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Constitutional Review is a law journal published by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia twice a year. The primary purpose of this journal is to disseminate research, conceptual analysis and other writings of a scientific nature on constitutional issues. Articles published cover various topics on constitutional courts, constitutional court decisions and issues on constitutional law, either in Indonesia or other countries. Designed as an international law journal, Constitutional Review is intended as a forum for legal scholarship that discusses ideas and insights from law professors, legal scholars, judges and practitioners.

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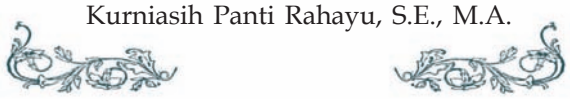

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CONTENTS

Note From the Editors

Constitutional Review (ConsRev) Journal is pleased to reach its eighth year of publication. This peer-reviewed journal is published twice a year by the Center for Research and Case Analysis Library Management of the Constitutional Court of the Republic of Indonesia. ConsRev provides a forum for the dissemination of scientific articles and analysis of legal issues by academics, researchers, observers, practitioners, law professors, legal scholars, and judges in Indonesia and abroad.

This issue features six articles by writers from various backgrounds, examining constitutional court decisions and constitutional issues in Indonesia and elsewhere.

The first article, **The Constitutional Struggle for Religious Freedom: A Comparative Study of India and Indonesia**, is by Neha Tripathi, PhD Candidate, National Law University, Delhi, India, and Anubhav Kumar, an Advocate who is also a Research Associate with the Bar Association of India. Their article compares the constitutional frameworks of India and Indonesia in relation to the right to religious freedom. Both countries have a religious majority – Hindus in India and Muslims in Indonesia – leading to concerns over the rights of followers of minority religions. The authors note that although the respective founders

of India and Indonesia established a constitutional basis for religious freedom, this is not necessarily the present reality, so courts must ensure they adjudicate against suppression of religious rights.

The second article, **The Development of Islam and Democracy in Indonesia**, is written by Hamdan Zoelva, a Lecturer at As-Syafi'iyah Islamic University in Bekasi, Indonesia, and former Chief Justice of the Indonesian Constitutional Court. He argues that Islam and democracy are two inseparable parts of social and political life in Indonesia. Acknowledging that democracy does not exist in the Islamic Holy Qur'an or the Hadith (Prophet Muhammad's words and actions), he nevertheless concludes that the principles of Islamic teachings, such as equality, deliberation, cooperation (*ta'awun*), and good habits (*taghyir*) are compatible with democratic values and both support each other.

The third article, **Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution,** looks into the effectiveness of various laws and regulations intended to protect women's political rights. This article is authored by Malika Rajan Vasandani, a graduate of the Law Faculty of Pelita Harapan University; Dwi Putra Nugraha, a PhD candidate of the University of Indonesia and Lecturer at the Law Faculty of Pelita Harapan University; and Susi Susantijo, a Senior Lecturer at the Law Faculty of Pelita Harapan University. They argue that Indonesia needs a constitutional shift from the prevailing system of quotas for female legislative candidates to a system of reserved parliamentary seats for women in order to reap the benefits of equal participation.

The fourth article is by Khairil Azmin Mokhtar, an Associate Professor at Ahmad Ibrahim Kulliyyah of Laws, the law faculty of the International Islamic University Malaysia in Selangor, Malaysia. His article is titled **Unmasking the Devil: The Role of the Civil Court and Islamic Religious Authorities in the Battle Against Religious Extremism and Terrorism in Malaysia**. This article examines how Malaysia's judiciary and Islamic authorities can combat threats from religious extremists and terrorists. The author concludes the federal

government must collaborate with the Islamic religious authorities of the states in countering such threats. In this way, efforts to eradicate extremism and terror can be more sustainable and effective.

The fifth article, **The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations**, is authored by Muchamad Ali Safa'at, an Associate Professor in Constitutional Law at the Faculty of Law at Brawijaya University in Malang, East Java, Indonesia. He maintains that the Constitutional Court's decisions on laws related to religion reinforce the symbiotic relationship between the state and religion. He concludes the Constitutional Court's decisions strengthen Indonesian secularity based on the state ideology, Pancasila, for the sake of balancing religious diversity, social integration and national development.

The final article in this edition is co-authored by Rofi Aulia Rahman of the Faculty of Law at Surabaya University in East Java, and Shu-Mei Tang, a Professor of Law with the Department of Financial and Economic Law at Asia University, Taiwan. In their article, **Fake News and Internet Shutdowns in Indonesia: Symptoms of Failure to Uphold Democracy**, they evaluate Indonesia's policy on restricting internet and social media access to reduce the spread of fake news amid riots. The authors conclude that cases of rioting had not been categorized as national emergencies, so the government failed to fulfill minimum standards to justify internet shutdowns.

We hope that this edition's timely and compelling articles, covering issues from religious freedom to women's political rights and internet access restrictions, will provide readers with new insights on some of the most significant constitutional court decisions and issues. We also expect this edition could encourage further research on constitutional issues and related fields in Indonesia and other countries. It is our modest hope that the research and knowledge in ConsRev might in some ways inspire the advancement of solutions to national and international legal issues.

The Constitutional Struggle for Religious Freedom: A Comparative Study of India and Indonesia

Neha Tripathi and Anubhav Kumar

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 001-036

Constitutions tend to regulate the relationship between religious and state authorities. Before the rise of the modern state, it was difficult to make proper distinctions between law, religion and morality. With the emergence of Western liberalism, the concept of democracy and secularism gained newfound attention, becoming ingrained and in tune with modern constitutional frameworks. Establishing the relationship between state and religion is a thorny issue for constitution-makers. Opponents of constitutional recognition of religion view religion as a private matter, relating to personal beliefs and conscience. This paper studies the comparative constitutional frameworks of India and Indonesia in relation to the right to religious freedom. As vibrant democracies comprised of ethnically diverse populations, both India and Indonesia grapple with issues concerning religious majorities and minorities. In India, Hindus are the majority, then Muslims, Christians, Sikhs and Buddhists; whereas in Indonesia, Muslims are the majority, then Christians, Hindus and Buddhists. Both India and Indonesia have ratified the International Covenant on Civil and Political Rights. The judgments of the constitutional courts in these countries have prompted constitutional law scholars to analyze the status of constitutionally recognized freedom of religion and its enforceability. This article first studies the relationship between state and religion in the contemporary sphere, thereby engaging in a comparative study of the formation of constitutional provisions in relation to religious freedom in India and Indonesia. Second, it aims to establish the importance of religious freedom within a constitutional framework. Third, it will discuss the issues surrounding recognition and enforcement of religious freedom in India and Indonesia, as well as providing an analysis from the perspective of majoritarianism and religious intolerance. Fourth, it will analyze landmark judgments of the constitutional courts of India and Indonesia in formulating and establishing the basic tenets of religious freedoms in the two nations. The role of the judiciary and governmental institutions in dealing with issues of religious freedom remains a central question in democratic countries such as India and Indonesia. Keeping in mind the need for a more holistic study and contributing to the literature in this area, the authors will present a comparative analysis of religious freedom in both these nations for nuanced understanding of religious rights and their interplay with the respective constitutions.

Keywords: Blasphemy, Essential Practice, Judiciary, Religion, Religious Rights.

The Development of Islam and Democracy in Indonesia

Hamdan Zoelva

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 037-061

Islam and democracy are two inseparable parts of social and political life in Indonesia. Textually, democracy itself does not exist in the Islamic Holy Qur'an or the Hadith (Prophet Muhammad's words and actions). However, implicitly and substantially, the basics of democracy are in the teachings of Islam, both in the Qur'an and the Hadith. The principles of Islamic teachings, such as equality, deliberation, cooperation (*ta'awun*), and good habits (*taghyir*), are compatible with democratic values. In addition, many idioms that form the basis of ethics and morals in society are generally derived from the experience of the Prophet Muhammad, correlating with the basic principles of modern democracy. In the context of Indonesia, it is undeniable that Islam has contributed to the climate of democratization. This further confirms that Islam is not against democracy. Both support each other.

Keywords: Development of Democracy, Indonesia, Islam.

Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution

Malika Rajan Vasandani, Dwi Putra Nugraha, and Susi Susantijo

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 062-086

As the world's third largest democracy, Indonesia's governmental system should ideally function as a government of the people, by the people, for the people, to borrow the famous words of Abraham Lincoln. In reality, the House of Representatives of the Republic of Indonesia, an institution which should best represent the nation's people in carrying out its duty of drafting legislative products, still fails to do so, as it is dominated by men. Deep-rooted patriarchal beliefs cloud the nation, while inadequate and inefficient laws have also contributed to the present situation of low female representation in politics. This article therefore looks into the effectiveness various laws and regulations intended to protect women's political rights. It assesses the effect of the low participation of women on the quality and gender-sensitivity of laws passed by the House of Representatives. It also evaluates the urgency to introduce affirmative action policies through the 1945 Constitution to increase women's participation rates. The authors have used the normative-empirical method, consisting of a statutory, conceptual and comparative approach. Materials used for this research include interviews with prominent figures, analysis of the law and a comparative study. Through this approach, the article concludes that prevailing regulations in Indonesia require improvement, as there needs to be a shift from the present quota system to a system of reserved legislative seats in order to reap the benefits of equal participation.

Keywords: Affirmative Action, Political Participation, Women's Rights.

Unmasking the Devil: The Role of the Civil Court and Islamic Religious Authorities in the Battle Against Religious Extremism and Terrorism in Malaysia

Khairil Azmin Mokhtar

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 087-112

This paper sets out to examine the role of the court and the Islamic religious authorities in fighting religious extremism and terrorism in Malaysia. The judiciary has obligations to protect the people, to guarantee freedom and to dispense justice. It is the constitutional duty of the Islamic religious authorities to preserve the religion, to safeguard the Muslim and to insulate the teachings of Islam in Malaysia. Under the federal constitutional framework of the country, civil court and federal government do not deal with religious matters because it comes under the jurisdiction of Syariah laws and Syariah court of the states. However, in order to combat religious extremism and terrorism under the pretext of Islam, the demarcation of constitutional power and jurisdiction between federal and state governments is obscured. The federal government which has exclusive legislative and executive powers over criminal matters, public order and security have to collaborate with the Islamic religious authorities of the states in encountering threats coming from religious extremists and terrorists' groups. Although laws, policies, and agencies relating to internal security, public order and crime are under the jurisdiction of the federal government, the ideological, theological, and philosophical dimensions of religious extremism and terrorism have to be dealt with by the Islamic religious authorities of the states. The civil court on a few occasions faced with challenging tasks of upholding rights of those accused of religious terrorism while at the same time preserving public order, peace, and security of the country. This is a qualitative research which involves legal study and analysis of primary materials including constitutions, legislations, emergency ordinances and court cases, and secondary materials such as books, articles and expert opinions. The symbiosis of federal authorities especially the civil courts, with the Islamic religious authorities of the states is the focal point of this paper. To counter the terrorists' threats and combat the spreading of the dangerous extremists' ideologies the court and the Islamic religious authorities need to have mutual understanding and establish cooperation in achieving the common goal. Only then the fight against religious extremism and terrorism in Malaysia is sustainable and effective.

Keywords: Court, Extremism, Human Rights, Religion, Religious Authorities, Terrorism.

The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations

Muchamad Ali Safa'at

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 113-150

Indonesia is neither a religious state nor a secular state. Based on the Pancasila state ideology and the 1945 Constitution, Indonesia adheres to a symbiotic model in which the state and religion are different entities but have a mutually influencing relationship. This relationship pattern can be seen from several laws that regulate issues related to religion, especially Islam, which is embraced by the majority of Indonesians. As a political product, the pattern of relations between the state and religion in the law is dynamic. However, in accordance with the principles of a democratic rule of law, the dynamics of democratic politics are controlled by legal instruments, one of which is through the authority to review laws as one of the powers of the Constitutional Court. The Constitutional Court's decisions in cases of judicial review of laws related to religion reinforce the model of the symbiotic relationship between the state and religion. Such decisions affirmed Pancasila as a model of Indonesian secularity that is needed for the sake of individual rights and freedoms, to balance or reconcile religious diversity, social integration and national development, and the independent development of the functional domains of society.

Keywords: Constitutional Court Decisions, Constitutional Law, Multiple Secularities, Secularity, State-Religion Relations.

Fake News and Internet Shutdowns in Indonesia: Symptoms of Failure to Uphold Democracy

Rofi Aulia Rahman and Shu-Mei Tang

Constitutional Review, Vol. 8, No. 1, May 2022, pp. 151-183

The Indonesian government limited or shut down internet access during separate riots in Jakarta and Papua in 2019. The justification for blocking the internet and disabling certain features of social media platforms was to quell the unrest by ceasing the spread of fake news. Nevertheless, the government did not declare a state of emergency in response to either situation, triggering debate on whether the internet restrictions had any strong constitutional basis or if they were out of proportion and unconstitutional. This study evaluates the government's policy on internet shutdowns to reduce the spread of fake news amid riots, and explicates when the state of emergency "feature" might be activated. The research method of this article is a doctrinal legal approach, which critically examines whether the government policy was excessive, and to what extent a state of emergency can be implemented by minimum standard requirements. The result of this study shows the riots in Jakarta and Papua ought not be categorized as national threats; hence, the internet shutdown was out of proportion. Fake news is part of the price we pay for a free society; thus the article argues that an internet shutdown is not a proper way to combat fake news. Furthermore, the government has failed to fulfill the minimum standards to justify the internet shutdowns. Access to the internet is a new face of democratic pillars, so blocking internet access without any sufficient legal instruments and correct constitutional interpretation might indicate symptoms of a failure to uphold democracy.

Keywords: Democracy, Fake News, Human Rights, Internet Shutdown, State of Emergency.

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The Constitutional Struggle for Religious Freedom: A Comparative Study of India and Indonesia

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Abstract

Constitutions tend to regulate the relationship between religious and state authorities. Before the rise of the modern state, it was difficult to make proper distinctions between law, religion and morality. With the emergence of Western liberalism, the concept of democracy and secularism gained newfound attention, becoming ingrained and in tune with modern constitutional frameworks. Establishing the relationship between state and religion is a thorny issue for constitution-makers. Opponents of constitutional recognition of religion view religion as a private matter, relating to personal beliefs and conscience. This paper studies the comparative constitutional frameworks of India and Indonesia in relation to the right to religious freedom. As vibrant democracies comprised of ethnically diverse populations, both India and Indonesia grapple with issues concerning religious majorities and minorities. In India, Hindus are the majority, then Muslims, Christians, Sikhs and Buddhists; whereas in Indonesia, Muslims are the majority, then Christians, Hindus and Buddhists. Both India and Indonesia have ratified the International Covenant on Civil and Political Rights. The judgments of the constitutional courts in these countries have prompted constitutional law scholars to analyze the status of constitutionally recognized

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freedom of religion and its enforceability. This article first studies the relationship between state and religion in the contemporary sphere, thereby engaging in a comparative study of the formation of constitutional provisions in relation to religious freedom in India and Indonesia. Second, it aims to establish the importance of religious freedom within a constitutional framework. Third, it will discuss the issues surrounding recognition and enforcement of religious freedom in India and Indonesia, as well as providing an analysis from the perspective of majoritarianism and religious intolerance. Fourth, it will analyze landmark judgments of the constitutional courts of India and Indonesia in formulating and establishing the basic tenets of religious freedoms in the two nations. The role of the judiciary and governmental institutions in dealing with issues of religious freedom remains a central question in democratic countries such as India and Indonesia. Keeping in mind the need for a more holistic study and contributing to the literature in this area, the authors will present a comparative analysis of religious freedom in both these nations for nuanced understanding of religious rights and their interplay with the respective constitutions.

Keywords: Blasphemy, Essential Practice, Judiciary, Religion, Religious Rights.

I. INTRODUCTION

The relationship between religion and politics remains highly debated in the field of political philosophy as well as in contemporary constitution processes.[1] During the Middle Ages, specifically in Europe, religion was perceived as the ultimate power source, determining the legitimacy of religion and state; gradually, during the reformation and enlightenment era, the influence of religion declined. Today, democracy and rule of law are the fundamental pillars of a constitutional state.[2]

Respect for another person's beliefs is "one of the hallmarks of a civilized society".[3] Religious liberty is commensurate as a triumph of liberal democracies.[4] Regarded as the "ultimate freedom" and the "cornerstone of all human rights", religious freedom is deeply rooted in human dignity and enjoys a special status

[1] Aernout Nieuwenhuis, "State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks," *International Journal of Constitutional Law* 10, no. 1 (2012): 153–174.

[2] Constantin Fasolt, "Separation of Church and State: The Past and Future of Sacred and Profane" (Fourth National Conference of the Historical Society, 2004).

[3] R v. Secretary of State for Education and Employment, ex p Williamson (2005) UKHL 15 [15].

[4] Refah Partisi [the Welfare Party] v. Turkey (2003) 37 EHRR 1, [90].

in the maintenance of social stability.[5] Religious freedom and religious tolerance are equally important and have been center stage in the secularized modern state.[6] With the secularization of the state and a revived interest in discourse surrounding religion toward the end of twentieth century, if we attempt to analyze the meaning of religion or importance of religious freedom in constitutional theory, then its foundational basis has to be seen from the prism of the right to equality.[7]

Religion, considered integral to existence in India and Indonesia, is often perceived as a mode of self-identification and establishing faith and belief in a value system, enforced through constitutional recognition.[8] However, with the homogeneity of society and especially in a post-colonial world, the right to religion has emerged as a primary right, denial of which, historically as well as in the contemporary world, has caused major crises, often leading to human rights violations and subsequently used as justification for state actions.[9]

The discourse surrounding religious freedom is not relatively new; rather, it was a gradual process of incorporating and recognizing such a right within the domestic framework. In the light of the complex development of the state and its entities, today, the ongoing crisis over the right to religious freedom cannot be ignored. Unique cultural and political settings, as well as the complex inter-relationship between religion, state and society, have posed much greater challenges to the maintenance of the sanctity of religious freedom in a constitutional state. These crises often emerge in constitutional democratic states by way of exceptions created in the name of other rights with respect to the exercise of religious freedom. After all, religion is here to stay, it is

5 James Wood Jr., "Religious Human Rights and a Democratic State," *Journal of Church and State* 46, no. 4 (2004): 739-764. Also see, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* Second edition (Oxford: Oxford University Press, 2013).

6 Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no.1 (2016): 15.

7 See, Yashomati Ghosh and Anirban Chakraborty, "Secularism, Multiculturalism and Legal Pluralism: A Comparative Analysis between the Indian and Western Constitutional Philosophy," *Asian Journal of Legal Education* 7, no.1 (2019): 73-81.

8 See generally, Mariam Rawan Abdulla, "Culture, Religion, and Freedom of Religion or Belief," *The Review of Faith & International Affairs* 16, no.4 (2018): 102-115.

9 Arcot Krishnaswami, "Study of Discrimination in the Matter of Religious Rights and Practices," (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1960).

not withering away in a secularized world, as advocated in the past.[10] Being a global phenomenon, secularization raises important questions about the role of government in connection with individuals and religious organizations having religious affiliations.[11] In this light, constitutions are made to regulate and affirm the relationship between state and religious authorities. This relationship differs from one nation to another and different approaches appear in their constitutions.[12] In pluralistic societies, there is much debate over whether religion should be a private or public matter, whether state agencies should handle religion or whether a country should eschew having a state religion.[13] It is therefore pertinent to dissect the dichotomy of the two and understand their interplay.

Asia's distinct post-colonial political, social, cultural and economic establishment requires analysis to bring about a holistic understanding of the relationship between state and religion.[14] Unlike the Western experience of religious pluralism, where the relationship between state and religion was often simply based on diverse Christian creeds, the Asian experience poses a much larger question in the light of distinct religious creeds, with the pressing need to have their interests recognized and voices heard.[15] Both India and Indonesia have seen various instances where the interpretation of religious freedom, being an indispensable constitutional feature, has been brought to question, which drives the inquiry of this article. Obviously, diverse religious organizations and their proponents and believers have their own demands, which raises important questions regarding religious freedom, such as: What encompasses religious freedom? Is religious freedom absolute? How should the state relationship with

[10] W. Cole Durham Jr., "Religious Freedom in a Worldwide Setting: Comparative Reflections, Universal Rights in a World of Diversity," *The Case of Religious Freedom Pontifical Academy of Social Sciences* 17, (2012).

[11] Nieuwenhuis, "State and Religion," 153–174.

[12] Dawood Ahmed, *Religion–State Relations* (Sweden: *International IDEA Constitution-Building Primer*, 2017). Available at https://www.idea.int/sites/default/files/publications/religion-state-relations-primer.pdf.

[13] Veit Bader, "Religious Pluralism: Secularism or Priority for Democracy?" *Political Theory* 27 no. 5 (1999): 597-633.

[14] J. Neo, A. Jamal, and D. Goh, *Regulating Religion in Asia: Norms, Modes, and Challenges* (Cambridge: Cambridge University Press 2019). "…in terms of demography, the Asia-Pacific region has the most religiously diverse profile in the world. The Index is based on the "percentage of each country's population that belongs to eight major religious groups, as of 2010", i.e. Buddhism, Christianity, Hinduism, Islam, Judaism, folk or traditional religions, adherents of other religions, as well as the religiously unaffiliated (including atheists and agnostics).

[15] See, Veronica Louise B. Jereza, "Many Identities, Many Communities: Religious Freedom amidst Religious Diversity in Southeast Asia," *The Review of Faith & International Affairs* 14 no. 4 (2016): 89-97.

religion be governed? What protection does a constitution accord to religion and by what means? Should religious freedom be allowed to be curtailed by other prominent rights? In a pluralistic society, how can the needs of majority and minority stakeholders be balanced with respect to religious freedom? Does the essentiality of religious practice only need to be accorded protection within a constitutional framework? How can equality in treatment be maintained with respect to diverse religious institutions? What role and limitations can be attributed within a constitutional framework to state and its entities when it comes to religious freedom?

In this light, let us analyze the constitutional status of religious freedom in India and Indonesia, thereby seeking to delve into the contemporary issues relating to the relationship between state and religion, which remains a central question in the light of affirmation of constitutional values and ethos. First, while the relationship between state, religion and politics is often discussed, the issue remains fundamental in analyzing and understanding the constitutional status of religious freedom in a state. Second, with religious freedom being internationally recognized as a fundamental human right, the state's obligation to it cannot be neglected. Third, the constitutional recognition of religious freedom in a state can take various forms depending upon historical circumstances, while socio-economic, political and cultural factors can duly affect such recognition and implementation. Fourth, analyzing the constitutional provisions relating to religious freedom in India and Indonesia, looking into the originalist understanding and the subsequent developments has highlighted the role of governmental institutions and landmark judgments by constitutional courts in both these nations.

II. RELIGION, STATE, AND POLITICS: AN OVERVIEW

> "In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case of the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects."[16]

[16] See, Hamilton *et al*. *The Federalist Papers* (New York: Penguin Publications, 1961).

One of the essential features of democracy is separation of religion and state.[17] The relationship between state and religion is a complex one. Durkheim argued that religion provides a social cohesion, as it is a source of solidarity in a society.[18] Initially, John Locke believed religious tolerance would inevitably lead to conflict and disorder in a society with diverse religious beliefs; however, later he argued that suppression of religious practices provokes disruptive behavior, and maintained that religion and the state have distinct ends.[19] John Rawls saw religion as illiberal and having a destabilizing potential, thereby he advocated for excluding religion from politics.[20]

Plato and Aristotle saw the state as a vehicle for human fulfilment. Augustine, on the other hand, believed that political instability is closely related to the development of theological and philosophical reasons. He used this reasoning to analyze the relationship between the individual and society.[21] Traditionally, religion and state were interdependent. Religious institutions used to accord validity and legality to the laws passed by the government, thereby establishing the supremacy of those governing the state. In turn, the state should financially assist these religious institutions. Gradually, with the need to limit the power of the state amid the rising prominence of the individual's right to conscience, there arose a need to establish separation between religion and state, considering religion a matter of the private realm.[22]

In the post-Cold War era, religion has emerged as a significant political actor. Ignoring religion can have a negative political impact, nationally as well as globally.[23] The change in the dynamics of society due to industrialization, globalization and modernization, brought about a need for secularization,

[17] Michael D.P. Driessen, "Religion, State and Democracy: Analysing Two Dimensions of Church-State Arrangement," *Politics and Religion* 3, no. 1 (2010). Also see, L Carl Brown, "Religion and State," *The Muslim Approach to Politics* (Columbia: Columbia University Press, 2000).

[18] Wilson Dallam Wallis, "Durkheim's View of Religion," *Journal of Religious Psychology, including its Anthropological and Sociological Aspects* 7, no.2 (1914): 252-267.

[19] See, Phillip Abrams, *John Locke: The Two Tracts on Government* (Cambridge: Cambridge University Press, 1967),16-17.

[20] Tom Bailey and Valentina Gentile (eds.), *Rawls and Religion* (Columbia: Columbia University Press, 2014).

[21] See, Raymond Plant, *Politics, Theology and History* (Cambridge: Cambridge University Press, 2001). Also see, John M. Rist, *Augustine: Ancient Thought Baptised* (Cambridge: Cambridge University Press, 1994), 205.

[22] Michael Walzer, "Liberalism and the Art of Separation," *Political Theory* 12, no.3 (1984), 315-330.

[23] Eric O. Hanson, *Religion and Politics in the International System Today* (Cambridge: Cambridge University Press, 2006).

based on considerations of structural and social differentiation, individualism, socialization, social and cultural diversity, privatization, and the rise of liberal democracies and rationality.[24] Secularization changed the political structure of the state. In a pre-modern society, the individual was placed on the social ladder depending upon his or her religious affiliation, whereas in the modernized world, the individual's religious belief is a private matter, thereby creating a constitutional structure wherein individual liberties cannot be denied solely on the ground of one's religious belief.[25] However, in reality, secularism remains contentious, depending upon the cultural, social and economic conditions prevailing in a state. The only one thing which remains common is respect toward human rights, accepting that each individual has the right to maintain their own religious belief, faith and worship. Secularization has in no way marginalized religion; rather, it has brought to the forefront complex questions regarding the functionality of religious institutions and their relevance to politics.[26]

2.1 Private-Public Discourse

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[27]

According to Bader, the institutional separation of the state should be based on three guiding principles: a libertarian principle (the state must permit the practice of any religion), an equalitarian principle (the state must not give preference to one religion over another), and a neutrality principle (states should not favor or disfavor religion).[28] Paul Weithman believes religion has the capacity to destabilize democracy because religious segregation makes social cooperation

[24] Steve Bruce, "Secularisation and Politics," in *Routledge Handbook of Religion and Politics*, Jeffrey Haynes (ed.), (London: Routledge 2009).

