in the Constitutional Law.**********

* Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Constitutional Council of the Republic of Kazakhstan], December 29, 1995, No. 2737, Article 2.

** Ibid, Article 4.

*** Ibid, Articles 10, 26.

**** Ibid, Articles 3, 5.

***** Ibid, Article 15. A member of the Council may be subject to early dismissal in following cases: "on the member's own application; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge; and violation of the oath."

****** Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Constitutional Court of the Republic of Tajikistan], November 3, 1995, No. 84, Articles 7, 8.

******* Ibid, Article 8.

******** Ibid.

********* Ibid, Article 9.

********** Ibid, Article 14. A Tajikistan Constitutional Court judge may be subject to early dismissal in following cases: "on the member's own application; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge; a violation of the oath; and loss of citizenship."

Composition of Central Asian Constitutional Courts				
	Number of Justices	**Organizational Structure**	**Appointment**	**Dismissal**
Uzbekistan Constitutional Court	7 judges,* 35-70 years old, specialists in law and politics.**	Chairperson (elected among judges), deputy chairperson and 5 judges. Judge rapporteurs designated for each case by the Chairperson.*** Apparatus of the Court	Appointed by Parliament upon submission by the President, based on proposal by the Supreme Judicial Council. Appointed for a term of 5 years, renewable only once.****	A judge may be dismissed by the Parliament on grounds listed in the Constitutional Law.*****

	Jurisdiction of Central Asian Constitutional Courts
Kyrgyzstan Constitutional Chamber (since 2010)******	1. Review constitutionality of normative legal acts (individual complaints included). 2. Review constitutionality of international treaties before ratification. 3. Review constitutionality of constitutional amendments.*******

* Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Constitutional Court of the Republic of Uzbekistan], May 27, 2017, No. ЗРУ-431, Artic*le 5*.

** Ibid, Article 16.

*** Ibid, Article 5.

**** Ibid, Article 5.

***** Ibid, Article 23. An Uzbekistan Constitutional Court judge may be subject to early dismissal in the following cases: "on the judge's own application; health grounds (attested by a medical commission); a guilty criminal verdict; a court judgment to apply compulsory medical measures; loss of citizenship; and violation of the oath."

****** Compared to the previous Kyrgyzstan Constitutional Court, which was suspended in 2010, the Constitutional Chamber's powers are much more limited. For instance, the additional competencies of the previous Constitutional Court were: review application of laws, interpret the Constitution, impeachment of president and judges, and review election results. For more information, see Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnom Sude [Constitutional Law on the Constitutional Court of the Kyrgyz Republic], December 18, 1993, No. 1335-XII 37, Article 13.

******* Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Article 4.

	Jurisdiction of Central Asian Constitutional Courts
Kazakhstan Constitutional Council (since 1995)*	1. Review elections and referenda. 2. Review constitutionality of acts of parliament before promulgation.** Since 2017, after promulgation at the request of the President.*** 3. Review constitutionality of international treaties before ratification. 4. Official interpretation of the Constitution.
Tajikistan Constitutional Court	1. Review constitutionality of normative legal acts. 2. Review constitutionality of international treaties before ratification. 3. Review constitutionality of constitutional amendments. 4. Resolve competence disputes between state officials. 5. Review individual complaint since 2008.****
Uzbekistan Constitutional Court	1. Review constitutionality of normative legal acts 2. Review constitutionality of international treaties before ratification. 3. Review constitutionality of autonomous Karakalpakstan Republic's Constitution and laws. 4. Official interpretation of the Constitution. 5. Review concrete cases upon referral by the Supreme Court (since 2017). 6. Other competencies defined by law.*****

* Before 1995, Kazakhstan had a Constitutional Court, which had substantially more powers, including individual complaint, the review of actions of state officials, and the review of decisions of ordinary courts. For more information, see Konstitucionnuj zakon Respubliki Kazakstan o Konstitucionnom Sude Respubliki Kazakstan [Constitutional Law on the Constitutional Court of the Republic of Kazakhstan], June 5, 1992, Article 10.

** Constitutional Law on the Constitutional Council of the Republic of Kazakhstan , Article 72.

*** Ibid, Article 17.

**** Constitutional Law on the Constitutional Court of the Republic of Tajikistan, Article 34.

***** Constitutional Law on the Constitutional Court of the Republic of Uzbekistan, Article 4.

This article, including the tables above, show that in Central Asia, the politico-historical context and political economy were the key elements that influenced the origin of constitutional courts. These determinants also shaped subsequent institutional adjustments conducted by these courts.

For example, after investors were attracted to Kazakhstan and various state enterprises were privatized, an economic boom from higher world oil prices enabled Nazarbayev to strengthen his power and to establish an autocratic economic system that no longer required a powerful constitutional court. Therefore, in 1995, the Kazakh Constitutional Court was replaced with the considerably weaker Constitutional Council, the powers of which were much lower. Circumstances were different in Kyrgyzstan, which maintained the initial institutional design of its Constitutional Court for a longer time because it required ongoing investment and international backing. However, the situation changed after the 2010 Tulip Revolution, when the Kyrgyzstan Constitutional Court was replaced with the Constitutional Chamber. Conversely, while Tajikistan and Uzbekistan established relatively less powerful courts, they have more recently seemed to be broadening the jurisdictions of these courts, which has also influenced by political economic interests.

III. CONCLUSION

This article pursued two central objectives. First, it sought to identify the primary factors and motives behind the creation of constitutional courts in Central Asia. Second, it defined how those factors and motives influenced the institutional design of these courts. In meeting these objectives, the article first examined the formation of constitutional courts in the setting of the former Soviet Union. It then explored popular theories of comparative constitutional law on the origin of judicial review.

Next, this article explained that in the setting of Central Asia, the insurance theory cannot completely and accurately explain the origin of constitutional review. On the contrary, the primary force behind the establishment of Central

Asia's constitutional courts and their institutional design has been the politico-economic interests of their states, shaped by the regional politico-historical and transitional context.

For the sake of highlighting the principal findings from this article, the following points can be restated. First, the historical context shows the Soviet Union's strategy based on fear of pan-Islamism and pan-Turkism toward Central Asia caused an "*incoherent sense of stateness*"[78] that resulted in a severely negative impact after those states gained independence following the demise of the Soviet Union. Second, the examination of the transitional events shows the early stages of transition in Central Asia were generally left in the hands of clan elites, regime elites, the old establishment and the Soviet political elite.

Thus, while the insurance theory may serve as a general explanation for the origin of constitutional review in some states, the experience of Central Asia shows otherwise, as the design and development of its constitutional courts has been based more on political economy and politico-historical factors.

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[78] Dagiev, *Regime Transition*.

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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 of 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/s10602-012-9132-5.

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 Plennary Sessions in the Investigating Committee for the Preparation for Indonesian Independence and the Committee of Indonenesian 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 Acehnese 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* [*Asymetrical 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 Sandiago 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 national consensus on the state ideology. The Unitary State of the Republic of

[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).

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 Article 28E and Article 28J on human rights 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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AUTHOR GUIDELINE

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