[25] Mark Chaves, "Secularization as Declining Religious Authority," *Social Forces* 72, no.3 (1994), 749-774. Secularization has to be understood not as reducing religion, but as reducing the scope of religious authority.

[26] George Moyser (ed.), *Politics and Religion in the Modern World* (London: Routledge, 1991).

[27] Universal Declaration of Human Rights/Article 18, available at https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 28.08.2021).

[28] Vieit Bader, "Religious Pluralism: Secularism or Priority for Democracy?" *Political Theory* 27, no.5 (1999): 597-633.

more difficult.[29] Even Bruce Ackerman advocates for the separation of religion and state, arguing for religious convictions to be private, thereby suggesting that religion should not have an appropriate place in the public realm.[30]

Hollenbach on other hand, conceives the private realm as being outside the purview of society and the public realm as consistent with society, and accordingly he believes that privatization of religion would hinder the exercising of religious freedom as a means of social freedom and that freedom of religion includes within itself right to seek to influence the policies and laws under which people are governed.[31] In this light, religion cannot be denied as being part of society and in turn influencing society; thus, privatizing religion would undermine the vibrancy of civil society, in turn affecting democracy.[32]

Now, the questions regarding the limitations on manifestations of religion or beliefs only arise in cases where religion is manifested in the public sphere, like carrying out street processions or the use of loudspeakers for religious purposes. In such cases, it comes in contrast or conflict with other aspects of societal harmony and other people's ways of living. It must be noted here that denial or restraint of freedom of religion, thought, belief or conscience can also stem from deeper social factors rather than governmental actions, which we shall inquire into in subsequent sections, as there are illustrations of social ostracism and other social pressures hampering the recognition and enforcement of freedom of religion.[33]

III. UNDERSTANDING RELIGIOUS FREEDOM: A CONSTITUTIONAL PERSPECTIVE

> "When we speak of religious liberty, specifically, we mean freedom of worship according to conscience and to bring up children in the faith of their parents; freedom for the individual to change his religion; freedom to

[29] Paul J. Weithman, *Religion and the Obligations of Citizenship* (New York: Cambridge University Press, 2002).

[30] Bruce Ackerman, *Social Justice in the Liberal State* (California: Yale University Press 1980).

[31] David Hollenbach, *The Global Face of Public Faith* (Washington, DC: Georgetown University Press, 2003), 259. See also, Hollenbach, "Public Reason/Private Religion? A Response to Paul J. Weithman," *The Journal of Religious Ethics* 22, no. 1 (1994): 39–46.

[32] Barbara Ann Rieffer, "Religion, Politics and Human Rights: Understanding the Role of Christianity in the Promotion of Human Rights," *Human Rights and Human Welfare* 6 (2006): 31-42.

[33] Krishnaswami, "Study of Discrimination," 11-12.

preach, educate, publish, and carry-on missionary activities; and freedom to organize with others, and to acquire and hold property for these purposes."[34]

The original understanding established by Protestantism and then furthered by enlightenment liberalism, was to protect mutual tolerance of Christians in their distinct profession of religion.[35] This original approach was based on the fundamental duty man owed to God. To this end, religious freedom was a political freedom to achieve a stated objective. With the advent of globalization, this original paradigm has been subjected to change, leading to the need to expand the scope of religious freedom as originally understood, to include even non-religious believers and creeds.[36] This expansion was gradually encompassed by the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981.[37] In view of this expansion, the foundation of religious freedom has been correlated with the inherent dignity of an individual, rather than being connected with the existence of God, as was the case originally.[38]

Now, here the question which arises is, why and how did religious freedom get accorded constitutional recognition and protection within the array of other freedoms? According to Steven D. Smith, there is a religious justification behind this. He presents two claims to elaborate this point: the priority claim and the voluntariness claim. The priority claim asserts that religious goods are more valuable than other goods and that religious duties take precedence over other duties. The voluntariness claim asserts that religious goods or duties involves

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[34] The original citation is attributed to G. Bromley Oxnam, "Liberty: Roman or Protestant," *Churchman* (1947), cited in Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press, 2008), 28.

[35] John Locke, "A Letter Concerning Toleration," in the *Selected Political Writings of John Locke* (2005), 126.

[36] See, Rafael Domingo, "A Right to Religious and Moral Freedom?", *I•CON* 12, no.1 (2014): 226–247.

[37] "Universal Declaration of Human Rights," G.A. res. 217A (III), UN Doc A/810 at 71 (1948); "International Covenant on Civil and Political Rights," G.A. res. 2200A (XXI), 21U.N. GAOR Supp. (No. 16) at 52, "UN Doc. A/6316," (1966), UNTS Vol. 999, 171, entered into force Mar. 23, 197. Also see, "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 UN GAOR Supp.,' (No. 51) at 171, "UN Doc. A/36/684," (1981).

[38] "A Letter Concerning Toleration" in *The Selected Political Writings of John Locke*, Paul E. Sigmund (New York: W.W. Norton & Company, 2005), 126.

freedom of choice.[39] Accordingly, it is these claims that support constitutional recognition and justify constitutional enforcement of religious freedom.[40]

Thomas Jefferson stated "*the constitutional freedom of religion is the most inalienable and sacred of all human rights.*"[41] In "Why Tolerate Religion?" Brian Leiter argues that religion as such does not warrant any special treatment and that when it comes to accommodating practices, it will not be practicable to accommodate all claims based on conscience and that it will be unfair, arbitrary and unreasonable to single out claims grounded in religious beliefs.[42]

IV. RIGHT TO RELIGIOUS FREEDOM: CONSTITUTIONAL FRAMEWORKS OF INDIA AND INDONESIA

Friction between religion-state relationships has dominated contemporary discourse surrounding constitution-making process around the world. With the advent of secularization, religion remained pivotal in shaping a concrete liberal democratic framework in its own form in different jurisdictions. Even though the prominence of religion in a modernized state has been deduced as a private matter, it still poses some important constitutional questions. The issue surrounding religious freedom, the mode and extent of imposing restrictions and limitations, remain central to the constitutionally guaranteed protection of religious freedom.

India and Indonesia have had a checkered history of colonialism. Upon independence, these nations undertook the task of formulating a constitution for themselves. Being culturally, socially and religiously diverse, they conducted the constitution-making process by trying to avoid a repetition of history and instead sought to establish a robust national structure. With the aspiration of maintenance of unity at the core, constitutional recognition of religious freedom

39 Steven D. Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140 (1991): 149-210.

40 Ibid.

41 "Minutes of University of Virginia Board of Visitors, 29 March 1819," *Founders Online,* National Archives. See, "Thomas Jefferson: Virginia Board of Visitors Minutes," (1819). Also see, Philip B. Kurland, "The Origins of the Religion Clauses of the Constitution," *William and Mary Law Review* 27, (1986): 839.

42 Brian Leiter, "Why Tolerate Religion?" (Princeton, New Jersey: Princeton University Press, 2012). Also see, Michael W. McConnell, "Why Protect Religious Freedom?" *The Yale Law Journal* 123, no.3 (2013): 530-861.

as an integral aspect of fundamental human rights remained an important task to be undertaken as a part of constitutional design.

India proclaimed itself constitutionally to be a secular state, whereas the Constitution of Indonesia is based on the belief of "the one and only God". India has a majority Hindu population with the presence of other religions like Islam, Christianity, Sikhism, Jainism, Buddhism and with secularism as the basic structure. The Constitution of India therefore guarantees every individual religious freedom subject to constitutionally imposed restrictions. Indonesia, on other hand, has a majority Muslim population with the presence of other religions. The Constitution of Indonesia refers to the term "religion" in various provisions but nowhere proclaims Islam as the state religion. In accordance with laws of Indonesia, there are six officially recognized religions; however, there are indigenous minority groups which fall outside the purview of the six officially recognized religions. Although there is freedom to choose and practice one's own religion, in accordance with the Constitution of Indonesia, the official recognition of selected religions restricts the implementation and recognition of religious freedom.

4.1 Right to Religious Freedom in India

Religion, as claimed, has long been an indispensable part of society.[43] It is no exaggeration to say that religion has played a central role in the existence of humanity. Today, in liberal democracies, religious liberty has assumed a great significance, often referred to as third most important civil liberty after right to life and freedom of speech and expression.[44] Constitutions too, across the globe have recognized the inseparable interplay of religion and the individual. It is interesting to note that while the word 'God' finds a place in a significant number of constitutions in the world, freedom of religion forms an essential

[43] Scott Arran, *In God We Trust: The Evolutionary landscape of Religion* (Oxford: Oxford University Press, 2005).

[44] Faizan Mustafa and Jagteshwar Singh Sohi, "Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy," *Bringham Young University Law Review* 9 (2017); Also see, Wood Jr., "Religious Human Rights and a Democratic State," 739-764.

facet of most constitutions.[45] Religious freedom in modern constitutions is, therefore, a ubiquitous concept.[46] Constitution-making is always faced with the perennial question of religion's intersection with law, quintessentially because globally, a state's "identity" is reflected through its constitution.[47] The challenge with it is not limited to accommodating religious freedom as a right but also to reconciling the fabrics of individual and group rights with religious practices.[48] The elusive concept also raises a multitude of questions on whether religion can be quantified or defined and what would be the scope of such freedom, etc.[49] This becomes extremely difficult in countries with complex social and religious structures, such as India.

India, with its fair share of major religious tensions, has been considered a land of 'religious harmony' and culture. Many of the major religions are said to have originated from there. It is therefore impossible to appreciate the way religious freedom is engineered in India's Constitution unless it is contextualized with the historic task of its framers. With its multiple religions, India has some inherent individual practices which contribute to bewildering diversity.[50] Perhaps, Sir Harcourt Butler's comment that, "The Indians are essentially religious as Europeans are essentially secular. Religion is still the alpha, and the omega of Indian life," would be the best representation of the impact of religion in India.[51] With tremendous religious influence on the everyday lives of people, it is quite remarkable how India has managed to constitutionally guarantee religious rights and establish a secular state, a task which involved a perpetual debate on values,

[45] A comparative study reveals that the word "god" appears in 109 out of 192 constitutions documented on the Constitute Project. Version of the term "freedom of religion" appears in 186 constitutions. See: "Constitute, the World Constitutions to Read, Search, and Compare," available at https:// www.constituteproject.org/."

[46] Asli Bali and Hanna Lerner, "Religion and Constitution Making in Comparative Perspective," in *Handbook on Comparative Constitution Making*, David Landau and Hanna Lerner (eds.), (Cheltenham: Edward Elgar, 2019).

[47] Tom Ginsburg and Rosalind Dixon, *Research Handbook on Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011), 141; Garry Jeffery Jacobson, "Constitutional Identity," *The Review of Politics* 68, no. 3 (2006).

[48] Rajeev Dhavan, "Religious Freedom in India," *American Journal of Comparative Law* 35, no.1 (1987): 209-254.

[49] Coleman D. Williams, *Freedom of Religion and the Indian Supreme Court: The Religious Denomination and Essential Practices Tests* (Thesis, University of Hawai'i at Manoa, 2019).

[50] Ibid.

[51] Rajendra K. Sharma, *Indian Society, Institutions and Change* (New Delhi: Atlantic Publishers and Distributors, 2004): 186.

culture, religion and practices in the Constituent Assembly while drafting the constitution.[52]

India does not only guarantee fundamental rights to individuals against the state under its Constitution but also guarantees certain 'group rights' to practice religion, in addition to minority rights.[53] With these two sets of rights, it also gives the state the power to regulate these rights. The Constitution of India provides to every person freedom to practice, profess, and propagate religion[54] and to establish and manage their religious affairs.[55] Like every fundamental right, these are also not absolute, and the state can intervene in the religious freedom if it affects public order, morality and health, in addition to a general restriction under the Indian Constitution's Part III on Fundamental Rights. The nature of religious freedom is such that many have written that these articles (25 and 26) very well constitute a code in itself.[56] These rights therefore are the embodiment of not only the deliberations which took place in the Constituent Assembly but also reflect the inspiration from various constitutions around the world and the Universal Declaration of Human Rights.[57]

4.1.1 Secularism in India

The essence of religious freedom is rooted in the idea of individual liberty and 'secular' identity. However, all of these are subject to the basic principles of dignity, equality and liberty of the individual, indispensable values of the Indian Constitution.[58] Religious freedom therefore is that the individual is free to choose and practice, profess and propagate a religion or reject it altogether.[59] Religious freedom in India is a value inherent from time immemorial.[60] It is testament to

[52] Constitution of India, Article 25-28.
[53] Constitution of India, Part III.
[54] Constitution of India, Article 25.
[55] Constitution of India, Article 26.
[56] R. Dhavan and F.S. Nariman, "The Supreme Court and Group Life," in *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India*, B.N Kripal et al. (eds) (New Delhi: Oxford University Press 2000), 256–87; M Galanter, "Hinduism, Secularism, and the Indian Judiciary," *Philosophy East and West* 1, no.4 (1971): 467.
[57] J. Patrocinio de Souza, "The Freedom of Religion Under the Indian Constitution," *The Indian Journal of Political Science* 13, no. 3/4 (1952).
[58] Indian Young Lawyers Association v State of Kerala 2018 SCC Online SC 1690 [231] (Chandrachud, J).
[59] Donald Eugene Smith, *India as a Secular State* (Bombay: Oxford University Press, 1963); Also see John Milton, *Areopagitica* (Cheltenham: AMG Press, 1966), 1644.
[60] See, Aijaz Ahmad, *Lineages of The Present: Political Essays* (New Delhi: Tulika Publishers, 1996), 313.

its unique 'secular' attribute which is differs from the Western conceptualization of secularism in many ways, such as retaining personal laws or maintaining religious institutions while ensuring a distance from intervening in religion.[61] This idea of secular structure is guaranteed in form of constitutional right to religious freedom envisaged under Articles 25 and 26 of the Constitution.[62]

Secularism in India in its own way has become one of the essential attributes of the Indian Constitution, having assumed constitutional identity, as the framers wanted, while basing the country on the idea of "inward association" with a "spiritual connection to higher power".[63] The word "secular" might have been added years later[64] to the Constitution, but its sentiment was dominant while deliberations were undertaken in the Constituent Assembly.[65] It was the central character of the 'secular state' which led to defeat of a motion by H.V. Kamath, who moved an amendment to begin the Preamble with the phrase, "In the name of god".[66] Secularism in India is the separation of state from religion and not the 'non-existence of religion'. In simpler terms, it can be described as the absence of 'state-sponsored religion' but it is not departure from religion. On the other hand, to secure basic rights of equality and dignity, in certain circumstances the state can intervene to regulate. The Constituent Assembly did not want to indulge in intellectual exercise around religion or prevent the state from engaging with religious groups because the right was premised on religion being a "personal choice", as believed by Gandhi himself.[67]

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61 Asli U. Bali and Hanna Lerner, "Constitutional Design without a Constitutional Moment: Lessons from Religiously Divided Societies," *Cornell International Law Journal* 49, no.2 (2016): 49(2), 227–308; Gary Jeffrey Jacobson, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (New Jersey: Princeton University Press, 2003), 286; Also see, Rajeev Bhargava, "The Distinctiveness of Indian Secularism," in *The Future of Secularism*, ed. T.N. Srinivasan (Delhi: Oxford University Press, 2006), 2; Also see, Partha Chatterjee, "Secularism and Toleration," *Economic and Political Weekly* 29, no. 28 (1994), 772; Also see Donald Eugene Smith, "India as a Secular State," 159.

62 Ranbir Singh and Karamvir Singh, "Secularism in India: Challenges and Its Future," *the Indian Journal of Political Science* 69 (2008): 597-603.

63 Ananya Mukherjee Reed, "Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do," *Atlantis* 25, no. 2 (2001): 42

64 Constitution of India, Preamble, the Constitution (Forty-Second Amendment) Act, 1976.

65 Adrija Roy Chowdhury, "Secularism: Why Nehru dropped, and Indira inserted the S-word in the Constitution," *The Indian Express* (2017).

66 Shefali Jha, "Secularism in the Constituent Assembly Debates," *Economics & Political Weekly* 37, (2002): 3175.

67 Charless Freer Andrews, Mahatma Gandhi's ideas: including selections from his writings, (London: Pierides Press, 1949).

Secularism is also affirmed as a constitutional principle which encompasses India's basic structure and it accounts for more than being a merely passive attitude towards religious tolerance. It is based on the concept of equal treatment of all religions and is described as neutrality towards religion.[68] Secularism, premised in the concept of equality, neutrality and liberty, enables an individual to make a personal choice and guarantees equal treatment of religion by state and its non-interference.[69] It is also important to note here that a greater degree of religious freedom does not only ensure manifestation of liberal constitutional values but also promotes social harmony, which if not granted may lead to imbalance in society and consequently result in violence.[70]

It is also true that religion could be a threatening weapon to polarize and destabilize society. There have been numerous instances in India, not only pre-independence but also post-independence, when violence was sparked by cases of inter-religious disputes, one of which the Supreme Court settled in 2019.[71] A complex country like India, with its plethora of religions and religious practices, coupled with a constitutional guarantee to maintain a secular fabric, has often faced multiple religious disputes going up to the Supreme Court to adjudicate. Since religion is a contested term and cannot be defined it always leaves a scope of interpretation with respect to its extent and this becomes pertinent when the state in a certain situation is allowed to regulate religious affairs. In this context, historically the role of the courts has been important but 'controversial' for their determination of the 'essentiality' of religion.

4.1.2 Essential Religious Practice and the Supreme Court

Constitutional scholar Gautam Bhatia argues that the religious rights guaranteed in the Indian Constitution are reconciliation between competing

[68] S R Bommai v. Union of India (1994) 3 SCC 1 [Reddy J.].

[69] Reed, "Religious Freedowm Versus Gender Equity," 42. See also, S.P. Sathe, *Secularism, Law and The Constitution of India* (Pune: Indian Secular Society, 1991).

[70] Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New Delhi: W.W. Norton Company, 2006); Also see, Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in The Twenty-First Century* (Cambridge: Cambridge University Press, 2011), 212-13; Also see, Patrick F. Fagan, "Why Religion Matters Even More: The Impact of Religious Practice on Social Stability," *Backgrounder* 1992, no. 1 (2006).

[71] The controversial religious dispute of Ram Mandir-Babri Masjid in Ajodhya was decided in 2019; M Siddiqui v. Mahant Suresh Das.

claims of individuals and groups over their right to practice, profess and propagate religion.[72] These claims and their extent are, however, not objectively defined and are blurred, thus making Supreme Court the central figure in determining religious claims and questions to manifest the scientific temper.[73] Over the years, the court has stepped in to decide such questions in many instances, which has developed a constitutional understanding of religious freedom, apparently different and narrower from what was envisaged in the Constitution.[74] Articles 25 and 26 provide for the constitutional right of religious freedom but the language is far from conviction. In this context, it is important to understand that while Article 25(1), in tune with liberal constitutional values, guarantees religious freedom, it is subjected to restrictions on the grounds of public order, morality, health, and restrictions under Part III. Moreover, Article 25(2) allows the state to intervene in managing religious affairs in order to ensure social welfare. Deliberating upon the scope of Article 25, Bhatia relies upon B.P. Rao and argues that Article 25 creates a difference between religion and secular practices that might be associated with religion.[75] Plainly read, it appears that Articles 25 and 26 protect a person's individual and group rights but in practice they fail to give a concrete answer on competing or conflicting rights in Part III.[76] They also clearly highlight two reoccurring questions before the courts: the first, on what constitutes essential practice for an individual to practice religion; and the second, on the extent of state intervention in temples, gurudwara, mosques, and other religious institutes. It is also clear from textual reading that the Constitution has left the question of determining the extent of intervention and the difference up to the courts completely.

To answer questions regarding whether religious practices are essential or non-essential, and therefore whether or not they merit constitutional protection,

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[72] See generally, Gautam Bhatia, "Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution," *Global Constitutionalism* 2, no.3 (2016): 351–382.

[73] Gandhi v. State of Bombay, 1954 SCR 1035, 1062 (India).

[74] Mustafa and Sohi, "Freedom of Religion in India," 931.

[75] Bhatia, "Freedom from Community," 356. See Also, B.P. Rao, "Matters of Religion," *Journal of the Indian Law Institute* 509, no. 5 (1963).

[76] Suhrith Parthasarathy, "Secularism and the Freedom of Religion Reconsidered – Old Wine in New Bottles?" *Indian Constitutional Law and Philosophy* (2015); Shrutanjaya Bhardwaj, "Individual Religious Freedom is Subject to Other Fundamental Rights," *SCC 7, Part-4 J-29* (2019).

the Indian Supreme Court devised a test of "essentiality" in the *Shirur Mutt* case.[77] In determining where a line must be drawn and what constitutes part of religion, the Court held that only essential practices to a religion shall be protected under Article 25. The Supreme Court did not adopt a definite standard for essentiality, but it can be reduced to three steps. First, the Court would differentiate between matters of religion and secular practice. Second, there should be a religious community for a practice to be considered essential. Third, even if a practice is considered essential it will not merit constitutional protection if it is based on 'superstitious' belief.[78] It is the third part of the test which has led to the criticism of the apex court.

On rejecting the American "assertion test" – whereby a plaintiff can assert that a particular practice is a religious practice – the seven-judge bench in *Shirur Mutt,* cultivated the Doctrine of Essential Religious Practice.[79] It is important to note here that in doing so, the Supreme Court not only moved beyond its scope of competence, but by entering into objective examination of religious practices, it also narrowed the scope of religious freedom guaranteed by the Constitution.[80] The essentiality test is moreover against the foundation of constitutionally-mandated religious freedom, which is premised on the "inward association to god".[81] It has also placed the matter of one's religious determination in the hands of judges who rely on an ambiguous test, which is devoid of any 'scientific evidence', to decide the essentiality of religious practice.

A shift was seen in the case of *Dargah Committee*,[82] when the Supreme Court started to determine if a practice was superstitious in nature. In this case, while hearing the validity of the Durgah Khwaja Saheb Act of 1955, the Supreme Court observed that when religious practices arise from superstitious belief, they

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77 Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005, 1021.

78 Rao, "Matters of Religion," 509.

79 Soumalya Ghosh, "Supreme Court on Women's Right to Religious Freedom in India: From Shirur Mutt to Sabarimala," *Indian Journal of Law and Justice* 10, no. 1 (2019): 162-168; Dhavan, "Religious Freedom in India," 209-254.

80 Faizan Mustafa, "The Unfreedom of Religion," *The Indian Express* (2015).

81 Mustafa and Sohi, "Freedom of Religion in India," 915.

82 Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383 (India), 33.

cannot claim protection under Article 26 as they are not "essential" to religion. In *Tilkayat Shri Govindlalji Maharaj*,[83] the Court went on to categorically state that the power to determine the essentiality of a religion remains with the courts only, virtually elevating itself, as Prof. Faizan Mustafa and Prof. Jagteshwar Singh Sohi said, to the status of clergy. A similar trend was observed in *Mohd. Hanif Qureshi v. State of Bihar*.[84]

The criticism of essential religious practice is premised in the Supreme Court allowing itself to sit on deciding theological questions on religious practices, imposing an external opinion on whether a practice is religious or not.[85] It is true that common law countries have imposed certain limitation on religious freedom, but the Indian courts have attracted criticism as they have curbed the individual freedom to choose religious practice, thus hurting liberal constitutional values. The Indian judiciary also failed to take into account that the competing rights under Articles 25 and 26 would be balanced by the text of the Constitution and Part III, whether or not explicitly provided for.[86]

4.1.3 Anti-Exclusion Test

In the recent *Sabarimala* case,[87] the Indian Supreme Court in a 4-1 decision held that the exclusion of women of a specific age range from entering Sabarimala temple in Kerala state was not valid. In doing so, the Court struck down Rule 3b of Kerala Hindu Places of Public Worship (authorities of entry) Rules, 1965, stating that it was an "exclusionary practice".[88]

It is interesting to note that Justice D.Y. Chandrachud hinted of the need to abjure the 'essential religious practice test' as he observed that "the religious committees must be allowed to determine for themselves what constitutes essential aspect of religion, and such practice must enjoy protection as a matter of autonomy". He advocated an 'anti-exclusion test' to manifest liberal

[83] Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors., AIR 1963 SC 1638 (India), 57.
[84] Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731.
[85] Suhrith Parthasarathy, "An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in the Sabarimala Case," *University of Oxford Human Rights Hub Journal* 3, no.2 (2020).
[86] H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing, 1993), 1269.
[87] *Indian Young Lawyers Association v. The State of Kerala*, AIR 2018, SC.
[88] Ibid.

constitutional values and to minimize the Court's intervention in determining essential practice. He observed that "the anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines... [but if] "a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal constitution".[89] In holding so, Justice Chandrachud also held that the religious freedom clauses under Articles 25 and 26 are not standalone but are part of "seamless web" of fundamental rights.

Deliberation of the anti-exclusion principle considers the extent of interference with the freedom to participate in normal economic and social life, and if it hampers such freedom, that practice cannot be permissible. However, the autonomy to decide a religious practice shall be with the people. This conclusion is reached by taking a cue from anti-discrimination laws, which state that an individual's access to basic guarantees cannot be taken away.[90] The Sabarimala was an example of exclusionary practice, as females of reproductive age had not been permitted to worship there. Similarly, women at Haji Ali Shrine petitioned Bombay High Court against an exclusionary practice. Based on such cases, it can be said the major religious disputes are in some way or other rooted in discrimination or exclusion rather than determining essentiality. It is, however, interesting to note that scholars have relied upon a dissenting opinion of former Supreme Court chief justice B.P. Sinha in *Syedna Tahir Saifuddin v. State of Bombay*,[91] which dealt with excommunication in the Bombay Prevention of Excommunication Act, 1949. The Dawoodi Bohra community, through their head priest, argued that his constitutional right of religious freedom would be violated by taking away his power to excommunicate. The Court struck down the act, stating the power of excommunication to be 'essential religious practice'. Justice Sinha in his dissent voiced that the excommunication *per se* does not only take

[89] Ibid., 112.
[90] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015).
[91] *Syedna Tahir Saifuddin v. State of Bombay* 1962 SCR Supl. (2) 496.

away a person's religious right but also their civil right,[92] and that Articles 25 and 26 are not standalone rights but are subject to the basic idea of constitution, as are Articles 17 and 15(2), which forms the premise for Bhatia's argument on the exclusion test. The anti-exclusion test, endorsed by Justice Chandrachud, manifests liberal constitutional principles by minimizing the court's role in religious determination. It can therefore be the test to determine the competing rights, after deciding on the extent of intervention on the fact in question.

This mechanism as argued will enable the courts to determine the balance between competing rights, respect religious autonomy and shall make way for striking down legislation if any 'practice' would be against human rights or discriminatory in nature. It will also ensure that the courts stick to their role of securing the religious rights of the individual, which in these troubled times has become a contentious issue both in and out of courts due to majoritarian tendencies, rather than inquiring into facets of the individual. It could also be a redemption of constitutional courts in India as champions of individual rights.

4.2 Right to Religious Freedom in Indonesia.

One of the most controversial human rights issues in Indonesia is that of religious freedom. Being a member of the United Nations, Indonesia, has an obligation to conform to the principles of international human rights. Also, efforts have been undertaken in the past to ensure effective recognition and implementation of human rights in the country.[93]

The Preamble of the Constitution of Indonesia proclaims: "...the independence of Indonesia is formulated into a constitution of the Republic of Indonesia which is built into a sovereign state based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and achieving social justice for all the people of Indonesia."[94] Chapter XI, Article

[92] Bhatia, "Freedom from Community," 353.

[93] For Indonesia's ratification status, see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN. Last accessed on 30.08.2021.

[94] See, Constitution of Indonesia, 1945, reinstated in 1959, available at https://www.constituteproject.org/constitution/Indonesia_2002.pdf?lang=en. Last accessed on 28.08.2021.

29, of the Indonesian Constitution, echoing the sentiments provided in the Preamble, declares that the state is based upon the belief in the One and Only God. Further, it goes on to provide that everyone will be guaranteed freedom of worship according to religion or belief.[95] Article 9 provides for the swearing of an oath by the President and Vice-President in accordance with their respective religions.[96] Article 28 E provides for freedom to choose and practice religion and that every person has freedom of belief, and to express their thoughts and tenets, in accordance with their conscience.[97] Article 28 I recognizes religious freedom as a human right and accords protection under any circumstances.[98] However, it seems that Indonesia recognizes the monotheistic concept, although there is no specific mention or imposition of the meaning of the phrase "One and Only God". Undoubtedly, the belief in a single deity is based on the premises of devotion and faith in accordance with a person's own religious belief.[99] In addition to constitutional provisions, Article 22 (1) of Law No. 39/1999 on Human Rights states that "every person is free to choose their religion and worship in accordance with their religion and beliefs". Article 22 (2) further provides that the state guarantees each person's freedom to choose and practice religion and worship according to their religious beliefs.[100]

4.2.1 Understanding Religion in Indonesia

In the wake of the central role played by Muslim organizations during the struggle for the independence of Indonesia, achieved in 1945, there were strong calls for Indonesia to become an Islamic state.[101] However, the nationalists, which comprised homogenous representations, demanded a unitary and neutral state that separated state and religion.[102] It was believed that establishment of a state

[95] Constitution of Indonesia, Chapter XI, Article 29.
[96] Constitution of Indonesia, Article 9.
[97] Constitution of Indonesia, Article 28E.
[98] Constitution of Indonesia, Article 28I.
[99] See, Alexius Andang L. Binawan, "Declarations and The Indonesian Constitution on Religious Freedom," *Journal of Islamic Studies* 49, no.2 (2011).
[100] Law Number 39 of 1999 on Human Rights, available at https://peraturan.go.id/common/dokumen/terjemah/2019/UU%2039%201999%20English.pdf.
[101] See, R. E. Elson, "Another Look at the Jakarta Charter Controversy of 1945," *Indonesia* 88, no. 105 (2009).
[102] For further discussion see, Dian A.H. Shah, "Constitutions, Religion and Politics in Asia, Indonesia, Malaysia and Sri Lanka" (Cambridge University Press 2017).

religion would intensify political disputes and complicate the integration of non-Muslims. On 1 June 1945, nationalist leader Soekarno introduced Pancasila as the philosophical basis of the state. Pancasila, the Indonesian state ideology, formulated by Soekarno, consists of five principles, which can be summed up as: belief in one God, internationalism or humanitarianism, nationalism, consensus through consultation and deliberation, and social justice for all.[103] These principles were formulated to represent the constitutional aspirations of the people of Indonesia. For Soekarno, achieving national unity was the ultimate goal, which necessitated rejection of specific reference to Islam in the Constitution.[104]

There was a clarification issued by the Indonesian Ministry of Religious Affairs, specifying the criteria for recognizing "religion": acknowledgment of a prophet, study of a canonical scripture or holy book, a standardized corpus of ritual practices and beliefs, knowledge and performance of which are incumbent on all believers, and a clear distinction of local custom from religion. Later, an additional criterion was included: the tradition in question must enjoy a significant measure of international recognition rather than being simply regional or local.[105] Indonesia has a predominantly Muslim population; however, based on the clarification issued by the Ministry of Religious Affairs, apart from Islam, official recognition has been given to five other religions: Hinduism, Protestantism, Catholicism, Buddhism, and Confucianism.[106]According to Indonesian law, other religions such as Judaism, Zoroastrianism, Shintoism, and Taoism are not prohibited to be practiced, although the six officially recognized religions are treated differently.[107] Other religions, apart from those officially recognized, need to register with the Ministry of Home Affairs as Civil Society Organizations , which are required by law to uphold all principles of Pancasila. All officially

[103] Michael Morfit, "Pancasila: The Indonesian State Ideology According to the New Order Government," *Asian Survey* 21, no.8 (1981): 838-851.

[104] See, Nadirsyah Hosen, "Religion and the Indonesian Constitution: A Recent Debate," *Journal of Southeast Asian Studies* 36, no.3 (2005): 419-40.

[105] Robert Hefner, "Islam and Institutional Religious Freedom in Indonesia," *Religions* 415, no. 12 (2021).

[106] See, Indonesia 2020 International Religious Freedom Report, available at https://www.state.gov/wp-content/uploads/2021/05/240282-INDONESIA-2020-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf. Accessed on 30.08.2021.

[107] Alexius Andang L. Binawan, "Declarations and the Indonesian Constitution on Religious Freedom," *Journal of Islamic Studies* 49, no. 2 (2011).

registered religious groups must comply with the directives of the Ministry of Religious Affairs.[108]

Indonesian adult citizens are required to hold a National Identity Card (KTP), which identifies the religion of the holder. Members of non-recognized minority religious groups have difficulty in obtaining these identity cards denoting their actual religion, so they are forced to inadequately and incorrectly identify themselves with recognized religious groups.[109] Law No. 23 of 2006 on Population Administration, allowed people from other religions to leave their religion blank on their KTPs.[110]In 2017, the Constitutional Court of Indonesia, in a landmark ruling, allowed citizens to put their indigenous faith on their national identity card.[111]

According to Arskal Salim, there has been a misinterpretation of Presidential Decree No. 1/PNPS/1965 (later made into law by Law No. 5/1969) on the Prevention of Abuse and Disrespect of Religion, which listed six religions as official. Salim maintains the decree was never meant to imply that only those six religions were officially acknowledged, but they came to be regarded as the only official religions after a 1974 law made religion a perquisite for validating marriage.[112] Of the six religions regarded as official, Confucianism was dropped from the list by President Soeharto because of its alleged relationship with communism. However, in 2001, President Abdurrahman Wahid allowed Confucianism to be a recognized religion.[113]

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[108] Morfit, "Pancasila," 838-851.

[109] "The Tandem Project, United Nations, Human Rights & Freedom of Religion or Belief," UN NGO in Special Consultative Status with the Economic and Social Council of the United Nations, 2020.

[110] Indonesia: Law No. 23 of 2006 on Population Administration, 29 December 2006. Also see, Hefner, "Islam and Institutional," 415.

[111] "Indonesia: Constitutional Court Opens Way to Recognition of Native Faiths," Library of Congress, published November 17, 2017. Also see, Judicial Review of Constitutional Court of Indonesia, Decision 97/PUU-XIV/2016 (The Constitutional Court of the Republic of Indonesia, 2016).

[112] Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era," in Ross H. McLeod and Andrew MacIntyre (eds.), *Indonesia: Democracy and the Promise of Good Governance* (Singapore: ISEAS, 2007), 116.

[113] Bani Syarif Maula, "Religious Freedom in Indonesia, between Upholding Constitutional Provisions and Complying with Social Considerations," *Journal of Indonesian Islam* 7, no.2 (2013): 383-403. Also see, Hyung-Jun Kim, "The Changing Interpretation of Religious Freedom in Indonesia," *Journal of Southeast Asian Studies* 29, no.2 (1998): 357-373.

Indonesia falls in such a category of a Muslim-majority country which has not made any specific declaration in its constitution concerning an Islamic nature of state.[114] Despite having constitutional and legal protection of the right to religious freedom, Indonesia has not seen full realization of religious freedom. According to one report, there have been instances of religious discrimination, which saw no active steps being taken by the government to punish or condemn such actions.[115]

The Constitutional Court of Indonesia has been called upon to decide on important issues in relation to the constitutional right to religion, such as considering the constitutionality of restricting polygamy and prohibiting courts from applying Islamic criminal and constitutional law.[116] In both these cases, the Constitutional Court highlighted that Islamic law does not have independent recognition in Indonesia.[117]

The Court has also held that "irreconcilable difference" is constitutionally valid as a ground for divorce, even though Islamic law doesn't provide for it.[118] In another decision, the Court held that a biological father should have a legal relationship with a child born out of wedlock.[119]

4.2.2 Blasphemy Law and the Right to Religious Freedom

As discussed above, each of the six recognized religions in Indonesia has its own National Council, which lays down what is considered orthodox beliefs and practices. Any deviation from these set standards attracts Article 156 (a) of the Penal Code, which is complemented by Presidential Decree No. 1/PNPS/1965. The Blasphemy Law covers two types of acts: deviation and defamation, provided

[114] For discussion on categories of countries having majority Muslim populations, see, Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries," *Georgetown Journal of International Law* 36 (2005): 947-1078.

[115] Also see, US Department of State, Bureau of Democracy, Human Rights and Labour, Annual Report on International Religious Freedom: Indonesia (2020), available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/, last accessed on 31.08.2021.

[116] Constitutional Court Decision 12/PUU-V/2007, decided October 3, 2007, 35 Constitutional Court Decision 19/PUU-VI/2008, decided August 12, 2008.

[117] See, Simon Butt, "Constitutional Recognition of 'Belief' in Indonesia", *Journal of Law and Religion* 35, no.3 (2020).

[118] Constitutional Court Decision 38/PUU-IX/2011, decided March 12, 2012.

[119] Constitutional Court Decision 46/PUU-VIII/2010, decided February 13, 2012.

under Articles 1 and 4 respectively. For these two acts, different mode of procedure have been provided. Article 1 states that before a person can be prosecuted for a blasphemous act, there needs to be an administrative warning under Article 2 (1). In addition, Article 2 (1) provides that the Minister of Religious Affairs, the Attorney General and the Minister of Home Affairs can issue a joint decree to warn a person who has violated Article 1 by promoting deviant teachings. If the violation is committed by a religious organization, the President has the power to ban the group on the recommendation of the aforementioned authorities. If there has been a warning or ban and the person or persons in the organization continues to act in breach of Article 1, then Article 3 provides that they can be prosecuted and, upon conviction, can be imprisoned for a maximum of five years.[120]

Further, Article 4 states that a person shall be punished with imprisonment for five years if they intentionally publicly express feelings or commit an act that is hostile, abusive or blasphemous against a religion adhered to in Indonesia, or with the intention that people do not adhere to any religion, which is based on the belief in God Almighty.[121] In 1966, this provision was incorporated as Article 156(a) of the Indonesian Criminal Code in Section V on Crimes Against Public Order, and unlike Article 1, no administrative warning is required under this provision.[122]

Indonesia's Blasphemy Law has attracted global attention and scrutiny, and there have been demands in the recent past to repeal the law as it is seen as threat to religious minorities. In this light, Article 28J of the Indonesian Constitution states that in exercising their rights and freedoms, every person shall be subject to any restrictions established by law 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.[123]

[120] Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law 7 (2001):* 3-5.
[121] See, Zainal Abidin Bagir, "Defamation of Religion Law in Post-Reformasi Indonesia: Is Revision Possible?" Australian Journal of Asian Law 13, no. 2 (2013): 153-168.
[122] See, Penal Code of Indonesia, Article 156 (a).
[123] Constitution of Indonesia, Article 28J.

The Government of Indonesia has maintained the right to define what constitutes religion in the country, so in practice the constitutional guarantee of freedom of religion has long been subjected to scrutiny and interpretations.[124] Following a history of repressive authoritarian rule, which ended in 1998, Indonesia ushered in a period of reform and democracy, which raised hopes of the promotion of religious freedom. However, conservative Islamist groups rose in power and used various modes of suppression against religious minorities.[125] This is where the Blasphemy Law came in handy.

One of the cases which highlights the complexities of the Blasphemy Law involves former Jakarta governor, Basuki "Ahok" Tjahaja Purnama, an ethnic Chinese Christian, who was initially charged with hate speech and was subsequently charged under the Blasphemy Law for desecrating religion[126] North Jakarta District Court reasoned that although one of the charges of blasphemy was dropped, Ahok had nevertheless "legitimately and convincingly conducted a criminal act of blasphemy", felt no remorse for what he did and his action caused unrest, hurt Islam and divided Muslims and groups.[127]

Indonesia's Constitutional Court has upheld the validity of the Blasphemy Law on the grounds of "public order" and "religious values", stating that non-regulation of blasphemous action can lead to "horizontal conflict, social unrest, social disunity and hostility within society".[128] However, the Court did caution against the misinterpretation of the Blasphemy Law and emphasized the need to revisit the framing of its provisions. The Court in this decision also highlighted the limitation of human rights on the grounds of religious values, stating: "the

[124] Nikolas K. Gvosdev, "Constitutional Doublethink, Managed Pluralism and Freedom of Religion," *Religion, State & Society* 29, no. 2: 81-90.

[125] Nur Amali Ibrahim, "The Law and Religious Intolerance in Indonesia," Baker Institute Blog, 2019.

[126] Decision of North Jakarta District Court No. 1537/Pid.B/2016/PN. Jkt.Utr for Defendant Basuki Tjahaja Purnama alias Ahok. See, Amnesty International at https://www.amnesty.org/en/latest/press-release/2017/05/indonesia-ahok-conviction-for-blasphemy-is-an-injustice/. Also see, Osman, Mohamed Nawab Mohamed, and Prashant Waikar, "Fear and Loathing: Uncivil Islamism and Indonesia's Anti-Ahok Movement", Indonesia 106, (2018), 89-109.

[127] See, https://globalfreedomofexpression.columbia.edu/cases/public-prosecutor-v-basuki-tjahaja-purnama-aka-ahok/. Also see, "Islam, Blasphemy, and Human Rights in Indonesia: The Trial of Ahok" (Routledge 2020). Also see, Adam Tyson, "Blasphemy and Judicial Legitimacy in Indonesia, Religion and Politics Section of the American Political Science Association", *Politics and Religion* 1 (2020): 24.

[128] See, Decision of the Constitutional Court No. 140/PUU-VII/2009. The validity of the Blasphemy Law has been subsequently upheld even in 2013. See, Decision of the Constitutional Court No. 84/PUU-X/2012, 116-117 and 142-143.

limitation of human rights on the grounds of 'religious values' as stipulated in Article 28J (2) of the 1945 Constitution is one of the considerations to limit implementation of human rights. This is different from Article 18 of the ICCPR, which does not include religious values as a limitation of individual freedom."[129]

The Blasphemy Law and its subsequent implementation has raised several human rights concerns over recent years amid an increasing number of cases and restrictions of religious freedom. The blasphemy provisions have often faced a backlash as being against the constitutional aspirations of the framers, as well as in violation of Indonesia's international obligations.

V. CONCLUSION

This comparative study of Indonesia and India presents a tale of dwindling constitutional status accorded to religious freedom in both the countries. In light of the absence of any clear definition of the term "religion", religious freedom has been subjected to exacting judicial scrutiny by courts in India and Indonesia. The Indian Supreme Court has devised the "Essential Religious Practices Test" to determine the essentiality of religious practices as integral to a particular religion to attract constitutional protection, which in turn strengthens the constitutional recognition of religious freedom. In Indonesia, the Blasphemy Law and its exercise has been subject to judicial scrutiny and has also received huge flack for being in violation of human rights standards. Even though the Constitutional Court of Indonesia has upheld the validity of the Blasphemy Law on various instances, this law and its usage place a large question mark over the constitutional recognition of religious freedom.

The status of religious freedom, especially with respect to religious minorities, is highly questionable with various instances of suppression of religious freedom and violations having been noted officially. The dominance of a majority threatens the existence of religious freedom and maintenance of liberal democracy in a state. This duly calls for the establishment of a robust mechanism for balancing

[129] Decision of the Constitutional Court No. 140/PUU-VII/2009, 276. Also see, Crouch, "Law and Religiion," 1-46.

the interests and needs of religious minorities. Indeed, the judiciary, though faced with opposition and challenges, and accused of corrupt practices, has played a central role in adjudicating important constitutional questions arising on the individual's right to religious freedom. India and Indonesia, even though having different constitutional designs, on various fronts share common experiences and values, also furthered by the vision of their respective founders to establish unity and respect for the human dignity of every individual. The challenges and extremities posed in the name of religious freedom can be well tackled by ensuring institutional strengthening of state machinery, and furthering and fostering the need to respect constitutional values and ethos by keeping in view international obligations, as well as mutual respect and tolerance for the maintenance of harmony and peace.

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The Development of Islam and Democracy in Indonesia

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Abstract

Islam and democracy are two inseparable parts of social and political life in Indonesia. Textually, democracy itself does not exist in the Islamic Holy Qur'an or the Hadith (Prophet Muhammad's words and actions). However, implicitly and substantially, the basics of democracy are in the teachings of Islam, both in the Qur'an and the Hadith. The principles of Islamic teachings, such as equality, deliberation, cooperation (*ta'awun*), and good habits (*taghyir*), are compatible with democratic values. In addition, many idioms that form the basis of ethics and morals in society are generally derived from the experience of the Prophet Muhammad, correlating with the basic principles of modern democracy. In the context of Indonesia, it is undeniable that Islam has contributed to the climate of democratization. This further confirms that Islam is not against democracy. Both support each other.

Keywords: Development of Democracy, Indonesia, Islam.

I. INTRODUCTION

Today, the discussion of religion and democracy in the Muslim world takes place in a dynamic global context. In various parts of the world, people are calling for the revival of religion and democratization, so that both become

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the most important themes in combatting the world's problems. This is due to the strengthening of communal identity and demands for people's political participation that arise in such a complex world environment, where technology is increasingly strengthening global relations, while at the same time, local, national, and cultural identities are still very strong.[1]

In line with this, the discussion about Islam and democracy is increasingly gaining a significant place in modern Islamic politics. Islamic political thinkers, both from among Muslims themselves and from Western intellectuals, seek to bring together the concepts of Islam and democracy, even though both depart from different historical roots. As Ibn Khaldun[2] said, Islam is God's teaching, which is full of prophetic values, while democracy is the result of human *ijtihad* (struggle), which is full of positivism and value-free. Islam comes from God, who has absolute truth, while democracy comes from a mutual agreement (social contract) that gives full power to the people.

In Indonesia, the portrait of Islam and democracy is a political phenomenon that is always interesting to observe. In fact, democracy in Indonesia has in general been accepted and progressed well, even though 85% of the population are Muslim. That is why Indonesia is categorized as the world's third largest democracy after India and the United States of America. This fact shows that Islam basically goes in hand with democracy. However, a few cases in Indonesia have indicated that democracy faces obstacles due to religious (Islamic) factors, especially in terms of freedom of religion and freedom of speech in relation to the country's Blasphemy Law. As concluded by Bowo Sugiarto, democracy has not brought any substantive changes to the condition of religious freedom in Indonesia.[3] Conversely, Daniel Peterson notes that Indonesia's Constitutional Court, in a landmark 2010 decision, ruled that public order in Indonesia is

[1] M. Syafi'i Anwar, *Pemikiran dan Aksi Islam* [*Islamic Thought and Action*] (Jakarta: Paramadina, 1995), 223.
[2] Ibn Khaldun, *Muqaddimah* (Jakarta: Pustaka Firdaus, 1986), 149.
[3] Bowo Sugiarto, "*Demokrasi, Agama, dan Negara di Indonesia Pasca-Soeharto* [*Democracy, Religion, and the State in Post-Suharto Indonesia*]" in *Demokrasi Tanpa Demos, Refleksi 100 Ilmuan Sosial Politik Tentang Kemunduran Demokrasi di Indonesia* [*Democracy without Demos, Reflections of 100 Socio-Political Scientists about the Decline of Democracy in Indonesia*], eds. A. Wijayanto, A.P. Budiarti, and H.P. Wiratraman (Jakarta: LP3ES, 2021), 12.

maintained by prioritizing the protection of the religious sensibilities of the Muslim majority over the fundamental rights of the country's religious minorities.[4]

If viewed from the normative perspective of democracy as majority rule, democracy should be a means to realize Islamic values at the state level, but the democracy which is applied in the Western world is accepted with caution by many Islamic scholars (*ulama*) in Indonesia.[5] According to them, liberal democracy, where any political decisions are based on democratic principles, can be contrary to Islamic teachings. In the opinion of M. Natsir, Islam does not depend on all of its inseparable regulations for the type of democracy that uses all "*cratie*" (power or rule), as practiced by Kemal Pasha, who as the founding president of Turkey, separated state and religion without abandoning Islam. Islam is an understanding, a principle of its own, which has its own nature. Islam is not 100% democracy.[6] Therefore, democracy is accepted on the condition that it respects religious values.[7]

This means that those who play the main role in democracy are the people, or in the language of the Indonesian Constitution: "Sovereignty is in the hands of the people and is implemented through the Constitution." For Muslims in Indonesia, the issue of democracy remains an important political agenda and thought, because this system of government is expected to be able to fight for the Islamic political cause, so that Islamic interests in a broad sense – socially, economically, and politically – will be better protected. Especially in the context of today's political life, more and more people find it an interesting fact that in Indonesia at the normative level, the majority of Islamic intellectuals argue that there is no substantial contradiction between Islam and democracy; even at the philosophical level the two are believed to animate each other.[8] This short

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4 Daniel Peterson, "*Penodaan Agama dan Ketertiban Umum di Indonesia Kontemporer* [*Blasphemy of Religion and Public Order in Contemporary Indonesia*]" in *Demokrasi Tanpa Demos, Refleksi 100 Ilmuan Sosial Politik Tentang Kemunduran Demokrasi di Indonesia* [*Democracy without Demos, Reflections of 100 Socio-Political Scientists about the Decline of Democracy in Indonesia*], eds. A. Wijayanto, A.P. Budiarti, and H.P. Wiratraman (Jakarta: LP3ES, 2021), 18.

5 Rahman Yasin, *Gagasan Islam tentang Demokrasi* [*Islamic Ideas about Democracy*] (Yogyakarta: AK Group, 2006), xvii.

6 M. Natsir, *Agama dan Negara, Dalam Perspektif Islam* [*Religion and State in Islamic Perspective*] (Jakarta: Media Dakwah, 2001), 89.

7 See the 1945 Constitution of Indonesia, Article 28J.

8 The 1945 Constitution of Indonesia, Article 1 paragraph (3), Third Amendment, State Gazette Number 13.

article will discuss the compatibility of Islam and democracy, especially in its implementation in Indonesia.

II. DISCUSSION

2.1. UNDERSTANDING THE IDEA OF DEMOCRACY

Democracy has become an important issue of modern society today. There is almost no country in the world that does not respond to this idea, even those led by corrupt and tyrannical governments. This has given rise to the use of terms such as Liberal Democracy, Guided Democracy, Pancasila Democracy, People's Democracy, Socialist Democracy and so on, characterizing particular regimes and their aspirations.[9]

Etymologically, democracy stems from two Greek words, *demos* (the people) and *kratos* (power or rule), meaning rule of the people. This means democracy can be interpreted as government by the people, where the highest power is in the hands of the people and is carried out directly by the people or their elected representatives under a free electoral system.[10] In this case, as a system, democracy places its citizens as free to make decisions through majority rule.[11] This emphasis is focused on citizens or the people, so a democratic government always pays attention to its citizens. The implication of such a perspective is that the pillars of democracy always prioritize the interests of the citizens. According to Diane Ravitch, the pillars of democracy include: (1) people's sovereignty, (2) government based on the consent of the governed, (3) majority rule, (4) minority rights, (5) guarantees of basic human rights, (6) free and fair elections, (7) equality before the law, (8) due process of law, (9) constitutional limits on government, (10) social, economic and political pluralism, and (11) values of tolerance, pragmatism, cooperation and compromise.[12]

Furthermore, Robert A. Dahl has identified the following indicators of democracy: (1) Control over governmental decisions on policy is constitutionally

[9] See *The Encyclopedia Americana*, Vol. 8 (Danbury, Connecticut: Grolier Incorporated, 1984), 684.
[10] Diane Ravitch, *What is Democracy*, translated by Budi Pyaritno (United States Information Agency, 1991), 4.
[11] Ibid., 5.
[12] Ibid., 6.

vested in elected officials; (2) Elected officials are chosen and peacefully removed in relatively frequent, fair and free elections in which coercion is quite limited; (3) Practically all adults have the right to vote in these elections; (4) Most adults also have the right to run for the public office as candidates in these elections; (5) Citizens have an effectively enforced right to freedom of expression, particularly political expression, including criticism of officials, the conduct of the government, the prevailing political, economic and social system, and the dominant ideology; (6) Citizens also have access to alternative sources of information that are not monopolized by the government or any other single group; (7) Finally, citizens have an effectively enforced right to form and join autonomous associations, such as political parties and interest groups, that attempt to influence the government by competing in elections and by other peaceful means.[13]

From the principles mentioned above, it can be seen that democracy offers political equality and balance. This means that every element of society has a relatively balanced opportunity and ability to fight for its political interests. However, the harmony of these principles can only be realized in social practice if the meaning of democracy is expanded. This means that the principles of democracy must be accompanied by ethical and normative values so that democracy does not conflict with the norms that develop in a society.[14] Democracy does not only mean government by majority as understood, but must pay attention and respect to minority rights.

2.2. INTERPREATING THE RULES OF DEMOCRACY IN ISLAM

As a religion, Islam is believed and understood to be a set of provisions and rules (*aqidah wa al-syaria'ah*) sourced from God (*Allah*). In all aspects of its teachings, Islam is intended to be a guide for humans. Because it is a guide for human life, it means that Islam is the basis for all or all human behavior, which includes social, economic and political areas. That is why, according to Husen Alatas,[15] Islam is an order that contains the main points of human life.

[13] Robert A. Dahl, *Democracy and Its Critics* (New Haven & London: Yale University Press, 1989), 233.
[14] See Carol C. Gould, *Demokrasi Ditinjau Kembali* [*Democracy Revisited*], translated by Samodera Wibawa (Yogyakarta: Tria Wacana, 1993), 23.
[15] Husen Alatas, *The Democracy of Islam* (Bandung and The Hague: W. van Hoeve, 1956), 38.

In the opinion of Tahir Azhary, Islam is a totality that is comprehensive and flexible. As religion (*ad-dien*) covers all aspects of human life, including legal and state aspects, the Qur'an does not recognize the doctrine of the separation between religion and social life.[16]

Basically, Islamic teachings are codified in the Qur'an and then elaborated in more detail in the Sunnah (Prophet Muhammad's words and actions), which is the reference for human behavior. In this context, it can be said that the one who has absolute control over humans is God (*Allah*). That is, God as creator (*al khaliq*) determines all the provisions and rules for each of His creations, including humans. Thus, humans must submit and obey all the provisions and rules of God. This is what Al Maududi[17] calls the basis of the foothold of God's sovereignty.

Among the verses of the Qur'an that Al Maududi refers to as the basis for the concept of God's sovereignty is one in Surah (Chapter) Yusuf, the translation of which reads: "...The decision is only God's decision. He has commanded that you worship none but Him. That is the straight religion, but most people do not know." In addition, in Surah al Maidah (5):45 the translation reads: "...Whoever does not decide a case according to what Allah has revealed, then they are the wrongdoers." However, in understanding the context of God's sovereignty above, Maududi[18] also includes the concept of caliphate (*khalifah*). In the concept of caliphate, humans are representatives of God who carry out the power delegated to them by God. This means that no single individual or group can be the representative of God, because the power of the caliphate is basically given to the whole community.

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[16] Muhammad Tahir Azhary, *Negara Hukum, Suatu Studi tentang Prinsip-prinsipnya dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini* [*The Rule of Law, a Study of its Principles in terms of Islamic Law, its Implementation in the Medina State Period and the Present*] (Prenada Nedia, 2003), 261.

[17] Abul A'la Maududi, *Hukum dan Konstitusi Sistem Politik Islam* [*Law and Constitution of the Islamic Political System*] (Bandung: Mizan, 1998), 188-189.

[18] Three concepts in the Islamic political system are monotheism, the message, and the caliph. The concept of monotheism includes the concept of divine sovereignty. See Abul A'la Maududi, *Human Rights in Islam,* translated by Bambang Iriana Djajaatmadja, 4 (Jakarta: Bumi Aksara, 2008), 2-3.

Like Maududi, Abdullah Ahmed An-Na'im[19] also emphasized that the representative of God's sovereignty is the *ummah*, the totality of the people of the Islamic state, not limited to an individual or group. If the people are collective representatives of God's sovereignty, then they have the right to appoint their representatives to carry out government obligations and be accountable to the people as agents of the original sovereignty of God. According to An-Na'im, from such an idea an operational mechanism for implementing the concept of a responsible representative government can be derived, although Islam does not show clear mechanisms and procedures for the election of the Caliph (the leader of the Muslim state) by the people, the mechanism for accountability in holding office, or succession on a regular and peaceful basis.[20]

By paying attention to the two opinions above, it can be said that the starting point of democracy in Islam lies in the principle of caliphate. However, to discuss further the relationship between Islam and democracy, according to Turan,[21] it is not only seen from the point of view of the political system, as constructed by Al Maududi or An-Na'im above, but must be viewed in terms of certain political or social foundations, for example the principles of equality, freedom of thought, and social justice.

The term democracy is not well known in the political vocabulary of Islam and this may be one of the sources of people's misconceptions about Islam and democracy. However, when we talk about democracy, it is known that some of the principles contained in the Qur'an and the practices of the Prophet Muhammad, for example, the use of the rule of *syura* (deliberation) as a foundation in political life. This rule is based on Surah Asy-Syura (42): 38 and Surah Ali-Imran (3): 145. The principle of deliberation is to respect the majority vote, as experienced by the Prophet Muhammad himself when he was about to decide whether the

[19] Abdullah Ahmed An-Naim, *Dekonstruksi Syariah: Wacana Kebebasan Sipil, Hak Asasi Manusia dan Hubungan Internasional dalam Islam* [*Deconstruction of Sharia: Discourse on Civil Liberties, Human Rights and International Relations in Islam*] (LKIS bekerjasama dengan Pustaka Pelajar [LKIS in collaboration with Pustaka Pelajar], 1994), 161-162.

[20] Ibid.

[21] See Ilter Turan, "Religion and Political Culture in Turkey" in R.L Trapper (ed.), *Islam in Modern Turkey: Religion, Politics and Literature in a Secular State* (London: I.B Tauris, 1991).

Muslims stayed in the city of Medina or came to greet the enemy outside the city before the battle of Uhud. Although the Prophet Muhammad himself was more inclined to defend in the city of Medina, he followed the opinion of the majority, who wanted to attack the enemy outside the city.[22] This means the decision and majority vote was applied by the Prophet Muhammad.

In essence, the deliberation contained a number of elements that we will naturally find related to political process, namely participation, freedom of expression and equality.[23] Compared to modern democracy, *syura* is a deliberative democracy, so that any citizen must have the right to freely and fairly participate and discuss any decision produced by a government.

Furthermore, the rules of *ta'aruf* or the attitude of knowing each other. This rule is based on Surah al-Hujurat (4): 13, which essentially emphasizes two things: first, the theocentric principle that God made humans into tribes or nations; and second, the theocentric objectivism principle that humans are objectively ethnic or tribal. nations. The plurality of nationalities must ultimately be returned to the original principle with the rules of *ta'aruf* contained in the letter of Surah al-Hujurat. This rule will obviously work well if there is a similarity or history (*al-musawah*), freedom, and dialogical communication.[24]

In Islam, there are also similarities to democracy in the known rules of *ta'awun* or cooperation, based on Surah al-Maidah (5): 2. In principle, Islam wants a broader understanding of political democracy, which means that there are no obstacles from power to achieving economic and social democracy. Economic and social democracy is a collaboration between citizens to eliminate economies based on monopolies, oligopolies and capitalism, and to build a government free from corruption and collusion.[25]

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[22] Al Qur'an dan Tafsirnya, Jilid II [The Qur'an and its Tafsir Volume II], (Yogyakarta: Universitas Islam Indonesia, 1991), 58.

[23] Affan Gaffar, "*Islam dan Demokrasi: Pengalaman Empirik yang Terbatas [Islam and Democracy: Limited Empirical Experience]*," in Munawir Sadjali, *Kontekstualitas Ajaran Islam [Contextuality of Islamic Teachings]* (Jakarta: Ikatan Persaudaraan Haji Indonesia dan Yayasan Wakaf Paramadina [Indonesian Hajj Brotherhood Association and Paramadina Waqf Foundation], 1995), 348-349.

[24] See Kuntowijoyo, *Identitas Politik Islam* [*Islamic Political Identity*] (Bandung: Mizan, 1997).

[25] Ibid.

Another rule that is often found in the Qur'an is *mashlahah* (pious), which means to be good according to religion. The good that is meant here is the good for all, not just for a group of people or only for the elite class. This is a common nuance of democracy, namely the greatest happiness for the greatest number.

Besides that, Islam also requires justice or fairness, as outlined in several verses of the Qur'an, including Surah An-Nisa (4): 58, and Surah al-An'am (6): 152. In this case, the justice in question includes distributive justice and productive justice. Distributive justice presupposes that there is justice for the results of work, while productive justice presupposes collective ownership of production assets within a certain period of time and is regulated democratically.[26]

The last democratic rule is *taghyir* or change, based on Surah ar-Ra'd (13): 11. In this rule, it is emphasized that humans are historical subjects who are very decisive when it comes to change. However, changes made by humans must be carried out gradually. This means that the democratic process must be planned through several stages.[27] One of the basic principles of democracy is equality between people. Islam emphasizes the importance of the equality of mankind, which originates from the teachings of monotheism. In the sermon of Haj Wada (last Haj of the Prophet Muhammad), the Prophet said,

> "O people, your Lord is One, and your Father is truly One: all of you are from Adam, and Adam was from the ground. The noblest of you in Allah's sight is the most godfearing: know that there is no superiority for an Arab over a non-Arab, a non-Arab over an Arab, a white-skinned person over a black-skinned person, and a black-skinned person over a white-skinned person, except by piety."[28]

Haekal, as concluded by Musda Mulia, views that the guidance of the Qur'an regarding state life does not refer to a certain model, but only outlines the basic principles of managing the state, namely brotherhood, equality between people, and human freedom. These three principles are derived from the monotheism (*tauhid*) principle, the principle of equality, and the principle of *sunnatullah* (divine law). Haekal, as a historian, bases his views on the early Islamic government

[26] Ibid.
[27] Ibid.
[28] Hadith from Imam Ahmad and Abu Nadrah (al-Munzir ibn Malik).

practices since the time of Prophet Muhammad and the Rashidun Caliphs, who have applied these principles consistently[29] The third principle that Haekal put forward seems to be the same as the ideas of the French Revolution (1789-1799), namely, *liberte*, *egalite* and *fraternite*. (freedom, equality and brotherhood), which became the basis for the development of Western democracy.

Fazlur Rahman notes that the structure of Muslim society must be egalitarian, open and not elitist. This stems from the command of the Qur'an to conduct their affairs by consultation (Surah 42:38), as well as the command to be good and desist from evil deeds (*amar ma'ruf nahil munkar*), which is addressed to the *ummah* and not specifically to a group of people (Surah Ali-Imran: 103), and also the command to help each other (Surah 58: 8). Thus, Fazlur Rahman views that Islamic teachings are in line with democratic principles and criticizes the *syura* (literally 'mutual consultation', historically, a 'council of elders') that was practiced in the history of the Islamic caliphate as it represented only elite groups by appointing people who shared the views of the Caliph.[30]

Based on the description above, it can be concluded that even although Islam does not recognize the term democracy, Islamic teachings contain complete meanings and instructions regarding democratic values that are carried out in state life and are very democratic.

In understanding how Islam and democracy developed in Indonesia, it is necessary to review academic opinions on the relationship between the state and religion. According to Alfred Stepan, as quoted by Bowo Sugiarto, there are four main models of the relationship between religion and state, namely: "separatist", "established religion", "positive accommodation", and "respect all". In the "separatist" model, religion and the state are completely separated. Religion should not interfere in state affairs and vice versa. In the "established religion" model, there is an official state religion, while still recognizing other religions. This model is adopted by Finland, Sweden, and England. In the "positive

[29] Musda Mulia, "Negara Islam, Pemikiran Politik Haikal" [Islamic State, Political Thought Husain Haikal] (PhD diss., Graduate Program of IAIN Syarif Hidayatullah Jakarta, 1977), 290-291.

[30] Mumtaz Ahmad, *Masalah-Masalah Teori Politik Islam* [*The Problems of Islamic Political Theory*] (Bandung: Penerbit Mizan [Mizan Publisher], 1994), 117-126.

accommodation" model, there is no separation between religion and state, and there is no official state religion, but the state is neutral and supports all religions. This model is adopted by Germany, Belgium, and The Netherlands. The "respect all" model has three characteristics: respecting the religion of the majority and minorities in the public sphere, the state provides assistance for religious activities, and the state treats all religions equally. This model is adopted by India, Senegal, and Indonesia.[31] Jonathan Fox[32] looks at the relationship between religion and the state from the aspect of state policy toward religion. According to Fox, there are fifteen categories of government involvement in religion, which can be classified into two main groups, namely states with policies for an official religion and states without policies for an official religion. One of the important variants among the latter is the so-called "Multi-Tiered Preferences 1" model. In this model, there is no official state religion but a hierarchy of religions in state policies, based on their ranking. One particular religion will receive the most benefits from the state because of it ranks highest. Indonesia is one of the countries which has adopted this model.

According to Tiar Anwar Bachtiar,[33] there are three opinions regarding the Islamic view of democracy. First, liberal opinions tend to be secular thought. This opinion is generalizing (*gebyar uyah*) that democracy is compatible with Islam. Second, opinions that expressly reject democracy because democracy is completely incompatible with Islam. In this opinion, democracy teachings are *kufr* (unbelief) and false (*bathil*) because they place the sovereignty of God under the sovereignty of humans. Third, democracy is not completely compatible with Islam and not completely contradictory. This opinion holds that there are certain aspects of democracy that cannot be accepted in Islam. For example, the philosophy of democracy that places humans as the holder of the highest sovereignty so that all decisions in the life of state can be decided through agreement between people. Such a philosophy is deemed to be against the

[31] Bowo Sugiarto, "Demokrasi, Agama, dan Negara", 5.

[32] Ibid., 6-7.

[33] Tiar Anwar Bachtiar, *Politik Islam di Indonesia, Wacana tentang Khilafah, Demokrasi dan Dinamikanya dalam Sejarah Indonesia* [*Islamic Politics in Indonesia, Discourse on Khilafah, Islamic Shari'ah, Democracy and its Dynamics in Indonesian History*] (Bandung: Persispress, 2002), 103.

sovereignty of God. But according Bachtiar, in the implementation of decision-making, democracy is actually in accordance with Islamic teachings, for example, the teaching of *syura*, which teaches how to make decisions by deliberation and mutual agreement, except for strict Islamic teachings (*qath'i*), which cannot be discussed. Democracy is accepted if it doesn't change the law that has been determined by God.

Democracy in Indonesia can be accepted by Muslims because it is not a democracy that is fully based on the teachings of liberalism. The implementation of Indonesian democracy must not conflict with the Constitution, as Indonesia adheres to constitutional democracy. The Indonesian Constitution places religious teachings in a very high position because the state ideology, Pancasila, as the basis of the philosophy of the Indonesian nation, places the principle "Belief in the one and only God" as its first principle. The formulation cannot be interpreted correctly without understanding the process of the birth of the formulation. The formulation "Belief in the one and only God" was originally agreed upon on June 22, 1945, in what is known as the Jakarta Charter (*Piagam Jakarta*), with the formulation, "Divinity, with the obligation to carry out Islamic law [*Syariat Islam*] for its adherents." The formulation was later changed on August 18, 1945, to its current version. However, it should be borne in mind that the Presidential Decree of 5 July 1959 states the Jakarta Charter inspired and is an inseparable part of the Indonesian Constitution. Therefore, the influence of the strategic position of Jakarta Charter on the Indonesian Constitution cannot be ignored. By understanding the process and history of the birth of the formulation of the first precepts, the position of Islam and the Islamic *ummah* in the Indonesian state becomes a special position. With this understanding, it can be seen why Islam occupies the main hierarchy in state policy, in line with the "Multi-Tiered Preferences 1" model devised by Jonathan Fox. Based on the above description, it can be concluded that democracy applied in Indonesia, based on the Pancasila philosophy and 1945 Constitution, is "Pancasila Democracy", where Pancasila cannot be separated from the influence of Islam.

2.3. IMPLEMENTATION OF ISLAM AND DEMOCRACY IN INDONESIA

Islam and democracy are two inseparable parts of social and political life in Indonesia. It is so said because both have a long tradition in the country's history. This is clearly recorded in the journey of Indonesian democracy, which shows that Islamic groups have always encouraged the democratization process and rejected authoritarianism and totalitarianism. The historical evidence can be found during the implementation of modern Indonesia's government, where Islamic groups played prominent roles, namely in the periods of Parliamentary Democracy, Guided Democracy (*Demokrasi Terpimpin*), Pancasila Democracy, and Democracy during the Reformation period.[34] There are many Islamic terms and influences in the terminology of Indonesia's political institutions. For example, "*Majelis Permusyawaratan Rakyat*" (the People's Consultative Assembly), which consist of words "*majelis*" (assembly), "*musyawarah*" (consultative/deliberation), and "*rakyat*" (people), all adopted from Arabic. Likewise, "*Dewan Perwakilan Rakyat*" (the House of Representatives), wherein "*diwan*" and "*wakil*" are also from Arabic.

The role and progress of Islamic groups in implementing democracy and the national state began long before the independence of Indonesia. Indonesian nationalism and practices of democratization were started by Islamic groups and organizations. For example, the Syarikat Islam (originally named Syarikat Dagang Islam) socio-political organization, founded in 1911 during the Dutch colonial era, is one of the sources of Indonesian nationalism. By using Islam as its basis and motivation, Syarikat Islam grew and developed rapidly, from 400,000 registered members in 1914 to 2.5 million members in 1919.[35] One of the central figures of Syarikat Islam, H.O.S. Cokroaminoto was a teacher and mentor to many of the cadres and students who went on to lead Indonesia to independence, among them Soekarno, Semaun, Kartosuwiryo, and Muso. In 1916 at its First National

[34] This division is based on the point of view of the development of democracy in Indonesia's history according to Miriam Budiarjo, *Dasar-Dasar Ilmu Politik, Edisi Revisi* [*Fundamentals of Political Science, Revised Edition*] (Jakarta: PT Gramedia Pustaka Utama, 2010), 127.

[35] Safrizal Rambe, *Sarekat Islam Pelopor Bangkitnya Nasionalisme Indonesia 1905-1942* [*Sarekat Islam Pioneers of the Rise of Indonesian Nationalism 1905-1942*] (Jakarta: Yayasan Kebangkitan Insan Cendekia, 2010), 65.

Congress in Bandung, Syarikat Islam urged that Indonesia must be self-governing or independent. Similarly, other Islamic organizations that were founded later, such as Muhammadiyah (1912), Matla'ul Anwar (1916), Persatuan Islam (1923), and Nahdlatul Ulama (1926), became the movers of independent Indonesia, so that Islam, nationalism, and democracy moved to strengthen each other. For example, the ideals of democracy that developed in Syarikat Islam as contained in the interpretation of the Principles and Support Program (*Program Azas dan Program Tandhim*) of Syarikat Islam, written by Cokroaminoto in 1931, emphasized the nature of the state and government must be undertaken by the principles of democracy.[36] Syarikat Islam fought for Indonesian independence (*national vrijheid*) in order to form a democratic government with equality of rights and dignity.[37] Cokroaminoto wrote that a country should not be called a true government if each citizen does not have the right to express a written and oral opinion, as each voice and opinion must be heard and considered.[38] He further wrote, the members of Syarikat Islam reject differences in social classes and reject differences in treatment before the law. The members Syarikat Islam also espoused equality between men and women.[39]

When Indonesia's founders met to debate the formulation of the nation's constitution in meetings of the Preparatory Body for Indonesian Independence (BPUPK), there were two main views regarding the basis for an independent Indonesia, namely Indonesia based on Islam and Indonesia based on secular nationalism. This dichotomy had emerged long before Indonesia's independence, where secular nationalist figures were members of the Jawa Hokokai, while the Islamic camp comprised many Islamic groups and organizations (i.e., Syarikat Islam, Muhammadiyah Nahdlatul Ulama, etc.). Even so, according to A.B. Kusuma, this division is not entirely correct because some of the figures included in the nationalist camp also wanted the implementation of sharia, including Soekarno,

[36] H.O.S. Tjokroaminoto, *Tafsir Program Azas dan Program Tandhim Syarikat Islam* [*Interpretation of the Basic Program and the Tandhim Syarikat Islam Program*] 13th Edition. (Jakarta: Mima Pipa House Publishing, 2011), 18-20.
[37] Ibid.
[38] Ibid., 22.
[39] Ibid., 34.

who strongly defended the sentence "...with the obligation to carry out sharia for its adherents," in the Jakarta Charter.[40]

At beginning of the BPUPK debates, Islamic leaders, such as Ki Bagus Hadikusumo wanted a state based on Islam because, according to Hadikusumo, Islam is perfect and sufficient to become the foundation of state life. On the other hand, figures who demanded a state based on nationalism included Soekarno, Hatta, Yamin, A.A. Maramis and others, because they felt the state must be separated from religion.[41]

The two main groups then reached a compromise through the Jakarta Charter, which later became the Preamble to the 1945 Constitution, by eliminating the words "...with the obligation to carry out sharia for its adherents". The Preamble of the Constitution is considered at the least to be compromised, which was strengthened by the Presidential Decree of 5 July 1959, which in essence stated Indonesia is a country based on the belief on God, which is imbued by the Jakarta Charter, so that sharia becomes an important factor and cannot be ignored in the Indonesian government.

The 1945 Constitution is strongly colored and influenced by Islamic teachings. Even in the draft prepared by the BPUPK, the first basis is God, with the obligation to carry out sharia for its adherents and the president of Indonesia must be Muslim. However, this was changed by the Preparatory Committee for Indonesian Independence (PPKI) on 18 August 1945 when it ratified as the Constitution for the newly independent Indonesia. Even so, Islamic values still give influence and color to the 1945 Constitution because the Jakarta Charter inspired the 1945 Constitution. In addition, the Islamic term *syura* (deliberation) is the core of Indonesian democracy, as stated in the fourth principle of Pancasila, namely democracy led by the wisdom of deliberations among representatives.

Understanding this history, especially the relationship between religion (Islam) and the state, is important for understanding Indonesian democracy, which grew in the later constitutional traditions.

[40] RM A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945* [*The Birth of the 1945 Constitution*] (Jakarta: Badan Penerbit Universitas Indonesia [University of Indonesia Publishing Agency], 2004), 19-20.
[41] Ibid.

2.3.1 Islam and Parliamentary Democracy (1949-1959)

Indonesia's political history entered a new phase with the implementation of the parliamentary democratic system under the 1949 Constitution of the Republic of Indonesia, which was soon replaced by the 1950 Constitution.[42] In fact, parliamentary democracy had been substantially implemented since November 1945. In this system, the executive body consists of the president as the constitutional head of state, assisted in political responsibilities by a cabinet of ministers.[43]

During this period, a free national general election was held in 1955, contested by more than 40 political parties and independent candidates. The election resulted in the formation of a coalition cabinet between the Indonesian National Party (PNI), the Islam-based Masyumi Party and Nahdlatul Ulama, as the three parties that won the most votes. However, the cabinet was hampered by inter-party feuding and bargaining, and was subjected to reshuffles, before being replaced when Soekarno introduced his Guided Democracy concept in 1959.

Indonesia's parliamentary democracy period can be considered as period of liberal democracy with a parliamentary system. During this period, the parties competed for influence, which meant that no cabinet could prevail for a long time. This period was also marked by sharp debates between Islamic and nationalist groups over the basis of the state in the Constituent Assembly (*Konstituante*), which had been elected in 1955 with the task of drawing up a permanent constitution for Indonesia.[44] This period was also marked by the ideological struggle of Muslims in the Constituent Assembly. In the Assembly, Islamic political parties held 230 seats while other parties had 286 seats. There was a debate and tug of war between national-Islamic and nationalist-secular groups in determining the basis of state that Indonesia would embrace.[45]

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42 Abdul Azis Thaba, *Islam dan Negara dalam Politik Orde Baru* [*Islam and the State in New Order Politics*] (Jakarta: Gemani Press, 1996), 166.

43 Budiarjo, *Dasar-Dasar Ilmu Politik*, 128.

44 *Konstituante* was a state organ established by Article 134 of the Provisional Constitution of 1950. It was tasked to form a permanent Indonesian Constitution.

45 Ahmad Syafi'i Maarif, *Islam dan Masalah Kenegaraan Studi tentang Percaturan Politik dalam Konstituante* [*Islam and State Issues: the Study of Political Competition in the Constituent Assembly*] (Jakarta: LP3ES, 1985), 124.

Under Article 134 of the Provisional Constitution of 1950, the Constituent Assembly was given the authority to form a permanent Indonesian constitution. The debates in the Assembly from November 1956 to 1959 could not decide on the basis of state as the Islamic and nationalist groups could not reach a joint decision. Under such a condition, with the excuse of saving the country, President Soekarno dissolved the Constituent Assembly and reimposed the 1945 Constitution by declaring that the Jakarta Charter inspired the Constitution. At the same time, Soekarno officially introduced Guided Democracy. According to Adnan Buyung Nasution the Presidential Decree used to make this change was unconstitutional. The Constituent Assembly had completed many of its tasks in drafting a new constitution, only the basis of state was yet to be decided.

2.3.2 Islam and Guided Democracy (1959-1965)

Established in July 1959, Guided Democracy was against multi-party democracy. According to President Soekarno, multi-party democracy is incompatible with the culture of Indonesian society because it only creates a free struggle for liberalism and the ensuing liberal democracy obstructs the development of the country in all fields.[46] Furthermore, according to Soekarno, Guided Democracy is an implementation policy or a working democracy for the implementation of the ideals of the Indonesia nation, especially in the social fields to achieve a prosperous and just society.[47] The birth of Guided Democracy, according to Adnan Buyung Nasution, was the birth of totalitarianism.[48] Masyumi, as one of the biggest parties in the parliament, was strongly against Guided Democracy because it would give absolute power to the president. Because of this opposition, the Masyumi Party was dissolved by Soekarno in 1960.

In general, the characteristics of democracy in this period were domination by the president, a limited role of political parties, the growing influence of the communists, and the expanding role of the Indonesian Armed Forces (ABRI)

[46] Koentjoro Poerbopranoto, *Sistem Pemerintah Demokrasi* [*Democratic Government System*] (Bandung: Eresco, 1978), 128.
[47] Ibid., 129.
[48] Adnan Buyung Nasution, *Arus Pemikiran Konstitusionalisme: Tata Negara* [*Current Thought of Constitutionalism: State Administration*] (Jakarta: Kata Hasta Pustaka, 2007), 18.

as a socio-political element.[49] In practice, Soekarno acted as a dictator, in the sense that almost all the powers of the state, namely the executive, legislative, and judicial branches, were in his hands.[50]

This period also saw the emergence of Soekarno's Nasakom (Nationalist-Religious-Communist) concept, which aimed to build a democratic framework from those three sources of national strength. Soekarno's passionate enthusiasm to fight neo-colonialism and neo-imperialism seems to have been exploited by the Indonesian Communist Party (PKI) to dominate the government. Proximity to the PKI eventually resulted in a deep conflict between the various components of the nation. The political behavior of the PKI, which had a Marxist orientation, was certainly not left unchecked by the Islamic political parties and the military. Finally, Soekarno's Guided Democracy came to an end after an abortive coup attempt by the September 30 Movement of 1965, resulting in the ascension of Soeharto as Indonesian president and ushering in the New Order era, which would last for over three decades.

2.3.3 Islam and Pancasila Democracy (1965-1998)

The formal foundations of this period were Pancasila, the 1945 Constitution, and Decrees of the Provisional People's Consultative Assembly (MPRS). In an effort to realign the implementation of the Constitution that had occurred during the Guided Democracy period, a number of corrective actions were taken.[51] Pancasila Democracy in general offers three components of democracy. First, democracy in the political field essentially reverts to the principles of the rule of law and legal certainty. Second, democracy in the economic field is essentially a decent life for all citizens. Third, democracy in the legal field is essentially a guarantee of the recognition and protection of human rights, and an independent and impartial judiciary. However, in reality the Pancasila Democracy implemented by Soeharto actually continued the concept of Guided Democracy implemented by Soekarno.[52]

[49] Miriam Budiarjo, *Dasar-Dasar Ilmu Politik,* 129.
[50] Abdul Azis Thaba, *Islam dan Negara,* 177-178.
[51] Miriam Budiarjo, *Dasar-Dasar Ilmu Politik,* 130-131.
[52] Adnan Buyung Nasution, *Arus Pemikiran Konstitusionalisme,* 20.

The main characteristics of the New Order were the dominant role of the military, bureaucratic and centralized political decision-making, emasculation of the roles and functions of political parties, government interference in various political parties and public affairs, the restriction of mass-based politics, monopolization of the state ideology, and control over the incorporation of non-governmental institutions. At this time, the New Order rulers placed Pancasila at the top of the system, so that all social and political institutions were required to adopt Pancasila as their sole principle, thereby overriding other principles, including Islamic principles. In fact, all political organizations and social organizations were required to adopt Pancasila as the "single principle". Muslims viewed this as a dangerous obligation, thus creating resistance to the formalization of Pancasila as the single principle.

2.3.4 Islam and Democracy in the Reformation Period

The fall of the New Order in 1998 opened opportunities for political reforms through democratization in Indonesia. In this era, the main breakthrough in the democratization process was a series of amendments to the 1945 Constitution, carried out by the People's Consultative Assembly (MPR) in four stages over 1999, 2000, 2001, and 2002. Several important changes were made to the 1945 Constitution to enable it to produce a democratic government. The role of the House of Representatives as a legislative body was strengthened and all of its members elected directly, supervision of the president was tightened, and human rights better guaranteed. The constitutional amendments also introduced direct general elections for the president and vice president.

Many people have misinterpreted the constitutional amendments and the inclusion of human rights to mean that Indonesia now adheres to a Western-style liberal democracy. In fact, the amendments still maintain the basis and principles of the 1945 Constitution as ratified on 18 August 1945, namely maintaining the Preamble as the philosophical basis of the Constitution. For example, on the matter of the economic system, Article 33 of the 1945 Constitution must reflect the Preamble of the 1945 Constitution, namely remaining as a welfare state that

promotes public welfare. Likewise, in addition to human rights, human obligations are also emphasized in Article 28J of the amended Constitution, namely that everyone is obliged to respect the human rights of others in the orderly life of society, nation, and state. In exercising their rights and freedoms, everyone is obliged to adhere to the limitations stipulated by law, for the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others, and to fulfill fair demands in accordance with consideration of morals, religious values, security, and public order in a democratic society.[53]

The limitation of human rights is due to the reason that religious values become of vital importance because they are a distinctive value in the life of the Indonesian state based on the teachings of the belief in God and Indonesian traditions and cultures. In this regard, the implementation of human rights must pay attention to and must not conflict with religious teachings. In this context, it can be understood why in Indonesia the issue of religion must become an important constitutional issue. In the event of a contradiction between the right and freedom of speech, and the right and freedom of religion, it is impossible to ignore issues of public order, because Indonesia is plural in terms of religion and belief. As found in many court decisions in Indonesia, in responding to these problems, decisions are made using constitutional criteria and positive laws, which appear to protect religion, while protecting religious rights and freedom by paying attention to public order in a democratic society as criteria determined by the Constitution. With this understanding, the attitude of the courts in Indonesia toward blasphemy must be seen from the legal point of view and the criteria of the Indonesia constitution. It can therefore be understood why the Constitutional Court has upheld Law No. 1/PNPS/1965 on the Prevention of Abuse and/or Blasphemy of Religion.

In the context of the relationship between Islam and democracy in the reform era, changes in the political system have encouraged the emergence of new political parties. Islam-based parties also ascended to the national political stage. Of course, these changes are not only interpreted as challenges, but also

[53] The 1945 Constitution of the Republic of Indonesia, Article 28J.

as how Islamic parties are able to influence and make important contributions to the building of democracy in Indonesia. From that, it can be said that after the New Order, Islam and democracy experienced a better relationship. Muslims see democracy as a gradual process leading to the rise of Islamic politics. Despite that, the share of votes acquired by Islamic political parties is decreasing, along with the number of seats of Islamic political parties in parliament. However, in this reformation period, many Islamic laws were formed, for example the Haj Law, Zakat Law, Syariah Banking Law, Waqf Law, amendments to the Religious Courts Law, which expanded the authority of the Religious Court in the Sharia business sector, as well as various laws related to sharia-based business practices.

III. CONCLUSION

Islam and democracy are two inseparable parts of social and political life in Indonesia. Textually, democracy itself does not exist in the Islamic Holy Qur'an or the Hadith (Prophet Muhammad's words and actions). However, implicitly and substantially, the basics of democracy are in the teachings of Islam, both within the Qur'an and the Hadith. The principles of Islamic teachings that are compatible with democratic values, such as equality, deliberation (*syura*), cooperation (*ta'awun*), good habits (*taghyir*). In addition, many idioms that form the basis of ethics and morals in society are generally derived from the experience of the Prophet Muhammad, which correlates with the basic principles of modern democracy. The said values and teachings of Islam strongly characterize the Indonesian Constitution, especially in relation to the principles of democracy and belief in God as the first principle of Pancasila, as well as in various laws.

Islam and its teachings occupy a prominent position in Indonesian government policies, including in the form of various laws and regulations made through a democratic process. It can be said that Islam obtained a priority in policy, having the most important hierarchy, without reducing the interests and services of other religions. This is reasonable because not only does Indonesia have a Muslim majority population, but also the history of the birth of Indonesian independence and the initial formulation of the Indonesian Constitution are

closely related to the interests of the Islamic *ummah*. Indonesia's Constitution is strongly influenced and colored by Islamic values. This is achieved through the awareness and involvement of Indonesian Muslims in the democratic process.

In the context of Indonesia, it is undeniable that Islam has contributed to the process of democratization and further confirms that Islam is not against democracy. Both support each other. Avoiding conflict between Islamic teachings and state policies is a smooth path for Indonesia's democracy.

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Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution

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Abstract

As the world's third largest democracy, Indonesia's governmental system should ideally function as a government of the people, by the people, for the people, to borrow the famous words of Abraham Lincoln. In reality, the House of Representatives of the Republic of Indonesia, an institution which should best represent the nation's people in carrying out its duty of drafting legislative products, still fails to do so, as it is dominated by men. Deep-rooted patriarchal beliefs cloud the nation, while inadequate and inefficient laws have also contributed to the present situation of low female representation in politics. This article therefore looks into the effectiveness various laws and regulations intended to protect women's political rights. It assesses the effect of the low participation of women on the quality and gender-sensitivity of laws passed by the House of Representatives. It also evaluates the urgency to introduce affirmative action policies through the 1945 Constitution to increase women's participation rates. The authors have used the normative-empirical method,

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consisting of a statutory, conceptual and comparative approach. Materials used for this research include interviews with prominent figures, analysis of the law and a comparative study. Through this approach, the article concludes that prevailing regulations in Indonesia require improvement, as there needs to be a shift from the present quota system to a system of reserved legislative seats in order to reap the benefits of equal participation.

Keywords: Affirmative Action, Political Participation, Women's Rights.

I. INTRODUCTION

"*Lex uno ore omnes alloquitur*" – The law speaks to all through one mouth. This maxim suggests that all persons are treated equally under the law[1] regardless of their differences, including but not limited to gender, race, religion, ethnicity and nationality. Indonesia's state ideology, Pancasila, enshrines similar values within its five *silas* (principles), which uphold humanism and draw on the varied cultural pluralism that is the very essence of the Indonesian worldview.[2] Pancasila knows no 'othering', as it is designed to be an inclusive ideology that protects and shelters all groups from any type of injustice. The 1945 Constitution of the Republic of Indonesia (hereinafter "the 1945 Constitution") also addresses how Indonesians are to be viewed as equal by the law. In that, the language of the 1945 Constitution and Pancasila indicates that Indonesia's founders fully intended to protect the human rights of the entire nation, as neither of these cornerstones of Indonesian law address the different genders in their stipulations, but instead provide protection to all citizens of Indonesia. Also, Indonesia places significant freedom in the hands of the people due to its status as a democratic state. By implementing such a system, the power of the government comes from the people.[3] The Indonesian government merely acts as a vessel to realize the aspirations of the citizens. In that, Indonesian citizens, both men and women,

[1] Shivani Rani, "Lex uno ore omnes alloquitur," last modified Februari 2, 2020, https://lawtimesjournal.in/lex-uno-ore-omnes-alloquitur/.

[2] Dicky Sofjan, "Pancasila and the Dignity of Humankind," *International Journal of Interreligious and Intercultural Studies* 1, no. 1 (October 2018): 2.

[3] This is affirmed by the 1945 Constitution of the Republic of Indonesia, Article 1 (2).

are rightfully entitled to equal opportunities in government.[4] Furthermore, the 1945 Constitution also guarantees one's right to be seen as equal before the law.[5]

However, much like other countries in Asia, legal protection of political rights in Indonesia is not adequately guaranteed and ensured.[6] This is evident as Indonesian women still fail to occupy important decision-making positions due to Indonesia's deeply embedded patriarchal culture, which poses a conspicuous threat to Indonesian democracy.[7] A testimony to such culture is the common term '*konco wingking*' – which is applied to Indonesian women and literally translates as 'the friend who follows behind'.[8] This Javanese concept suggests that women are relegated to background tasks, as their primary function is to serve as companions to men. A woman is only expected to accompany her husband on all his ventures, legitimize his decisions and obediently tend to his needs. This terminology, like many similar phrases, is tied to the concept of '*kodrat*' (nature) in referring to the character of women and their capabilities.[9] Such patriarchal notions put women into boxes and limit them to a predetermined set of actions. These figurative boxes are noticeable through the expectations set by society, which requires every woman to fulfill her primary responsibility of bearing children, to be a nurturing mother and wife, as well as successfully managing her household. Notions such as '*kodrat*' tend to affect motivational factors such as ambition, self-confidence, self-belief and dedication, discouraging women from taking on important public roles.[10] Such forms of discrimination hinder women from freely and fully contributing to society.[11] This situation erodes opportunities for women to exercise their political right to participate in government as protected under Article 43 of Law No. 39 of 1999 on Human

4 Ibid., Article 28D (3).
5 Ibid., Article 27 (1).
6 Desi Hanara, "Mainstreaming Human Rights in the Asian Judiciary," *Constitutional Review* 4, no. 1 (May 2018), 79.
7 Edward Aspinall, Sally White and Amalinda Savirani, "Women's Political Representation in Indonesia: Who Wins and How?" *Journal of Current Southeast Asian Affairs* 40, no. 1 (May 2021): 3.
8 Moh. Faiz Maulana, *Konco Wingking dari Waktu ke Waktu, [*The Friend Who Follow behind from Time to Time*]* (Yogyakarta: Diva Pres, 2021), 1.
9 Husein Muhammad, *Fiqh Perempuan: Refleksi Kiai atas Wacana Agama dan Gender [Women's Fiqh: Kiai's Reflection on Religious and Gender Discourse]* (Yogyakarta: LKIS, 2001), 9.
10 Sue Maguire, "*The Obstacles to Women Entering Parliament and Local Government,"* (Report, University of Bath, 2018), 6.
11 Samidha Pokharel, "Gender Discrimination: Women Perspectives," *Nepalese Journal of Development and Rural Studies* 5, no. 2 (January 2008): 80.

Rights (hereinafter "the Human Rights Law"). Women are often discouraged from exercising such rights due to a lack of regulations motivating such participation. Cumulatively, this hampers women from exercising their political right to stand for election.

The Indonesian government has made several attempts to increase the protection of women's rights, including ratifying the Convention on the Political Rights of Women through Law No. 68 of 1958,[12] as well as the ratification of the Convention on the Elimination of All Forms of Discrimination against Women through Law No. 7 of 1984.[13] Indonesia has also given special attention to the protection of women's rights in the drafting of various regulations including but not limited to the Human Rights Law, Law No. 23 of 2004 on the Elimination of Domestic Violence, Law No. 12 of 2006 on Citizenship, and Law No. 21 of 2007 on the Eradication of the Criminal Act of Human Trafficking. Former Indonesian president Abdurrahman Wahid even issued Presidential Instruction No. 9 of 2000 on Gender Mainstreaming in National Development. The instruction sets out that gender mainstreaming is an inseparable part of the functional activities of all government agencies and institutions and therefore shall be done in order to improve the position, role and quality of women. This shall also be done to realize gender equality,[14] which is a basic human right and a catalyst for development.[15]

Indonesia has issued several affirmative action policies[16] during the country's reformation era, including through Law No. 12 of 2003 on General Elections for the Members of the House of Representatives, Regional Representative Council and

[12] Law No. 68 of 1958 on the Ratification of the Convention on Women's Political Rights.

[13] Law No. 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women.

[14] Preamble of Presidential Instruction No. 9 of 2000 on Gender Mainstreaming in National Development. By definition, gender mainstreaming refers to a set of specific strategies and approaches, both technical and institutional, which are implemented to achieve gender equality as an overarching and long-term development goal. Gender mainstreaming essentially integrates the concept of gender equality into various organizations on multiple levels with the aim of eradicating and/or limiting discriminatory social institutions, laws, norms, and practices. The aforementioned definition is a conclusion of the UN Economic and Social Council of 1997. See Division for the Advancement of Women United Nations Department for Economic and Social Affairs, "Gender Mainstreaming" (Women 2000, 1997), 1-10.

[15] Venantie Nyiransabimana, "Gender Equality: Key Challenges and Practical Solutions to Women Participation in Local Governance in Rwanda," *African Journal of Public Affairs* 10, no. 3 (September 2008): 2.

[16] In its essence, affirmative action refers to positive discrimination toward minority and/or aggrieved groups. In this particular context, affirmative action refers to positive steps undertaken with the purpose of increasing representation of women politically, culturally, and legislatively. See Robert Fullinwider, "Affirmative Action," The Stanford Encyclopedia of Philosophy, Summer 2018 Edition, February 18, 2021.

Regional People's Representative Councils, which introduced a minimum quota for female political candidates.[17] Affirmative action policies emphasize equality of results, which requires differential treatment in order to achieve equitable social welfare and treatment.[18] Equality and inclusion therefore sometimes necessitate the provision of different treatment for oppressed or disadvantaged groups.[19] Such policies are aimed at specific groups to correct inequalities.[20] The inequality to be addressed through the introduction of the quota system was the minimal participation of women in the legislative branch of the Indonesian government. The low representation of women meant that women and men were unequal in the political field. The introduction of the quota provided differential treatment, which is considered positive discrimination and justified according to the stipulations of the 1945 Constitution.[21] The special treatment is particularly extended to achieve a sense of equality and justice in the political field and can be considered a logical consequence of ratifying the aforementioned Convention on Political Rights of Women, and the Convention on the Elimination of All Forms of Discrimination against Women.[22] In this regard, citizens are entitled to freedom and equality, not only as theoretical rights but also as practical, operative rights.[23]

In this context, gender quotas for electoral systems aim to advance the participation of women in politics. Under a quota system, political parties must

[17] The inclusion of the 30% quota is considered in line with Article 4 of the CEDAW, which has been ratified by Law No. 7 of 1984. See Ukthi Raqim, "Implementasi Ketentuan Kuota 30% Keterwakilan di DPRD Kota Salatiga" [Implementation of the Quota Provisions for 30% Representation in the Salatiga City DPRD] (Thesis, University of Semarang, 2016), 3.

[18] Anne Phillips, "Defending Equality of Outcome," *Journal of Political Philosophy* 12, no. 1 (March 2004): 4.

[19] Iris Marion Young, *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 2011), 158.

[20] Carol Lee Bacchi, *The Politics of Affirmative Action: Women Equality and Category Politics* (London: Sage Publications, 1996), 15.

[21] The 1945 Constitution of the Republic of Indonesia, Article 28H (2).

[22] Consideration of the Indonesian Constitutional Court in the Review of Law No. 10 of 2008 on General Elections in Case No. 22-24/PUU-VI/2008. See Nalom Kurniawan, "Keterwakilan Perempuan di Dewan Perwakilan Rakyat Pasca Putusan Mahkamah Konstitusi Nomor 22-24/PUU-VI/2008" [Women's Representation in the House of Representatives after the Decision of the Constitutional Court Number 22-24/PUU-VI/2008] (Pusat Penelitian dan Pengkajian Perkara Pengelolaan Teknologi Informasi dan Komunikasi Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia [Center for Research and Case Study Management of Information and Communication Technology at the Registrar's Office and the Secretariat General of the Constitutional Court of the Republic of Indonesia], 2013), 274.

[23] Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 2004), 72.

have a certain percentage of women in their organizational structure and must nominate a certain proportion of women as legislative candidates in each electoral district. This system is increasingly being used in a number of countries to raise the political participation of women.[24] At its core, this system operates to ensure the recruitment of women into political positions and to warrant that they are not just a token few in the male-dominated political landscape of a country.[25] In Indonesia, this requirement is set out within Article 245 of Law No. 7 of 2017 on General Elections (hereinafter "the General Elections Law") which stipulates that at least 30% of the list of nominated candidates for the legislative branch shall be women.[26] In addition, Article 246 of the same law sets out the 'zipper system' mechanism, which requires political parties to include at least one female candidate among every three nominated candidates.[27] Articles 245 and 246 perfectly embody Article 28H (2) of the 1945 Constitution, which encourages differential treatment to be awarded in order to make sure that each individual receives equality and justice.[28] The specific amount of 30% is based on a 1990 resolution by the United Nations (UN) Economic and Social Council, which recommended governments, political parties and other representative groups should increase the proportion of women in leadership positions to at least 30% by 1995, with the aim of achieving equal representation between women and men by the year 2000. In 2005, the UN Department of Economic and Social Affairs said the 30% figure is the "critical mass" necessary for women to make a visible impact on the style and content of political decision-making.[29]

Despite real indications that quotas are gradually increasing the numbers of female representatives in Indonesia, they have failed to make a substantial difference in ensuring the political rights of women. Political parties have

[24] "Electoral Quotas for Women: An International Overview," Parliament of Australia, accessed September 29, 2021, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/ElectoralQuotas.

[25] Mona Lena Krook and Diana Z. O'Brien, "The Politics of Group Representation: Quotas for Women and Minorities Worldwide," *Comparative Politics* 42, no. 3 (April 2010): 256.

[26] Law No. 7 of 2017 on General Elections, Article 245.

[27] Ibid., Article 246 (2).

[28] The 1945 Constitution, Article 28H (2).

[29] Division for the Advancement of Women, "Equal Participation of Women and Men in Decision-Making Processes with Particular Emphasis on Political Participation and Leadership" (United Nations Department of Economic and Social Affairs), 2005.

nominated women as 30% of candidates, as per the requirement.[30] However, there has been no significant change to the real participation rates, as the number of women elected to government remains very low. This indicates a problem with the current system as it does not serve the very purpose of its creation, which is to increase the political participation of women. The system merely ensures that women are involved up to the nomination stage but pays no heed to the actual number of women in parliament, especially in the House of Representatives of the Republic of Indonesia (*Dewan Perwakilan Rakyat*, hereinafter "the DPR"). This issue shall be the main focus of this article, as the DPR is tasked with the important role of drawing up and passing laws.

Statistical research shows that in 2019, women filled only 118 of the DPR's 575 seats, accounting for 20.5% of the total available seats.[31] In fact, ever since 1999 up to the 2019 general elections, women's representation in the DPR has not yet reached 30%, as shown in the following table:

Table 1.1. Participation rates of women and men in the DPR over 74 years[32]

Representation of Women in DPR RI from 1950 to 2024				
Period	Women		Men	
	Total	%	Total	%
1950-1955	9	3.8	236	96.2
1955-1960	17	6.3	255	93.7
1956-1959	25	5.1	488	94.9
1971-1977	36	7.83	424	92.2
1977-1982	29	6.3	431	93.7
1982-1987	39	8.5	421	91.5

[30] BBC News, "Pemilu: Jumlah Caleg Perempuan terus Meningkat, Tapi Mengapa 30% Belum Pernah Tercapai?" [Election: The Number of Women Candidates Continues to Increase, However, Why Has 30% Never Been Achieved?] *BBC News Indonesia,* April 1, 2019.

[31] Scholastica Gerintya, "Kuota 30% Perempuan di Parlemen Belum Pernah Tercapai," [The 30% Quota of Women in Parliament Has Never Been Reached] *Tirto.ID*, September 7, 2017.

[32] Khofifah Indar Parawansa, "Hambatan Terhadap Partisipasi Politik Perempuan di Indonesia," [The Obstacles to Women's Political Participation in Indonesia] *International IDEA*, 2002.

Representation of Women in DPR RI from 1950 to 2024				
Period	Women		Men	
	Total	%	Total	%
1987-1992	65	13.9	435	87.0
1992-1997	62	12.5	438	87.5
1997-1999	54	10.8	446	89.2
1999-2004	45	9.0	455	91.0
2004-2009	61	11.09	489	89.3
2009-2014	101	17.86	459	82.14
2019-2024	118	20.52	457	78.48

Based on the factors set out, there is an urgent need to restructure the constitutional system and reconsider what is to be stipulated in the 1945 Constitution, such that it can become the ultimate guide in conducting the state. Presently, Indonesia's attempt to increase women's representation in the DPR can be seen only through the 30% quota at the candidacy level, stipulated in the General Elections Law, which has failed to achieve equal representation. Introducing a new system that is stipulated within both the law and also the Constitution would greatly increase the chances for higher levels of women's participation and representation. The 1945 Constitution needs to be amended to provide a better legal umbrella that would ensure the political rights of women. Such an amendment is imperative, especially when viewed from the aspect of constitutional endurance.[33] The hierarchy of law places the 1945 Constitution at the very top, followed by Laws or Government Regulations in Lieu of Law further below. Having established such grounds, there is an urgency for a new

[33] With reference to this, K.C. Wheare states that "a constitution is indeed the resultant of parallelogram of forces political, economic, and social – which operate at the time of its adoption." In that, the constitution is described to be the 'soul' of a State and must be reflected in progressiveness of state practice. Sri Seomantri shares similar views and opines that the amendment of the 1945 Constitution is necessary because current regulations cannot be bound upon future generations, thus subjecting the constitution to changes. He further elucidates that in governing a state, development is inevitable, and therefore calls for an amendment of the 1945 Constitution. Sri Soemantri, *Prosedur dan Sistem Perubahan Konstitusi [Constitutional Amendment Procedure and System]* (Bandung: Alumni, 2006), 272.

system to boost the rate of women's representation in the legislative branch of the Indonesian government. Such change should be included in the Constitution, considering that it manifests supremacy of the law and is to be complied with by both the state and its citizens.

II. METHOD

This article utilizes normative-empirical legal research to produce a qualitative study in the form of descriptive information that seeks to portray present phenomena related to this research topic. This article can be classified as normative considering that it relies on a number of legal products such as positive law, principles and legal doctrines. On the other hand, to further substantiate this article, it also uses empirical legal research in the form of discussions and interviews, which are unwritten in nature and based on behavior as a social symptom.

The data used in conducting and compiling this article includes primary and secondary data. Primary data tends to be derived directly from sources without any interference or developments made by other parties. Secondary data, on the other hand, is often derived from relevant statutory provisions.

The relevant data presented or utilized in this article is obtained through reviewing laws and regulations accessible online, interviews with politicians and women's rights activists, and a comparative study with Rwanda as a country that has successfully overcome low participation rates of women in parliament. Five women representing different fields of expertise were interviewed because of their knowledge and their firsthand experience in fighting for women's rights. The first two interviewees are female politicians, Rahayu Saraswati and Grace Natalie. Rahayu Saraswati is a former member of the DPR and an activist, who currently serves as Deputy Chairperson of the Gerindra Party. Grace Natalie is a prominent politician, being the founder and former leader of the Indonesian Solidarity Party. The next figure interviewed is Tunggal Pawestri, a women's rights activist and a gender consultant. To provide insights from an academic

perspective, Iva Kasuma was the fourth subject interviewed. A lecturer and academician of the University of Indonesia, she teaches and conducts extensive research on the subject of Women and Law. The fifth interview was conducted with Olivia Salampessy, who is Vice Chairwoman of the National Commission on Violence against Women and chairs the Maluku provincial chapter of the Indonesian Women's Political Caucus.

The collected data, as described above, will be subject to a normative-qualitative analysis. In that, the data will be organized and categorized into a comprehendible classification before further identifying the necessary factors crucial to this article. It shall be descriptive to provide practical solutions that would solve the questions raised in the formulation of issues. It also seeks to address the ability of prevailing laws to resolve current and future issues related to women's representation.[34] The data will be analyzed objectively and interpreted alongside other relevant, complementary documents.

III. ANALYSIS AND DISCUSSION

3.1. Analysis of Regulations on the Protection of Women's Political Rights

The ratio of male to female citizens in Indonesia in 2020 was 102 males to 100 females.[35] This shows the Indonesian population is made up of almost as many women as men. Taking this into account, alongside the fact that Indonesia is a democratic state, all public affairs should require genuine partnership and collaboration between men and women in order to achieve the true essence of democracy. Indonesia has seemingly made a great effort to realize this by implementing principles of anti-discrimination and gender equality as a general tone of its legislative products. This is seen first through the symbolism in the state ideology, Pancasila, which reflects the importance and cooperation of both men and women through the representation of both genders, as seen in the gold

[34] Lexy J. Moleong, *Metodologi Penelitian Kualitatif [Qualitative Research Methodology]* (Bandung: Remaja Rosdakarya Offset, 2008), 22.

[35] Rr. Ariyani Yakti Widyastuti, "BPS Umumkan Sensus Penduduk 2020: Jumlah Laki-laki Lebih Banyak dari Perempuan," [BPS Announces Population Census 2020: There are More Men than Women] *Tempo.co*, January 23, 2021.

chain symbol that embodies the second *sila* (principle).[36] Soekarno, the father of the nation, also affirmed the symbolism portrays the equal standing and the cruciality of cooperation of the two genders.[37]

Both Pancasila and the 1945 Constitution are the cornerstones of all other Indonesian laws to follow, therefore they provide excellent groundwork to ensure the eradication of discrimination. However, in special circumstances whereby certain groups of individuals are at a disadvantage due to economic, social or cultural reasons, there arises the need for laws to positively discriminate against said groups to provide a level playing field. In that, through the specific provisions that positively discriminate against such groups, they will be able to receive special treatment allowing them to receive equal standing with their peers. Considering the patriarchal culture that looms over Indonesia and severely disadvantages Indonesian women, this part of the article will analyze the adequacy of prevailing laws and regulations in protecting the political rights of women to participate in the legislative branch of government, specifically in the DPR.[38]

Before analyzing the protection of the political rights of women in Indonesia, it is important to readdress the general definition and scope of political rights. In that, political rights refer to an individual's ability to participate in the civil and political life of society and the state without fear of discrimination or repression.[39] To provide further context, in Indonesia, the general political rights of its citizens are regulated and protected under several legislative products. The most underlying protection can be seen through Article 28D (3) of the 1945 Constitution,

[36] In a public lecture on 22 July 1958, Soekarno said the equal rights of men and women are specifically illustrated in the second *sila*, which talks about just and civilized humanity. He said the second *sila* is represented by the symbol of a chain on the lower right corner of the heraldic shield on the Garuda Pancasila emblem. The chain is made up of interlocked square and circular links, with the squares representing men and the circles representing women. Cumulatively, they signify equality between the two genders. It also acts as a reminder that the nation's survival depends on the cooperation between its male and female citizens. Rr. Dewi Kencana Qur'ani D. et al., "Perspektif Pancasila Terhadap Kesetaraan Gender dalam Bidang Politik," [Pancasila Perspective on Gender Equality in Politics] *Lontar Merah* 1, no. 2 (2018): 86.

[37] Ibid.

[38] Interviews by the authors indicate there is a strong patriarchal culture that not only clouds Indonesia's political field but also the nation in general, making it the main barrier that prevents women from participating in the legislative branch. Several interviewees also shared how the hours and the mechanism of conducting legislative practices are very draining and time consuming, such that women are often discouraged from participating. In addition to the culture, funding is another significant hindrance.

[39] "Citizenship and Political Rights," Commission on Security and Cooperation in Europe, accessed November 20, 2021, https://www.csce.gov/about-commission-security-and-cooperation-europe.

which awards every citizen equal opportunity in government.[40] In addition to this, Article 23 of the Human Rights Law similarly protects every citizen's right to vote, be voted for and participate in government directly and/or indirectly through representatives.[41] Indonesia's ratification of the International Convention on Civil and Political Rights can be considered a crowning accomplishment as it solidifies this intent by formally requiring Indonesia to ensure the equal civil and political rights of men and women.

Despite these strong foundational stipulations, a discernable pattern could be detected in the formulation and tone of the legislature, whereby it lacks specific protection of the political rights of women. The legislature does protect political rights, but these stipulations are gender-blind as they fail to recognize the different roles and circumstances that are imposed upon the different genders. This results in low participation rates for women. Starting with the 1945 Constitution, Article 28H (2) states that every person has the right to receive special treatment to obtain equal opportunity and benefits in order to achieve equality and fairness.[42] This clause indicates the 1945 Constitution recognizes and acknowledges the existence of disadvantaged groups that may be in need of special treatment in order to be viewed as equals. Unfortunately, the 1945 Constitution does not address the specific groups that may receive special treatment and therefore can be considered insensitive to gender. This, combined with Indonesia's deep-rooted and widely practiced patriarchal culture, has a significant impact on the political participation of women, which remains very low. Thus, there is a dire need for the 1945 Constitution to acknowledge women as one of the disadvantaged groups of people who deserve a special place in parliament.

The second legislative product that shall be further scrutinized is Indonesia's Human Rights Law. This law adequately outlines the right of women to be selected and/or appointed for a job or profession in accordance with requirements and legislation. Not only does the Human Rights Law acknowledge the principle

[40] The 1945 Constitution, Article 28D (3).
[41] Law No. 39 of 1999 on Human Rights, Article 23.
[42] The 1945 Constitution, Article 27 (1).

of anti-discrimination, it also provides stipulations on the particular rights of women. This law is holistic in the sense that it provides special attention and room for women and the protection of their rights. The Human Rights Law is comprehensive and successfully embodies the relevant provisions needed for adequate protection.

The third legislative product subject to the analysis is the General Elections Law. Although this law does not explicitly protect the political rights of Indonesian citizens, it does stipulate an electoral quota that is to be fulfilled by every political party when nominating candidates for the DPR. It is important to acknowledge the General Elections Law has undergone revisions, significantly improving its affirmative action clauses. As previously mentioned, the quota was first introduced through Law No. 12 of 2003 on General Elections, which mandated that political parties pay attention to women's representation by considering having women as 30% of nominated candidates. However, the law did not stipulate any concrete mechanism, verification process or sanctions for political parties that fail to comply with the quota. The 2003 version of the law was later revoked and replaced by Law No. 10 of 2008 on General Elections. This law could be seen as a major upgrade from the previous version. First, it altered the wording of the quota system, changing it from an aspirational to a mandatory provision,[43] accompanied by a concrete mechanism (in the form of the zipper system)[44] and a verification process. In that, political parties have to produce a statement on the fulfillment of the quota[45] to the General Elections Commission (*Komisi Pemilihan Umum*, hereinafter "the KPU") for further verification. Any political party that fails to meet the quota is given the chance to amend its list.[46] Following this, the KPU will announce the female representation rates of each political party through the national daily print and electronic media.[47] Furthermore, political parties are also required by this law to have at least 30% representation by

[43] Law No. 10 of 2008 on General Elections, Article 53.
[44] Law No. 10 of 2008, Article 55 (2).
[45] Law No. 10 of 2008, Article 15 (d).
[46] Law No. 10 of 2008, Article 58 (2).
[47] Law No. 10 of 2008, Article 61 (6) and Article 66 (2).

women at the central level of their management.[48] This law was subsequently revoked and further revised by the revolutionary Law No. 7 of 2017, which is the prevailing General Elections Law. This law, in comparison to the previous one, is more accommodating of women's participation in the legislative branch. Not only does it require women's participation in the political parties and their lists of nominated candidates, but also in the membership of all KPU levels, as well as in District Election Committees (*Panitia Pemilihan Kecamatan*), Voting Committees (*Panitia Pemungutan Suara*), Voting Organizational Committees (*Kelompok Penyelenggara Pemungutan Suara*), and in all levels of the Election Supervisory Agency (*Badan Pengawas Pemilihan Umum*).

The discussions with the interviewees, as well as a detailed reading of the 1945 Constitution and other relevant legislative products, reveals there is a strong intent to bring about equality between the two genders, especially by the founders of Indonesia. However, such intent is seemingly not enough to generate a ripple effect for more regulations and laws to level the playing field between the genders. In fact, it is like a mere formality that lacks a proper execution mechanism. The 30% quota, for instance, was formulated with the sole intent of increasing female participation; however, as previously explained, participation rates remain relatively low. This renders the intent and the quota itself redundant. In order to successfully actualize the intent and bring about a greater participation rate within the legislature, beyond just the candidacy level, substantial changes must be made to the current system.

The most logical change would be to shift the emphasis from the quota placed at the candidacy level and instead implement a system of reserved seats for women, as practiced by Rwanda. This Central African country had also struggled with low participation rates of women, who were traditionally seen as subservient to men.[49] However, the Rwandan government has shown great commitment to gender equality, the empowerment of women and promoting

[48] Law No. 10 of 2008, Article 8.

[49] Claire Wallace, Christian Haerpfer and Pamela Abbott, "Women in Rwandan Politics and Society," *International Journal of Sociology* 38, no. 4 (Winter 2008-2009): 112.

women's rights.[50] To achieve this, the country known as 'the land of a thousand hills' implemented an affirmative action clause which recognizes the need for equality between the two genders. This was done when a new constitution was introduced, reserving for women 30% of seats in the lower house of parliament. The reservation system is outlined in Article 10 (4) of Rwanda's Constitution, which stipulates:

> "The State of Rwanda commits itself to upholding the following fundamental principles and ensuring their respect ... building a State governed by the rule of law, a pluralistic democratic Government, equality of all Rwandans and between men and women which is affirmed by women occupying at least thirty percent (30%) of positions in decision-making organs."[51]

Upon introducing such a system through its Constitution and laws, Rwanda has reaped great benefits from increased women's participation as it led to the passing of laws that are more sensitive toward the needs of women and children. Furthermore, it has also created a ripple effect, generating a participation rate that not only meets the 30% threshold but exceeds it.

Some may argue that Rwanda's reservation of seats system is already reflected in Indonesia through the quota system. However, there are stark differences between the two, as the reservation system withholds seats for women, thereby ensuring a higher level of representation. The quota system, on the other hand, only ensures that 30% of nominees are women, without paying heed to actual representation rates in parliament. This system merely acts as a gate for political parties to participate in legislation but there is no pressure put on the parties to ensure that they pick capable women candidates who will be representing the nation. Without such a regulation, political parties shall continue to give precedence to male politicians and therefore leave little to no room for female representation in the legislative branch of government. It is also important to

[50] Pamela Abbott and Dixon Malunda, "The Promise and the Reality: Women's Rights in Rwanda," *African Journal of International and Comparative Law* 2, no. 4 (November 2016): 561.

[51] Article 10 (4): Fundamental Principles, Chapter III: Fundamental Principles and Home-Grown Solutions, Rwanda Constitution of 2003 with Amendments through 2015. More details on the mechanism of reservation of seats, specifically for the legislative branch of the Rwandan government are contained in Article 76 of the Rwanda Constitution and also in Organic Law, Article No 03 of 2010 that governs Presidential and Legislative Elections.

adopt Rwanda's reservation of seats system if Indonesia would like to achieve more than the mere 30% of women representatives, considering the reservation of seats has been successful in bringing about a larger proportion of female participation than initially expected.[52] Moreover, ever since the reservation system was implemented, more legislation oriented toward women has been passed, including but not limited to products that aim to prevent gender-based violence, laws that award extensive property rights to women and also legislation that protects women's rights in the workforce.[53] This is because it has been proven that seeing a number of women in positions of power inspires more women to aspire for the same.

In discussing the feasibility and technical aspects of implementing the reservation system, it is important to emphasize that it will not in any way hamper Indonesia's status as a democratic country. If anything, implementing this system would foster a higher degree of democratic participation by improving the representation of the voices in parliament. Reserving 30% of the legislative seats does not mean that women would be appointed to parliament; rather, it would be allowing women to receive the chance they deserve to represent the women of Indonesia. This would also not hamper the way in which the general elections are to be held as it would still fully take into account the voices of the general public in making the decision of whom to elect. Implementing the reservation of seats would not nullify the 30% quota for women set out for political parties when nominating representatives. Provisions regarding candidacy and the checking mechanism by the KPU would still prevail. The difference would be an added level of protection of women's rights in the form of reserved seats in parliament.

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[52] Through the implementation of a new system, Rwanda is now notable for electing a large number of women to rule alongside men in important positions. In fact, in 2013, the Rwandan Parliamentary elections reached a record-breaking 64% women candidates who won office, making Rwanda a top country for women in politics. Due to adequate regulations, the women-reserved seats were then leveraged by women who gained prominence and decided to use their platform to run for non-reserved seats, thus generating a snowball effect and surpassing the quota. Elizabeth Bennett, "Rwanda Strides Towards Gender Equality in Government," *Kennedy School Review*, August 15, 2014.

[53] Carey Leigh Hogg, "Women's Political Representation in Post-Conflict Rwanda: A Politics of Inclusion or Exclusion," *Journal of International Women's Studies* 11, no. 3 (September 2009): 47.

It is safe to say that although good efforts have been made to protect and encourage the participation of women in the legislative branch, better results could be achieved through the system of reserved seats. The current quota system has been in place for almost two decades and is yet to achieve substantial participation of women. Therefore, a new and more efficient system is necessary to increase women's representation.

3.2. Analysis of the Urgency to Enact Laws to Increase Women's Political Participation

The five interviewees for this research were unanimous that Indonesia must increase women's participation in the DPR. There are three main underlying reasons for this stance: (i) it is the absolute, protected right of women to participate in government, (ii) to create more gender-sensitive laws, and (iii) to generate a ripple effect. The first reason, pointed out by Olivia Salampessy, is that providing a better mechanism would allow for increased women's participation in the DPR, as it is their right to be equally present in all layers and levels of both governmental and non-governmental institutions. The 1945 Constitution, she correctly points out, does not limit the right to participate in government only to men.[54] The law already stipulates that such a right is reserved for all Indonesian citizens, irrespective of gender, so the presence and involvement of women is of absolute necessity.

This leads to the second point, discussed by both Tunggal Pawestri and Iva Kasuma, who both feel that women's participation in the legislative branch is necessary to ensure that legislative products are produced with women's perspectives. This point is further supported by Iva Kasuma, who says that ideally both men and women must have sensitivity toward gender issues. However, the reality indicates that Indonesia is still highly patriarchal and there is a need to implement better affirmative action clauses through a more effective mechanism

[54] Although earlier parts of this research pointed out how the 1945 Constitution fails to discuss the standing of women in particular, this does not mean that the rights protected within the 1945 Constitution are solely reserved for men. The point in case here is that the 1945 Constitution already provides for comprehensive protection of all its citizens but fails to show the level of sensitivity that is required specifically for groups disadvantaged by the patriarchal culture, such as Indonesian women.

to increase women's representation. In order to better address women-related issues, more women are needed in the DPR, thereby allowing them to draft laws that are sensitive toward these issues.[55]

A study of the gender-sensitivity of laws approved by the DPR and enacted during President Joko Widodo's first term in office over 2014-2019 shows Indonesia's current system is deficient in protecting the specific needs and interests of women. While 90 laws passed during the span of five years, only 17 included stipulations that acknowledged the standing of women.[56] Furthermore, of the 17 laws that were sensitive toward women, only 13 were actually in the context of protecting the specific interests and rights of women. From this, it is evident there is a dire need to increase women's participation in order to bring about laws of better quality. Even though figures such as Rahayu Saraswati caution that higher numbers do not necessarily translate into better representation of women and women's issues, it does mean that bringing more women into the DPR would increase their role in legislative discussions and in giving their two cents to the formulation and debate of bills.

The third point, as discussed by Rahayu Saraswati, Iva Kasuma and Olivia Salampessy, is that Indonesia's political environment is very masculine, being dominated by men. A better mechanism is therefore needed to raise women's participation rates to shift the idea that politics is reserved for men. Furthermore, this would create a ripple effect, as according to Saraswati, reaching or exceeding 30% representation would be easier if women had an example or a predecessor who has "broken the glass ceiling". This would provide the necessary inspiration for them to also start to participate in government. Uniquely, Grace Natalie feels there is no point in discussing the urgency and/or whether it is worth pursuing,

[55] Another urgency clearly detailed by the interviewees for this research is that certain specific needs and life processes apply only to women, such as giving birth, nursing, monthly periods and others. Taking this into account, men are placed in a position that makes them less able to properly represent the interest of women, considering they have not and will never be subjected to the aforementioned processes. Thus, they cannot point out specifically what are the needs of women in these times.

[56] The indicators that were used to assess the sensitivity of these laws are words such as "*perempuan* [women]", "*wanita* [woman]", "*kelompok rentan* [vulnerable groups]", "*rentan* [vulnerable]", "*gender*", "*jenis kelamin* [gender]", and "*keterwakilan* [representation]". The context of the laws that contain the aforementioned terminologies were then further assessed to ensure they were specifically provided to protect the interest of women in particular.

as it is simply something that needs to be done without further consideration of its potential benefits.

Not having enough women in parliament would mean that the laws released would continue to address the needs and standing of the two genders the same way, despite the dire need to address women differently.[57] The legislative products would continue to solely feed the patriarchal culture that surrounds the nation. Thus, Indonesia would not only suffer from serious inequality of the genders, but the country would also then fail to fully benefit from the women of the nation as they would be impaired from exercising their rights to participate in important positions of power.

Furthermore, the urgency also stems from the fact that Indonesia, unlike Sweden and other countries with a high representation of women in politics, will never be able to bring about greater female participation without enacting laws that demand for the same. Countries such as Sweden[58] and Germany[59] have successfully gained an increase in female participation solely based on the internal quota enacted by the political parties themselves.[60] Looking at the patriarchal culture and the low external pressure that is put on the political parties then leads to the urgency for the Indonesian government to increase female participation through implementing the aforementioned system of reserved seats. This is especially true if we take into account the potential social shift that

[57] Based on the sensitivity study conducted of the 90 laws passed during President Joko Widodo's first five-year term, it is possible to conclude that the laws still lack the sensitivity and acknowledgement necessary for women. This contributes to the urgency of introducing the reservation of seats system that would allow women to have fixed and safe spots assured for them within the DPR.

[58] The Green Party first introduced quotas in 1981, followed by the Left Party in 1987. In addition to this, the Swedish Social Democratic Party decided on a minimum representation of 40% for either sex at all levels within the party. The internal quotas often fluctuated and differed from one party to another, but they were all enacted with the same aim of reaching equal representation of the two genders. Lenita Freidenvall, "Women's Political Representation and Gender Quotas – the Swedish Case," *Working Paper Series – The Research program on Gender Quotas*, (2003), 11.

[59] Even though there are no legislated quotas for representation of the two genders in Germany, a multitude of political parties often impose voluntary quotas to push for representation. Four German political parties started doing so in late 1980s and early 1990s. Even though this resulted in mixed success rates, the quotas on average have significantly increased women's representation. Louise K. Davidson-Schmich, "Implementation of political party gender quotas: Evidence from the German Länder 1990-2000," *Party Politics* 12, no. 2 (March 2016): 213.

[60] In the interview conducted with Grace Natalie, she said that waiting for internal quotas by political parties would not be a viable option for Indonesia, considering that there are still a number of issues that are seen as more dominating and urgent due to the prevalence of patriarchal culture. Therefore, a more systematic change needs to be brought about through the reservation of seats system.

will be brought about by enacting this system. As laws have the capability of engineering and altering social norms, the enactment of the reserved seats system will display the seriousness of the legislature to level the playing field between the two genders and potentially erode the predominant patriarchal culture.

The underlying urgency not only stems from the necessity for Indonesia to introduce better laws that can adequately regulate its citizen but also stems from the need to address and overcome the patriarchal culture that is rooted within the country. Steps taken by previous legislators to remedy the situation have not been sufficient; therefore, there is just a need to implement a better system in order to realize a more balanced representation of both genders in the Indonesian government. The benefits felt by the increase would be longstanding and cross multiple fields. It would therefore be best to implement the reserved seats system for future Indonesian legislative elections.

IV. CONCLUSION

Based on the authors' research through multiple interviews, detailed analysis of the law, as well a comparative study, it can be concluded that:

1. Indonesia's present regulations that seek to protect and/or encourage the political rights of women to participate in government are not yet sufficient. This is because a number of laws and regulations still fail to acknowledge the presence of women and their specific needs. Overarching protection is provided for Indonesian citizens, but the strong patriarchal culture that clouds Indonesian society hinders women from being elected to positions of power. Also, the present affirmative action clause on women's political participation is limited to candidacy and therefore fails to translate to actual representation in parliament. This erodes the very essence of implementing an affirmative action clause, considering it has been almost two decades since its introduction and participation levels remain below the 30% target.
2. It is urgent to introduce a new system that would allow an increase in the participation of women, specifically in the legislative branch of the Indonesian

government. This can be done by modifying election rules to reserve a minimum of 30% of seats in the DPR for women. This would guarantee women a greater presence in parliament. To realize this, a women-only ballot, alongside a regular ballot, can be utilized in future elections to ensure that 30% of seats are filled by women. This shall be done with the hope that there will be a ripple effect, bringing about a more balanced representation between the genders. This system is based on that of Rwanda, which has already reaped the fruit of balanced participation in the government in form of better quality legislative products.

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Unmasking the Devil: The Role of the Civil Court and Islamic Religious Authorities in the Battle Against Religious Extremism and Terrorism in Malaysia

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Abstract

This paper sets out to examine the role of the court and the Islamic religious authorities in fighting religious extremism and terrorism in Malaysia. The judiciary has obligations to protect the people, to guarantee freedom and to dispense justice. It is the constitutional duty of the Islamic religious authorities to preserve the religion, to safeguard the Muslim and to insulate the teachings of Islam in Malaysia. Under the federal constitutional framework of the country, civil court and federal government do not deal with religious matters because it comes under the jurisdiction of Syariah laws and Syariah court of the states. However, in order to combat religious extremism and terrorism under the pretext of Islam, the demarcation of constitutional power and jurisdiction between federal and state governments is obscured. The federal government which has exclusive legislative and executive powers over criminal matters, public order and security have to collaborate with the Islamic religious authorities of the states in encountering threats coming from religious extremists and terrorists' groups. Although laws, policies, and agencies relating to internal security, public order and crime are under the jurisdiction of the federal government, the ideological, theological, and philosophical dimensions of religious extremism and terrorism

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have to be dealt with by the Islamic religious authorities of the states. The civil court on a few occasions faced with challenging tasks of upholding rights of those accused of religious terrorism while at the same time preserving public order, peace, and security of the country. This is a qualitative research which involves legal study and analysis of primary materials including constitutions, legislations, emergency ordinances and court cases, and secondary materials such as books, articles and expert opinions. The symbiosis of federal authorities especially the civil courts, with the Islamic religious authorities of the states is the focal point of this paper. To counter the terrorists' threats and combat the spreading of the dangerous extremists' ideologies the court and the Islamic religious authorities need to have mutual understanding and establish cooperation in achieving the common goal. Only then the fight against religious extremism and terrorism in Malaysia is sustainable and effective.

Keywords: Extremism, Terrorism, Religion, Human Rights, Court, Religious Authorities.

I. INTRODUCTION

Malaysia is a country proud of its multireligious, multiethnic and multicultural characters. Religious freedom is an important aspect of this democratic nation and freedom of religion is one of the fundamental liberties guaranteed and protected by the Federal Constitution. Respect and understanding are vital in preserving peace and harmony between the people of various races and religions living in the country. Tun Mahathir the former Prime Minister of Malaysia in one of his speeches provides a good illustration.

> Islam is capable of coexisting with other religions too, including with those without any religion. In Malaysia we have a truly incompatible mix of Hindus, Buddhists and Taoists, and Muslims, with a small Christian minority thrown in. Strictly speaking we cannot even sit at the same table to eat. Muslims violently object to pork, which the Chinese love, but Muslims love beef, which the Hindus do not eat. But we can and we do sit at the same table to eat because we are sensitive toward each other's sensitivities.[1]

Article 11 of the Federal Constitution proclaims that every person has the right to profess, to practise and to propagate his religion. This right can be claimed

[1] Mahathir Mohamad, "Islam, Terrorism and Malaysia's Response. Remarks by Prime Minister of Malaysia," accessed September 21, 2021, https://asiasociety.org/new-york/islam-terrorism-and-malaysias-response.

by anybody irrespective of religion, citizenship, gender, ethnic group, or others. However, the sanctity of religion has been undermined by groups of people who seem to have vile intentions. Not only have these people diluted the truth, but they also have created chaos and violence under the guise of religion. This has become a major global problem and Malaysia has not been spared.

In this country, initially religious extremism originated from deviant teachings whereby 'religion was used as a means to propagate mistrust among the populace and to undermine the democratically elected government. This was a result of misinterpretation of the Islamic faith according to the ideologies of some interest groups.'[2] The view is shared by Mahathir who stated, "Islam the religion is not the cause of terrorism. Islam ... is a religion of peace. However through the centuries, deviations from the true teachings of Islam take place. And so Muslims kill despite the injunction of their religion against killing especially of innocent people."[3] Extremism stems from those with an uncompromising mindset with regards to their beliefs and convictions which pose as a threat to the nation. If efforts are not taken to wean these groups off extremism, they would degenerate into terrorists and strike blindly without regard for the life of the innocent and disrupt the peace and stability of the country.[4] There have been many incidents of such nature which have occurred. On 7 July , 1979, an individual claiming to be Imam Mahdi had attacked and injured an imam at a mosque. In another incident serious acts of violence had been committed on Thursday 16 October 1960, when a group of heretical followers of another person claiming to be Imam Mahdi, attacked a police station. Confrontation involving armed military personnel and citizens during the Memali tragedy of November 1985 and Al-Ma'unah incident in July 2000 involved fatalities on both sides. These are examples of armed violence that were driven by the deviant teaching and radical ideology of local Islamic groups.[5]

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[2] Ahmad Zahid Hamidi, "Malaysia's Policy on Counter Terrorism and Deradicalisation Strategy," *Journal of Public Security and Safety* 6, no. 2 (2016): 1.

[3] Muhammad, "Islam, Terrorism and Malaysia's Response."

[4] Hamidi, "Malaysia's Policy on Counter Terrorism."

[5] Majlis Agama Islam Selangor [Selangor Islamic Religious Council]. *Ajaran Sesat: Merungkai Kekusutan & Kecelaruan* [*Heresies: Unraveling the Tangles & Ignorance*] (Selangor Darul Ehsan: Majlis Agama Islam Selangor (MAIS) [Selangor Islamic Religious Council], 2015), 9-58.

Religious extremism and terrorism are becoming ever increasingly worrying and more difficult to contain because terrorist movements have gone beyond national boundaries, are highly organized, well financed and more sophisticated and advanced in terms of communication, strategy, and weaponry. As admitted by the former Deputy Prime Minister of Malaysia, who at that time was also the Minister of Home Affairs, since 2013 the Islamic State (IS) militancy or Daesh has become the fastest growing threat to Malaysia.[6] The group is extremely dangerous because it espouses views and teachings that promotes the *takfiri* ideology. "*Takfiri* ideology is characterized by harsh literalist interpretations of Islam, which pronounce apostasy and disbelief against Muslims who espouse differing interpretations on religious matters, thus justifying the shedding of their blood. The ideology legitimized the murder of Muslims and other religious groups who oppose them.'[7] According to Jaafar and Akhmetova the influence of the jihadist Salafism and Wahhabism led to the formation of local religious extremist cells such as *Tentera Sabiullah*, *Darul Dakwah* (House of Call to Islam), *Kumpulan Crypto* (Crypto Group), *Kumpulan Mohd Nasir Ismail* (Mohd Nasir Ismail's Group), *Kumpulan Jundullah* (Army of God Group), *Kumpulan Revolusi Islam Ibrahim Libya* (Ibrahim Libya Islamic Revolution Group), *Kumpulan Mujahidin Kedah* (Kedah Mujahidin Group - KMK), *Kumpulan Perjuangan Islam Perak* (Perak Islamic Movement Group- KPIP), *Al-Maunah*, and *Kumpulan Mujahidin Malaysia* (Malaysian Mujahidin).

These extremists' groups shared a common goal namely to topple down the government and demanded the creation of the administrative body that would be fully aligned with their own versions of Islam.[8] The goal is in consonance with various statements and fatwas issued by some leaders of the groups that Muslims must refrain from voting and taking part in democratic political elections. They

6 Hamidi, "Malaysia's Policy on Counter Terrorism."

7 Naved Bakali, "Challenging Terrorism as a Form of Otherness: Exploring the Parallels between Far-Right and Muslim Religious Extremism," *Islamophobia Studies Journal* 5, no. 1 (Fall 2019): 100.

8 Muhammad Izzuddin Jaafar and Elmira Akhmetova, "Religious Extremism and Radicalisation of Muslims in Malaysia: The Malay Ties with the Mujahidin, Al Qaeda and ISIS," *Journal of Nusantara Studies (JONUS)* 5, no. 1 (January 2020): 105.

declare that these activities are forbidden (haram) for Muslims to participate.[9] Thus, although Malaysia is a country that has Syariah laws and courts such extremists' groups still commits acts of violence and cause destruction to the society in the country. In fact, the reality is, as correctly observed by Anthony H. Cordesman, that globally the most extremist and terrorist violence occurs in Muslim states. The violence overwhelmingly consists of attacks by Muslim extremists on fellow Muslims, and not a clash between civilizations.[10]

Nevertheless, the war against terrorism must not jeopardize exercise of legitimate rights of the people. The judiciary has to carry out its obligations to protect the people, and at the same time guarantee freedom and dispense justice. It is the constitutional duty of the Islamic religious authorities to preserve the religion, to safeguard Muslims and insulate the true teachings of Islam in Malaysia. Under the federal constitutional framework of the country, the civil courts and federal government do not deal with religious matters because it comes under the jurisdiction of Syariah laws and courts of the individual states. However, to combat religious extremism and terrorism under the pretext of Islam, the demarcation of constitutional power and jurisdiction between federal and state governments is obscured. The federal government which has exclusive legislative and executive powers over criminal matters, public order and security must collaborate with the Islamic religious authorities of the states in encountering threats coming from religious extremists and terrorists' groups. Although laws, policies, and agencies relating to internal security, public order and crime are under the jurisdiction of the federal government, the ideological, theological, and philosophical dimensions of religious extremism and terrorism have to be dealt with by the Islamic religious authorities of the states. The civil court on a few occasions had faced the challenging tasks of upholding rights of those accused of religious terrorism while at the same time preserving public order, peace, and security of the country.

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[9] Mohamed Ali, *The Roots of Religious Extremism: Understanding the Salafi Doctrine of Al-Wala' Wal Bara'* (London: Imperial College Press, 2015), 7.

[10] Anthony H. Cordesman, "Islam and the Patterns in Terrorism and Violent Extremism," *Center for Strategic and International Studies (CSIS)*, accessed July 14, 2021, https://www.csis.org/analysis/islam-and-patterns-terrorism-and-violent-extremism.

This paper sets out to examine the role of the court and the Islamic religious authorities in fighting religious extremism and terrorism in Malaysia. This qualitative research involves a legal study and analysis of primary materials including constitutions, legislations, emergency ordinances and court cases, and secondary materials such as books, articles, and expert opinions.

II. CONSTITUTIONAL SETTINGS

Article 11 of the Federal Constitution guaranteed the right to every person, including permanent residents, migrant workers, tourists, international students, asylum seekers and refugees, to religion.[11] The provision also states that nobody can be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own. Religious rights guaranteed under the constitution do not only apply to individual and personal capacities, but it also covers religious groups. The constitution protects the rights of any religious group to manage its own religious affairs. All religious groups have the constitutional rights to establish and maintain institutions for religious or charitable purposes. Rights to property are also guaranteed because it is stated that every religious group has the right to acquire and own property and hold and administer it. Freedom of religion had been upheld by the courts in several cases such as *Jamaluddin bin Othman v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*[12] and *Minister for Home Affairs v. Jamaluddin*.[13] Both the High Court and the Supreme Court in the said cases have maintained the right of the person to practise and propagate Christianity. Notwithstanding that under s 8(1) of the Internal Security Act 1980 (which has now been repealed), the Home Minister was given powers to detain a person to prevent him from 'acting in any manner' prejudicial to the security of Malaysia, the Minister has

[11] Maqsood Ahmad & Ors v. Ketua Pegawai Penguatkuasa Agama [Chief Religious Authority Officer] & Ors, 9 MLJ 596 (2019), https://www.defendingforb.org/media/dt1awevp/maqsood-ahmad-ors-v-ketua-pegawai-penguatkuasa-agama-ors-2019-9-mlj-596.pdf.

[12] Jamaluddin bin Othman v. Menteri Hal Ehwal Dalam Negeri, Malaysia [Minister of Home Affairs, Malaysia] & Anor, 1 MLJ 368 (1989).

[13] 1 MLJ, 418 (1989).

no power to deprive a person of his right to profess and practise his religion which is guaranteed under Art. 11 of the Constitution.

Religion is a nourishment to the soul. It brings peace to the mind and fulfils one's spiritual needs. It is meant to create peaceful way of life for human beings. Religion creates peace between a person and his creator, and it also creates harmony between a person with the nature and his surroundings. It also has the objective of establishing a peaceful environment for the society. Accordingly, the Federal Constitution of Malaysia does not authorize any act contrary to any general law relating to public order, public health, or morality. The express limitation of religious rights can be found in Article 11(5). In other words, religious rights guaranteed by the Constitution cannot be abused to disrupt public order. Any action even those associated with any religion may be limited if it endangers public health and undermine morality of the public, "The freedom to profess and practise one's religion should not be turned into a licence to commit unlawful acts or acts tending to prejudice or threaten the security of the country."[14]

The scope of right to practice religion has also been circumscribed by the courts as had been decided in several cases. One of the cases concerns a Muslim Chief Inspector of the police force who was dismissed subsequent to disciplinary actions taken against him.[15] Among the disciplinary charges was for insubordination by committing polygamy without the permission of his superior. He claimed that the charge is unsustainable on the ground that it goes against his right to practise his religious belief and contended that the practice of polygamous marriage is permissible under the Islamic faith. He claimed that by denying his application to enter a polygamous marriage, which allowed by Surah An Nisa verse 3 of the Holy Koran, his superiors had infringed his freedom of religious practice which is constitutionally guaranteed under Article 11(1) of the Federal Constitution. The court however disagreed and explained that the verse means polygamous marriage is merely permissible in Islam, not obligatory. A

[14] Minister for Home Affairs v. Jamaluddin, 1 MLJ 418 (1989).
[15] Zakaria bin Abdul Rahman v. Chief of the Malaysian National Police & Anor, 3 MLJ 385 (2001).

Muslim is therefore not required, as a matter of religious obligation, to take upon more than one wife. As a matter of fact, there are certain conditions that need to be met before a Muslim is allowed to do so. Thus, it is not fundamentally wrong for the disciplinary authority to require any member of the police force to obtain prior permission from his superior officer before entering a polygamous marriage. Such a condition therefore could not be construed as infringing the constitutional guarantee to profess and practise his religion as contained in Article 11(1) of the Federal Constitution. Failure to obtain such a permission amounted to a breach of discipline. The court therefore decided that the officer had clearly acted contrary to good discipline in marrying his second wife after his request for permission to do so was turned down by his superior officer.

Another case concerned three primary school Muslim students who had been expelled from their school.[16] The school had issued 'The School Regulations 1997' which stipulated, *inter alia*, that all students are prohibited from wearing 'jubah, turban (serban), topi, ketayap dan purdah'. Despite the prohibition, the students wore serban as part of their school uniform to school. Consequently, they were expelled. They challenged their dismissal in court and at the High Court the learned judge found in their favour and made a ruling, *inter alia*, that the School Regulations 1997 was unconstitutional.[17] On appeal however the Court of Appeal reversed the judgment of the High Court.[18] The appeal then reached the highest court in Malaysia, namely the Federal Court. The only constitutional issue submitted to the Federal Court is whether the regulations prohibiting the wearing of 'serban' by school pupils violated Article 11(1) of the Federal Constitution? The students argued that wearing serban is part of Islamic prophetic teaching, thus the regulations prohibiting students from wearing serban violated their rights to practise their religion which includes every religious practice that 'have some basis or become part of that religion whether they are mandatory or otherwise.' The right to practice religion can only be restricted if, by exercising such rights, it affects public order, public health, and public morality.

[16] Meor Atiqulrahman bin Ishak and others v. Fatimah Binti and Others, 4 MLJ 605 (2006).
[17] 5 MLJ 375 (2001).
[18] 2 MLJ 25 (2005).

In course of the judgment, the Federal Court laid down the method in determining whether a particular religious practice is protected by the Constitution or not, "First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion." Once all the questions have been answered in the affirmative "The court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or 'an integral part' of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it." In this case, the Federal Court answered the first and the second questions in the affirmative. In its deliberation the Federal Court states that various factors should be considered in determining whether the 'limitation' or 'prohibition' of a practice of a religion is constitutional or unconstitutional under Article 11(1) of the Federal Constitution. Only the court can decide it when the matter comes before the court. In the course of making its decision, expert witnesses may be called to assist the court regarding a practice. In cases involving Islamic religious practice, the issue regarding the 'hukum' of the practice may be referred to the Shari'ah Committees (Fatwa Committees) in the States or the National Fatwa Council. In the current case, an expert opinion was called and he gave his opinion that the wearing of turban is 'sunat' or commendable. Contrary to the opinion of the expert witness, the judge concluded that it is not part of 'Islamic prophetic teaching' and went on to hold that the School Regulations 1997 in so far as it prohibits the students from wearing a turban as part of the school uniform during school hours does not contravene the provision of Article 11(1) of the Federal Constitution and therefore is not unconstitutional.

Another case of restriction of religious practices made by the court concerning dress and attire is *Hjh Halimatussadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor*.[19] A Muslim female public servant was dismissed by the government for wearing attire covering the face or 'purdah' during office

[19] 3 MLJ 61 (1994).

hours. Under para 2.2.1 of the Service Circular No 2 of 1985 pertaining to dress code for civil servants, women officers were prohibited from wearing among others 'any dress which covered the face during office hours'. She brought an action in the High Court challenging the validity of her dismissal by the Public Services Commission (PSC) but the action was dismissed by the High Court.[20] She then appealed to the Supreme Court, which was the highest court of the land during that time, based on several grounds, *inter alia*, that her constitutional right under Article 11(1) of the Federal Constitution to profess and practise her religion had been infringed. In its judgement, the Supreme Court held that the freedom of religion guaranteed under Article 11(1) of the Federal Constitution is not absolute as Article 11(5) does not authorize any act contrary to any general law relating to public order, public health, or morality. The prohibition against the wearing of attire covering the face by lady civil officers during work does not affect the appellant's constitutional right to practise her religion. The opinion of Dato' Mufti Wilayah Persekutuan that Islam as a religion does not require a Muslim woman to wear a purdah had been accepted by the court and therefore it concluded that the wearing of purdah had nothing to do with the appellant's constitutional right to profess and practise her religion.

As can be observed in the cases discussed above the right to practice religion had been restricted by the court on various occasions not because based on public order, public health or morality, but on the basis whether or not the action or practice is required or obligatory under that religion. It appears that only an action or practice which been classified as obligatory is certain to be protected by Article 11.

III. ISLAMIC RELIGIOUS AUTHORITIES AND RELIGIOUS EXTREMISM AND TERRORISM

The Islamic religious authorities play a very crucial role in providing legitimacy to the moderate Islamic worldview which is the true teaching of Islam.[21] This

[20] 1 MLJ 513 (1992).

[21] Siti Zubaidah Ismail, "Menangani Ajaran Sesat di Kalangan Umat Islam: Perspektif Undang-Undang dan Pentadbiran [Dealing with Heresies Among Muslims: Legal Perspectives and Administration]," *Jurnal Syariah* 18, no. 2 (2010): 247-276.

is true in Malaysia and maybe relevant to other countries and in some, a different context.[22] Under the federal constitutional framework of Malaysia, Islamic religious administration and laws come under the exclusive purview of the individual states. Federal authorities cannot indulge into these matters as it would mean breaching the constitutional division of power between the federal government and the state as outlined in the Federal Constitution of Malaysia. Any executive action and legislative interference by the federal government on Islamic affairs and matters which come under the states' autonomy would be declared unconstitutional and *ultra vires* by the court as evidenced in the case of *Mamat Bin Daud & Ors v. Government of Malaysia [1988] 1 MLJ 119*. The issue before the court in the case is whether section 298A of the Penal Code, a federal law, which provides for offences causing, disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, the maintenance of harmony or unity, on grounds of religion *ultra vires* Article 74(1) of the Federal Constitution and invalid, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. The Supreme Court declared that *section 298A* is a law with respect to which Parliament has no power to make law and it is invalid and therefore null and void and of no effect.

The importance to preserve the true teachings of Islamic religion and prevent any enmity among Muslims have been highlighted by Lord President (LP) Tun Salleh Abas (as he then was) in *Mamat Bin Daud*. Delivering judgment of the Supreme Court in the case, the Lord President stated "...[E]xcept that to allow any Muslim or groups of Muslims to adopt divergent practices and entertain differing concepts of Islamic religion may well be dangerous and could lead to disunity among Muslims and, therefore, could affect public order in the states. But the power to legislate in order to control or stop such practices is given to

[22] In a report relating to terrorist recruitment in American correctional institutions, Mark S. Hamm states that 'the only way to combat the expansion of radical Islam is through the moderating voice of religious authority and intellectual agency'. Mark S. Hamm "Terrorist Recruitment in American Correctional Institutions: An Exploratory Study of Non-Traditional Faith Groups," *National Institute of Justice (NIJ)*, published December, 2007, https://nij.ojp.gov/library/publications/terrorist-recruitment-american-correctional-institutions-exploratory-study-non.

states as could be seen from Article 11, clause (4)."[23] His lordship further stated that it is the religious authorities of the states "...which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. Clause (4) is a power which enables states to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thoughts and opinions within the Islamic religion itself."

The task to decide and determine on any issues and matter pertaining to Islamic religion clearly rests with the Islamic religious authorities of the states. Salleh Abas L.P had explained this succinctly as reproduced below:

> "Surely, a legislation to deny a Muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is a legislation upon religious doctrine. In its applicability to the religion of Islam, the impugned section must, in my view, be within the competence of State Legislative Assemblies only.... in so far as its application to Muslims is concerned, (it) is a law, the object of which is to ensure that Islamic religion practised in this country must conform to the tenets, precepts and practices allowed by states...In enacting this impugned section, I do not think that Parliament can really rely on its powers to legislate on public order because the exercise of such power comes into a direct conflict with state powers to legislate on, and control, the practices of Islamic religion."

Terrorism is against the teachings of Islam. To protect the sanctity and the integrity of Islam, it is the obligation of the Islamic authorities to act against any people who misuse the name of Islam or abuse their religious positions and credentials. To achieve this objective, one of the methods used by the authorities is the requirement for any person who would like to teach or preach Islam must have sufficient and correct knowledge of the religion. This is done by the conferment of 'Tauliah', or official permission issued by the relevant religious authorities. The laws to this effect can be found in all states in the country and issued by the religious authorities of the respective states. The case of *Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012]*

[23] Mamat Bin Daud and Ors v. Government of Malaysia 1 MLJ 119 (1988).

4 MLJ 281 highlights the importance and purpose of *Taulia*h. In this case the validity of section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 came into question. Under the section any person who engaged in the teaching of the religion without a *Tauliah* from the Tauliah Committee, except to members of his family at his place of residence only, was guilty of an offence punishable by a fine or jail or both. *Tauliah* is a pre-requisite before one can teach the Islamic religion. The Tauliah Committee, which comprises of the Mufti and between three and seven other persons with appropriate experience, knowledge, and expertise, had power to grant or withdraw a *Tauliah* for the purpose of the teaching of the Islamic religion or any aspect thereof. Section 53(1) was enacted pursuant to Article 74(2) read together with Item 1, State List, Ninth Schedule of the Federal Constitution which empowered the State Legislature to make laws for the creation and punishment of offences against the precepts of Islam' by persons professing the religion. The Federal Court, in upholding the provision and constitutionality of *Tauliah,* states that Tauliah was made 'not merely to prevent deviant teachings but also to maintain order and prevent division in the community'. 'The requirement of *Taulia*h is for the purpose of protecting the public interest (maslahah) falls within the concept of *siyasah shari'yyah*. It was necessary in this day and age for the authority to regulate the teachings or preaching of the religion to control, if not eliminate, deviant teachings and safeguard the integrity of the religion. The integrity of the religion needs to be safeguarded at all costs.'

The necessity for the Islamic religious authorities to ensure that only qualified people with the correct understanding and knowledge of the religion are allowed to teach the religion became more apparent due to the findings that, in addition to social media, ISIS also uses *usrah* (an Islamic form of gathering) at the local educational institutions such as universities and colleges to spread the ideology. *Usrah* is an easy way in approaching and disseminating an extreme understanding of religion among the young people. The method proved to be effective as several cases were reported that Malaysians were captivated with the jihadi movement spread by their *naqib* (male leader) including a former

Malaysian army commander aged 29 reported to have joined ISIS after being influenced by his *naqib*.[24]

Another mechanism that is being employed by Islamic authorities to thwart religious extremism and violence associated with religious movement is through the issuance of religious edicts or *fatwa*. Official fatwas made by the Fatwa committees of the respective States are point of reference when people are in doubt over certain religious issues and problems. The fatwas are made after the problems or questions sent for considerations to the Mufti have been deliberated, discussed, and researched by members of the committees, which make the fatwas very reliable and influential. Many fatwas have been issued to protect the people from being deceived into deviant groups and heresy. Fatwas on radical and extremist religious organization also have been issued to make the public aware of their subversive activities and violent means of operations. Thus, there are fatwas concerning the doctrines and teachings propagated by IS, JI, Al Qaeda, and others. The fatwas can be relied by the courts and governmental authorities in making decisions, and in some ways counter the propaganda and publicity made by the terrorists' organizations. As can be observed in the cases mentioned in this writing, many expert witnesses which have been called upon by the courts and enforcement agencies to assist in the trials and investigations are muftis and members of the fatwa committees. It shows that the enforcement agencies and security personnel as well as court of officers need to work in tandem with members of Islamic religious authorities.

The application of fatwa by Islamic religious authorities in circumscribing deviant and untrue teaching of Islam can be seen in the case of *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354*. In this case, the petitioners were charged in the Syariah Court for religious offences. The first petitioner was charged pertaining to defiance or disobedience of the fatwa, which was published in the Government Gazette for having in his possession a VCD that contained material that was contrary to Hukum Syarak or 'the precepts of Islam'. While

[24] Jaafar and Akhmetova, "Religious extremism and Radicalization."

the second petitioner, was also charged in the Syariah court for Syariah offences in expounding a doctrine relating to the religion of Islam which was contrary to the Hukum Syarak, or the precepts of Islam. Both petitioners sought to declare the Syariah enactments upon which they were charged as unconstitutional and invalid. The court disagreed with the petitioners. It was held that fatwas that have gone through the process as prescribed by the law become binding and have the force of law. The publication was done on the direction of the Ruler, who is the head of the religion of Islam in the State of Terengganu, on the advice of the Fatwa Committee of the State. The court also accepted the opinion of three expert witnesses who agreed that the term 'the precepts of Islam' covered the three main domains i.e., creed or belief (*aqidah* or *usuluddin*), law (*shariah*) and ethics or morality (*akhlak*) and included the teachings in the Qur'an and Sunnah. For present purposes of this paper, it is most important to highlight that all of them agreed that *aqidah* forms one of the precepts of Islam as used in the Constitution.

IV. THE COURTS AND CASES RELATING TO RELIGIOUS EXTREMISM AND TERRORISM

The Supreme Court in *Minister for Home Affairs v. Jamaluddin* warns that the freedom to profess and practise one's religion should not be turned into a license to commit unlawful acts or acts tending to prejudice or threaten the security of the country. The freedom to profess and practise one's religion is itself subject to the general laws of the country as expressly provided in cluase (5) of Article 11 of the Constitution.[25] Thus the protection conferred by Article 11 of the Constitution cannot be a complete umbrella for all actions. This is also alluded to by the Supreme Court in *Mamat bin Daud & Ors v. Government* when it reminded that "Clause (5) of Article 11 of the Constitution assertively stipulates that that article which provides for freedom of religion does not authorise any act contrary to any general law relating to public order, public health or morality." Based on this principle, there are many laws relating to public order,

[25] 1 MLJ 418 (1989).

public health or morality which could be used to restrict any unconstitutional religious action.

Obvious examples would be offences pertaining to religion in the Penal Code. In the Federal List of the Federal Constitution, which lists down exclusive legislative jurisdiction of the Parliament, item 3 deals with internal security generally and includes in paragraph (a) thereof public order. One of the laws made in pursuant to the legislative power of the Parliament is the Penal Code. Chapter XV of the Penal Code, which is a federal law, bears the heading 'Of Offences Relating To Religion'. It comprises sections 295 to section 298A. Offences relating to religion in the chapter include injuring or defiling a place of worship with intent to insult the religion of any class; disturbing a religious assembly; trespassing on burial places; uttering words, etc., with deliberate intent to wound the religious feelings of any person, and causing, etc. disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

Initially, according to Ahmad El-Muhammady Malaysia had employed the Internal Security Act (ISA) 1960 to deal with the threat of terrorism and violent extremism. Despite its good record of accomplishment in combating terrorism and the spread of radical ideas propagated by terrorist-extremist groups, the law was repealed due to incessant pressure from the oppositions, civil societies, and human right groups. It was replaced by new laws such as the Security Offences (Special Measures) (SOSMA) 2012, Prevention of Terrorism Act (POTA) 2015, Special Measures Against Terrorism in Foreign Countries (SMATA) 2015, Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLATFPUA). Preexisting laws such as the Penal Code and Prevention of Crime Act (POCA) 1959 are also used.[26] The numerous laws which can be employed by the Malaysian authorities currently in combating terrorism and violent extremism activities associated with religion can be divided int two main groups. Firstly, ordinary laws, and secondly, special laws. Ordinary laws refer

[26] Ahmad El-Muhammady, "Radicalisation mode: Learning from Malaysian militant-extremists," in *Terrorist Deradicalisation in Global Context. Success, Failure and Continuity*. ed. Rohan Gunaratna and Sabariah Hussin (Oxon: Routledge, 2020), 156.

to laws made by federal legislature and state legislatures under their respective constitutional powers.[27] These laws must be consistent with other provisions of the Constitution, particularly Part II which deals with Fundamental Liberties. Any provision of these laws which is inconsistent with the constitution and infringe any rights guaranteed by the constitution shall be declared invalid by the court.[28]

Special laws refer to laws made by the Parliament in pursuant to Article 149 which deals with special powers against subversion, organized violence, and acts and crimes prejudicial to the public. Under the provision, the Parliament can make laws designed to stop or prevent action whether inside or outside the Federation to cause Malaysian citizens to fear, organized violence against persons or property; to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; to procure the alteration, otherwise than by lawful means, of anything by law established; which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof, or which is prejudicial to public order in, or the security of, the Federation or any part thereof. Any provision of the law made in pursuance of Article 149 is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13. In other words provision of special law remains valid even it is inconsistent with constitutional rights of life and personal liberty; freedom of movement; rights to free speech, freedom of assembly and freedom of association, and rights relating to property. Laws that fall under the former category are Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLATFPUA) 2001, Special Measures Against Terrorism in Foreign Countries (SMATA) 2015, and the Penal Code. Legislations which are made under the constitutional provision to combat subversion and organized violence are Security Offences (Special Measures) (SOSMA) 2012, Prevention

[27] For federal legislature the power is based on article 74(1) read together with List 1 and List 3 of the 9th Schedule to the Federal Constitution of Malaysia. For state legislatures their power is based on article 74 (2) read together with List 2 and List 3 of the 9th Schedule to the Federal Constitution of Malaysia.

[28] Article 4 (1) of the Federal Constitution of Malaysia.

of Terrorism Act (POTA) 2015, and Prevention of Crime Act (POCA) 1959. The repealed Internal Security Act (ISA) 1960 falls under this category. At least three criteria are being used by the police in Malaysia to determine what is considered terrorism, extremism and radicalization, and how these elements could pose threats to the national security.

> First, the legal criteria: the acts that violate any statues embodied in the national laws. This includes any belief systems and ideologies that may bring harm to public order and the national security. Second, from an Islamic perspective: any belief systems and ideologies that deviate from the mainstream Islam as defined by the state's religious authorities. Third, the acts that are against the universal values and may generate public disorder and threaten the national security. [29]

The use of special law and preventive detention power can be seen in *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors MLJ [2005] 4 MLJ 636*. The detainees in this case were said to be associated with the *Jemaah Islamiah*. They were initially arrested under section 73 of the Internal Security Act 1960 and subsequently detained without trial pursuant to section 8 of the Act. They applied for the writ of Habeas Corpus. Among the issues discussed in this case was whether Article 149 overrides Article 11 which protects freedom of religion. Based on the allegations of fact, the court was of the view that the actions of the detainees were not only unlawful as being outside the limits of the Constitution but were a threat to national security. They had been identified to be engaged in activities which were described as militant activities. They had been actively involved in receiving instructions on armed warfare both in theory and through physical training. The movement propagated actions which included attempts to create unrest as well as overthrowing the government through armed rebellion. In the present case, the Minister formed the opinion that the activities of the applicants did not fall within the limits of professing and preaching of religion, a view which was shared by the judge. The argument that exercise of the powers under the ISA had the effect of curtailing the rights guaranteed to the applicants under Article 11 of the Federal Constitution was fallacious. The court held that

[29] El-Muhammady, "Radicalisation mode," 157-158.

even though Article 11 relating to freedom of religion is not mentioned alongside Articles 5, 9, 10 or 13, Article 11 of the Federal Constitution does not prevail or override Art 149 of the Federal Constitution. Furthermore, by permitting federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam under clause (4) of Article 11 clearly evinced the intention that the right accorded under Article 11 (1) of the Federal Constitution was not absolute. Hence the detention was valid and the use of ISA in this case did not restrict freedom of religion.

Similarly, in *Abdul Razak bin Baharudin & Ors v. Ketua Polis Negara & Ors [2004] 7 MLJ 267* the detainees were arrested and detained under the ISA due to their activities and involvement with JI. They argued that their arrest and detention were against the freedom to practice Islam under Article 11 of the Federal Constitution. In dismissing the application for Habeas Corpus, the judge stated that after a thorough analysis of all the relevant facts, including the grounds and allegations of facts, he was not persuaded to conclude that the activities of the detainees can justifiably be said to fall within the intended constitutional provision of 'Freedom of Religion' entrenched in Article 11 of the Federal Constitution. The court held that the activities were rightly concluded by the Minister as being 'prejudicial to the security' of the country and must be 'prevented' as required under s8(1) of the Internal Security Act 1960.

The authorities had used the ISA as in the two cases above to arrest and detain the persons without trial. As pointed out earlier for the past three decades ISA, which is a special law, had been employed to combat organized violence and extremism imbued with religious perceptions. The law however since then had been repealed and can no longer be used against any person involved in terrorism related activities and organization. It seems that the tendency currently is to charge the suspects in court under ordinary laws. Recent court cases on terrorism activities associated with religious extremism involved the use of provisions in the Penal Code, namely Chapter VIA on offences relating to terrorism. The chapter can be divided into two, firstly provisions for suppression of terrorist acts and support for terrorist acts which consists of section 130B to

section 130M, and secondly provisions for suppression of financing of terrorist acts from section 130N to section 130TA.

In *Mohd. Nasuha bin Abdul Razak v. The Accuser Raya [2020] 3 MLJ 530* the person was charged before the Kuala Lumpur High Court for four terrorism related offences under the Penal Code, namely sections 130J(1)(a), 130JB(1)(a) and 130N(b). The offences are for soliciting or giving support to terrorist groups or for the commission of terrorist acts; possession, etc. of items associated with terrorist groups or terrorist acts and providing or collecting property for terrorist acts. He pleaded guilty to all the four charges and was duly convicted. In *Mustaza bin Abdul Rahman v. Public Prosecutor [2021] 1 MLJ 230* the accused was charged with committing offences relating to terrorism under the Penal Code for soliciting or giving support to terrorist groups or for the commission of terrorist acts and intentional omission to give information relating to terrorist acts. He was alleged to be involved in activities of 'Ikhwah Anshar Daulah Islamiyah', which the trial court agreed that it was terrorist group. During trial, the court granted 'protected witness' status to a witness under section 6 of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). The accused was convicted on all charges. In *The Accuser Raya lwn Anuar bin AB Rawi [2016] MLJU 533* an Imam and religious preacher was charged under Section 130JB of the Penal Code for possession of items associated with terrorist groups or terrorist acts and been found guilty by the court. The judge in this case noted that the opinion of expert witness that the materials in possession of the accused relate to Islamic State (IS) and Al-Qaeda.

Taking into consideration the increasing number of terrorism related cases which are connected to the group the court felt dutybound to restrict the phenomenon for the sake of peace and stability of the country. In *The Accuser Raya lwn Tengku Shukri bin Che Engku Hashim [2018] 8 MLJ 645* the accused was charged for the offences under s 130J(1)(a) and (b) of the Penal Code for soliciting or giving support to terrorist groups or for the commission of terrorist acts. Based on Telegram conversations found in the mobile phone owned by the accused, the expert confirmed that the 'sumpah taat setia' (bay'ah) was referring

to a support group of IS i.e. *Ikhwan Anshar Daulah Islamiyah*. The accused then pleaded guilty to both charges and was sentenced with imprisonment. In *Public Prosecutor v. Aszroy bin Achoi [2018] 9 MLJ 702,* the accused was charged for offences in soliciting or giving support to terrorist groups or for the commission of terrorist acts and possession of items associated with terrorist groups or terrorist acts. Seventy-two images were extracted from the mobile phone and according to an academic researcher, forty-three out of the seventy-two images were associated with the terrorist group, IS. The accused also provided the police with a password to a Facebook account and the postings on this Facebook account showed that they supported the IS and promoted terrorism. He then was charged with two charges of terrorism under sections 130J(1)(a) and 130JB(1)(a) of the Penal Code and was later convicted for both charges. In *Public Prosecutor v. Razis bin Awang [2020] MLJU 132,* the accused was charged with two counts of offences. The first charge related to an offence in contravention of section 130J(1)(a) of the Penal Code of giving support to a terrorist group of "Islamic State" by making a loyalty pledge (bay'ah) and the second charge referred to a contravention of section 130JB(1)(a) of Penal Code for possessing nine photographs relating to the said group. During the trial expert witnesses on terrorist group of IS had been called to assist the court. At the end of the trial, he was found guilty of both charges and sentenced to a few years imprisonment.

In *Public Prosecutor v. Wan Mohamad Nur Firdaus bin Abd Wahab and other appeal [2019] 4 MLJ 692,* the accused was charged under sections 130J(1)(a) and 130JB(1)(a) of the Penal Code. His phone was found to have contained twenty-three images connected to the terrorist group Islamic State and had sworn an allegiance (bay'ah) to IS. He was convicted and sentenced to eight years and five years imprisonment for the two charges. On appeal the judges had allowed his appeal to reduce the sentence. The court stated that although terrorism offences were serious in nature, they should not be treated on equal footing for some acts of terrorism of which were more heinous than the others. The punishment and sentence should be commensurate with the degree of participation. In this

case, the court was of the view that the participation of the accused with the said terrorist group was passive and minimal.

Not all prosecutions for terrorism related offences were successful. In *The Accuser Raya lwn Siti Noor Aishah bt Atam [2017] 7 MLJ 461,* the accused was charged under section 130JB(1)(a) of the Penal Code for the offence of having in her possession twelve books containing elements of terrorism and associated with terrorist groups, namely Jemaah Islamiah, Islamic State, and al-Qaeda. In establishing the offence, the prosecution called several witnesses, opinions on *Usuluddin* (Islamic theology) and two experts on studies of violence. The three witnesses were of the view that the books showed elements of *Khawarij* or violence associated with JI, IS and AQ. One of the issues for the court's determination was whether the twelve books contained elements or were associated with a terrorist group. During trial, it was established that all twelve books were not banned yet and the failure of the Ministry to ban the books were not in concert and were inconsistent with the decision to make the possession of the books an offence under section 130JB(1)(a) of the Code. After considering all facts and arguments, the court held the accused was not guilty and she was acquitted and discharged with immediate effect.

From the laws and cases discussed above the offences, as rightly pointed out by Ahmad El Muhammady, can be divided into ideological offences and criminal offences. He defined ideological offences as 'offences committed based on ideological belief' that may not necessarily cause physical harm to the public such as possession of extremist materials such as images, videos, audio, symbols, flags, books, reading materials, promotion and supporting of extremist ideology, via posting in social media, taking the pledge of allegiance (bay'ah) and donation. Although an ideological offence potentially leads to terrorism and violence, it is not violent in itself. These types of offences have been classified as 'terrorism offences' in the Penal Code. Criminal offences are defined as the 'actual act of crimes' that cause physical harm to the public and individuals. Under current laws, there is no express distinction and treatment between ideological offences and criminal offences. It is viewed that ideological and criminal offences should

be treated differently.[30] People who commit ideological offences should not be subjected to similar treatment or punishment with people who commit criminal offences. Imposing severe punishment for ideological offences will produce an unintended consequence in the long run. Rather than punitive, the sentence for ideological offences should be restorative and rehabilitative.

V. CONCLUSION

The use of military capabilities in defeating terrorism, which is a part of the hard approach, is with the purpose of causing physical damage to terrorist organizations. Prosecution and detention of terrorists, which are also part of the hard approach, is aimed at stifling their activities. Despite such measures, the ideology underpinning the terror would remain intact. The application of soft approaches such as deradicalization and countering/preventing violent extremism which aims at tackling the ideological roots of terrorism are considered highly effective in dealing with the ideological problem. Malaysia has adopted the practical holistic counter-terrorism strategy which involves the use of hard and soft approaches with a dual focus, to eliminate the terrorist organization and to defeat the extremist ideology in its potential or actual forms. The holistic approach provides commensurate measures and proportionate reaction to terrorism related activities. The ever-increasing threat by religious extremists and terrorist groups requires the enforcement agencies to step up their efforts to protect the society and nation. At the same time the authorities need to be vigilant and more tolerant in dealing with cases of ideological offences so as not to impede lawful exercise of rights to free speech and expression, and legitimate religious rights. Innocent people who unknowingly fall into the trap of the terrorist organization also need to be assisted and not punished. The enforcement agencies, together with the courts and Islamic religious authorities must work in tandem to defeat not only terrorist organizations but its ideology as well. To counter the terrorists' threats and to combat the spreading of the dangerous extremists' ideologies the court and the Islamic religious authorities

[30] Ibid., 165-166.

need to cooperate. Only then the fight against religious extremism and terrorism in Malaysia is sustainable and effective.

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The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations

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Abstract

Indonesia is neither a religious state nor a secular state. Based on the Pancasila state ideology and the 1945 Constitution, Indonesia adheres to a symbiotic model in which the state and religion are different entities but have a mutually influencing relationship. This relationship pattern can be seen from several laws that regulate issues related to religion, especially Islam, which is embraced by the majority of Indonesians. As a political product, the pattern of relations between the state and religion in the law is dynamic. However, in accordance with the principles of a democratic rule of law, the dynamics of democratic politics are controlled by legal instruments, one of which is through the authority to review laws as one of the powers of the Constitutional Court. The Constitutional Court's decisions in cases of judicial review of laws related to religion reinforce the model of the symbiotic relationship between the state and religion. Such decisions affirmed Pancasila as a model of Indonesian secularity that is needed for the sake of individual rights and freedoms, to balance or reconcile religious diversity, social integration and national development, and the independent development of the functional domains of society.

Keywords: Constitutional Court Decisions, Constitutional Law, Secularity, State-Religion Relations, Multiple Secularities.

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I. INTRODUCTION

In general, the relationship between the state and religion is based on three paradigms, namely the integralist paradigm, the symbiotic paradigm, and the secularistic paradigm. The three paradigms form different state patterns, namely (1) a secular state that separates state and religion; (2) state religion; and (3) a state which is not a religious state but does not clearly separate state affairs and religious affairs.

The pattern of state-religious relations in Indonesia is based on Pancasila as the nation's ideology and the basis of the state. Pancasila is a compromise in the middle point between the secular nation state and the Islamic state. Pancasila on the one hand affirms that the state is a separate entity that is not a theocracy. This means that the state remains in a profane or worldly territory with all its rules and devices that are also established and carried out secularly. However, the state's goals and policies, though decided and executed secularly, can be influenced by reasons derived from religious teachings.

One of the phenomena that can be used to look at the development of the relationship between state and religion is the law, especially laws regulating or related to religion. There are two strong reasons for this. First, law in the modern sense is one of the secularization vehicles since it is developed based on rational consideration and not religion.[1] Second, there are two principal functions of the law and legal process: integrative and transformative. Integrative is law as a government mechanism to manage conflict and facilitate social order. Transformative is perceiving law as a vehicle to express values and to change social and political conditions.[2] In other words, the law in relation to religious life can be made to regulate and limit religion, which means secularization; while on the other hand, it can be a legalization of religious law into state law. In Habermas's perspective, law is a tool of social solidarity, especially integration in complex societies. The law that applies based on the principle of legality is

[1] Richard S. Willen, "Religion and the Law: The Secularization of Testimonial Procedures," *Sociological Analysis* 44, no. 1 (Spring 1983): 53.

[2] Ofrit Liviatan, "From Abortion to Islam: The Changing Function of Law in Europe's Cultural Debates," *Fordham International Law Journal* 36, no. 1 (2013): 94.

a transformation of free communication that gives legitimacy to certain social institutions.[3]

In the historical constructivist approach, there are two views of the relationship between religion and state. First, the static view holds that state institutions determine the behavior of religious organizations. Second, the society-centered approach believes that the state is a reflection of the value of society, and conversely, a society with high adherence to religion will influence the political institutions of the country. From the history of Indonesia, Jeremy Menchik stated that the contours of religion and politics are fluid and evolve together over time. Therefore, there is an overlap area between the state and the religious community, as well as an autonomous sphere of state and religious society (Islam). Therefore, there can be no clear line between state and society (religion).[4]

The dynamics of the relationship between the state and religion must be kept within the corridors of Pancasila. This obligation is also attached to one of the authorities of the Indonesian Constitutional Court, namely to review law (*undang-undang*) against the Constitution. Through this authority, the Constitutional Court reviews the law, including several laws relating to religion. The touchstone used by the Constitutional Court is the 1945 Constitution, where Pancasila is part of the Preamble and in its chapters also regulate the right to freedom of religion and worship. In other words, the Constitutional Court has a role in determining the relationship between state and religion and the relationship between religious and secular regions.

This article analyzes the role of the Constitutional Court in determining the relationship between the state and religion, especially in the field of law. The relationship in this case includes the determination of differentiation boundaries and the relationship between the territory of the state and the territory of religion. The analysis is carried out by first explaining the model and dynamics of the relationship between state and religion as well as the development of the

[3] M. Ulric Killion, "The Function of Law in Habermas' Modern Society," *Global Jurist* 10, no. 2 (March 2010): 12-13.
[4] Jeremy Menchik, *Islam and Democracy in Indonesia: Tolerance without Liberalism* (New York: Cambridge University Press, 2016), 94.

theory of distinction and differentiation of state and religion, particularly the theory of "multiple secularities".

In the next section, the model of the relationship between state and religion based on Pancasila is explained and analyzed for its suitability with the secularity model according to the theory of "multiple secularities". That theoretical and conceptual analysis will be followed by analysis of several decisions of the Constitutional Court to determine whether or not to strengthen the relationship between state and religion based on Pancasila and its compatibility with the theory of "multiple secularities".

The decisions analyzed are those on judicial review of laws related to religion, namely Decision Number 19/PUU-VI/2008 on the authority of the Religious Courts as regulated in Law Number 7 of 1989 as amended by Law Number 3 of 2006 on Religious Courts, Decision Number 12/PUU-V/2007 on restrictions on polygamy in Law Number 1 of 1974 on Marriage, Decision Number 140/PUU-VII/2009 on blasphemy in Law Number 1/PNPS/1965, Decision Number 68/PUU-XII/ 2014 on interfaith marriage in Law Number 1 of 1974 on Marriage, and Decision Number 97/PUU-XIV/2016 on the status of "belief" in Law Number 24 of 2013 on Population Administration.

II. STATE AND RELIGION: THE CONCEPT OF SECULARITY AS DIFFERENTIATION

It has been stated in the Introduction that the relationship between the state and religion is based on three paradigms, namely the integralist paradigm that forms a state based on a certain religion, the symbiotic paradigm that forms a non-religious state model but does not clearly separate state affairs and religious affairs, and the secularistic paradigm that forms a secular state.[5]

According to the integralist paradigm, state and religion are one. There is no distinction between religious institutions and political institutions. The head of state is the holder of religious power and political power. The government is

[5] Rahmatunnair, "Paradigma Formalisasi Hukum Islam di Indonesia [*Paradigm of Formalization of Islamic Law in Indonesia*]," *Ahkam: Jurnal Ilmu Syariah* 12, no. 1 (January 2012): 101.

run on the basis of "divine sovereignty". Supporters of this paradigm believe that sovereignty is in the hands of God, which gave rise to the notion of a religious state or theocracy. Government is run (at least claimed) based on God's words.[6]

The symbiotic paradigm is based on the view that the state and religion are two different entities but need each other so that it is impossible to separate them clearly. Religion requires power in order to obtain guaranteed protection. On the other hand, the state needs religion as an area of ethical and moral-spiritual guidance for the administration of the state and society. Religious law still has the opportunity to influence state laws, even in certain cases it does not rule out the possibility of religious law being used as state law.[7]

The secularistic paradigm proposes a separation between religion and the state. The state and religion are two different institutions and have different territories so that their existence must be separated and they cannot interfere with each other. In a secular state, there is no relationship between state and religion. The state is a matter of human relations with other humans, or world affairs. Conversely, religion is the relationship between humans and God, which is individual. These two things, according to secularism, cannot be combined.[8]

However, in the state history, there are practices that links the three models of the state, namely the existence of secularization, which is found in both religious and symbiotic states. On the other hand, the influence of religion is not always interpreted negatively as being opposed to modernization. Even in a secular state, the influence of religion is unavoidable as it is held by the community to be a value of truth. In every state, it is necessary to distinguish and pattern the relationship between the state and religion in accordance with the values and goals to be addressed. Therefore, each country has its own secularity. Secularity cannot be conceived singly but varies. This is what is called "multiple secularities".

The term "secularization" has its own historical journey. The word is used in the era of religious wars to declare the separation of territory or property from the control of ecclesiastical power. In anticlerical and progressive circles,

6 Ibid., 102.
7 Ibid., 103.
8 Ibid., 104.

the term secularization is used to explain the freedom of modern man from the bondage of religion. "Secularization" has been used as an ideological concept that has an evaluative connotation, containing a kind of positive or negative assessment of the separation of religion from social life. Secularization can also be seen as an empirical phenomenon of social development that separated from the domination of institutions and religious symbols.[9]

Secularization theory is criticized by recent religious sociologists.[10] Europe, the region that in the past centuries was the backbone of the Catholic Church, has undergone a process of modernization hand-in-hand with secularization that cannot be stopped or reversed. In contrast, in the United States, the massive development of modernization does not necessarily lead people away from religious institutions, beliefs and practices. Religion remains influential in public spaces, including being a key factor in presidential elections.[11] In other parts of the world, such as Asia, Africa and Latin America, secularization takes place very minimally even though the society has undergone a process of modernization since the beginning of the 20th century. Modernization and secularization do not occur in a single way. Although almost every society in the world is experiencing it, its direction and process are different from each other, influenced by many aspects with different effects.

Secularization that becomes part of the modernization theories that necessitate the separation of religion and state, and the decline of the role of religion, is a haphazard generalization. Even in Western countries, secularization is not uniform. The relationship between religion and state in the West is the result of dynamics and negotiation with different results.[12] Modernization indeed takes place and penetrates the most private areas of human life. However, the

[9] Hans Raun Iversen, "Secular Religion and Religious Secularism: A Profile of the Religious Development in Denmark since 1968," *Nordic Journal of Religion and Society* 119, no. 2 (2006): 83.

[10] Amika Wardana, "Agama dan Penuaan Masyarakat Indonesia: Sebuah Agenda Penelitian [Religion and the Aging of Indonesian Society: A Research Agenda]" (presented in the Monthly Routine Discussion Center for Early Childhood and Elderly Studies at Yogyakarta State University, 2014).

[11] Bryan S. Turner, *Religion and Modern Society: Citizenship, Secularization and the State* (New York: Cambridge University Press, 2011), 143.

[12] Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila* [*Plenary State: Historicity, Rationality, and Actuality of Pancasila*] (Jakarta: Kompas Gramedia, 2011), 96.

modernization response has also manifested itself in the form of explosions of religious spirit in public spaces.

Therefore, the so-called secularization is not the disappearance of religion from the public sphere. On the contrary, religion penetrates in the process of modernization. Religion in European history has become the foundation of morality and even Western civilization. The nation-state also breeds religious fundamentalism, such as Islamism, against modern assumptions as "humanly revolt against God". For Muslim-majority countries, secularization has a different meaning because of views of history and doctrine that differ from those of the Western world.[13] Islam has never had a universal ministerial hierarchy. Mosques in Islam are more a place for worship and not a theological institution like the church. The Caliph in Muslim political history is primarily a political leader, not religious leader. Religious scholars or figures in Islam function solely as religious scholars; have no authority like Catholic clergy.[14]

Given the concept of secularization in terms of differentiation, religion is no longer the sole definer of all reality. Differences allow religious institutions to make decisions autonomously, even though state institutions can influence them but without power. With differentiation, religion can also develop relative autonomy to provide a basis of morality to both support and oppose state power. Religious differentiation from state power does not eliminate all religious influence on the state. The religious community can influence public policy but is not a determinant. The influence is positioned as an aspiration equal to the aspirations of other people.[15] When religious leaders are active in public life it will affect people's lives and give legitimacy to public institutions.[16]

The involvement of religious institutions in the public sphere entails some requirements. First, upon entering the public sphere, religion must not only defend its freedom but also the freedom of other believers to prevent the absolutism of

[13] Turner, *Religion and Modern Society*, 133.
[14] Ahmad Nur Fuad, "Sekularisasi Politik (Pengalaman Amerika Serikat dan Dunia Islam) [*Political Secularization (The United States and the Islamic World Experience)*]," *Journal of Salam* 12, no. 2 (July - December 2009): 91.
[15] Latif, *Negara Paripurna* [*Plenary State*], 107-108.
[16] Mirjam Künkler and Alfred Stepan, "Indonesian Democratization in Theoretical Perspective," in *Democracy and Islam in Indonesia,* ed. Mirjam Künkler and Alfred Stepan (New York: Columbia University Press, 2013), 7.

the state in the name of one religion. Second, when entering the public domain with the question of secular absolutism, religion does not want to replace it with religion as the basis of state administration, but rather to ethically criticize the secular reality. Third, in entering the public sphere of religion, defending the traditional life pattern based on the values of the technical administrative matters of the anonymous modern state without returning to the model of traditional religious society. The role of religion is through civil society.[17]

The increasing role of religion in the public sphere in various countries shows that religion is compatible with democracy and political civility. Even public religion can act as a significant counterweight to the hegemony of the market and the modern state.[18] In terms of democracy and the role of religion in the public sphere, it must necessarily keep religion as one factor but not a determinant and in an authoritative position. To determine the proper proportions, Olle Törnquist proposed four criteria to be determined first, namely (1) what is meant by public affairs, (2) what is meant by the people, (3) what is the substance and function of democratic institutions, and (4) how people can use it to control public affairs.[19]

An-Naim has claimed Muslims need a secular state, but secular state in this case is the separation between state and religion and the state's neutrality towards religion, not then the separation of religion from politics. The separation between Islam and the state does not prevent Muslims from proposing policies or laws that originate from their religion or belief. All citizens have that right, as long as it is supported by a "civic reason" that is the argument required for policy or law to be accepted by the public at large, who can accept or reject it through public debate without having to judge its religious piety.[20]

Wohlrab-Sahr and Burchardt differentiate secularism and secularization. Secularism is a philosophical ideological movement, the ideology of separation

[17] Latif, *Negara Paripurna* [*Plenary State*], 109.
[18] Robert W. Hefner, "Public Islam and the Problem of Democratization," *Sociology of Religion* 62, no. 4 (2001): 491.
[19] Olle Törnquist, "Muslim Politics and Democracy: The Case of Indonesia," *Journal of Indonesian Islam* 1, no. 1 (June 2007): 4.
[20] An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008), 7-8.

of the state, especially politics and religion. Secularization is the process of distinction between the religious domain and other social areas, including the reduction of religion's role in social life. Secularity is a form, whether cultural, symbolic or institutional, that shows the distinction between religion and other social areas.[21]

Relationships are between not only state and religion, but also include other community domains, including law, education, science, business, and others. The relationship and distinction between religious and secular, and the idea of justification, are empirically different. This implies that religions and other social areas have never been fully separated without contact or collaboration. Therefore, secularity is a result of a negotiation or social contestation process. The boundaries between religious and secular areas are always negotiated, challenged, and renewed. Secularization and secularity are the analytical frameworks to test the historical transformation of all world religions within different structures of modern society.[22]

The rejection of secularism and secularization in Islamic countries does not necessarily mean the absence of a distinction between religion and secular. The idea of multiple-secularities not only captures the conditions as a consequence of the past, but rather the interplay between cultural history and its encounter with modern era.[23] Jose Casanova declares that religion is compatible with modernity, democracy, and civilization. This is in contrast to the dominant sociological discourse that usually places religion in opposite positions to the state or politics. Colonial sociology has long understood pessimistically the increasing role of religion, especially Islam, within the public domain and the law.[24]

The relationship between religion and state is clearer in the Christian than in the Islamic tradition. Fueled by the bitter experience of religious politicization by the church in medieval times, Western Christianity has reached the conclusion of

[21] Wohlrab-Sahr and Burchardt, "Multiple Secularities: Toward a Cultural Sociology of Secular Modernities," *Comparative Sociology* 11, no. 6 (January 2012): 881.
[22] Ibid., 882.
[23] Wohlrab-Sahr and Burchardt, "Multiple Secularities," 885.
[24] Syafiq Hasyim, *State and Religion: Considering Indonesia Islam as Model of Democratization for the Muslim World* (Berlin: Liberales Institut, 2013), 6.

the necessity of separating the religious domain from the state domain. Islamic history does not have this problem so it is still a debate to date whether Islam necessitates a particular state form or not.[25]

Burchardt and Wohlrab-Sahr call secularity models in different countries "multiple secularities". The concept of multiple secularities represents the practices of distinctions between religion and secular to capture their boundaries. It also brings consequences on the shift and re-interpretation of the meaning of religion.[26]

The concept of "multiple secularities" is used in contrast to the monolithic concept of the secularity of modernism. "Multiple secularities" explains three main themes. First, there are different meanings and cultural stages in distinguishing between religious and secular spheres, including the relationship between religious history and ethnic diversity, in the process of nation state formation, as well as the cultural concept used as a path of secularization and sacred values attached. Second, in explaining the influence of global interconnection on the secularity of a society. The diversity of secularity today is often associated with international migration, a regime that respects religious plurality, the emergence of post-national citizenship, and the changing role of religion in international politics. The meaning of secular territory is also influenced by international human rights regimes. This theme explains under what conditions the interrelationship between secularity and different regions can occur, why some societies develop their own meaning of secularity while others refuse. Third, the institutionalization that seeks to explain the different forms of secularity institutionalization; what is the concrete form of the notion of secularity institutionalization, how the shift of institutionalization occurs separately from state institutions, and whether there is an alternative to the cohabitation of religion and modernity.[27]

Based on the "multiple secularities" approaches and social problems to be solved, Wohlrab-Sahr and Burchardt divide the forms of secularity into four models. First, secularity for the sake of individual rights and freedoms. Second,

[25] Hasyim, *State and Religion*, 6.
[26] Berlin Boston De Gruyter, *Working with a secular age: interdisciplinary perspectives on Charles Taylor's Master Narrative* (Berlin: Berlin Boston De Gruyter, 2014), 115.
[27] Marian Burchardt and Monika Wohlrab-Sahr, "Multiple Secularities: Religion and Modernity in the Global Age – Introduction," *International Sociology* 28, no. 6 (November 2013): 606.

secularity in order to balance or reconcile religious diversity. Third, secularity for the sake of social integration and national development. Fourth, secularity for the sake of the independent development of the functional domains of society. The four basic forms of secularity are related to different guiding ideas: first is the idea of freedom and individuality; second is tolerance, respect, and nonintervention; third is renewal, enlightenment, and modernity; and the fourth is the idea of rationality, efficiency, and autonomy.[28]

III. STATE AND RELIGION BASED ON PANCASILA AND THE CONSTITUTION

Pancasila was created from the interaction of thoughts and social movements of Indonesian society. The thoughts of the nation's founders were influenced by nationalism theories and movements from both the West and Islam, synthesized with local conditions and viewpoints. Western thought became a reference although aspects of individualism and liberalism were rejected.[29] On the other hand, it is undeniable that Islam was part of the formation of Indonesian nationalism. Islamic organizations like *Sarekat Islam* had aspired for independence.[30] Muslim leaders who referred to Islamic thought, rejected the separation of state and religion, wanted Islam as the state's basis. An Islamic state is, in their view, not a theocracy but a divine democracy or a theo-democracy.[31]

As Indonesia's founders prepared a constitution, the debate over whether Indonesia should be a national state or an Islamic state went through several stages. Each stage shows progress and has implications for the orientation of the state-religion distinction and relationship. Indonesia's declaration of independence on August 17, 1945, was followed a day later by the promulgation of the 1945 Constitution and Pancasila. This was not a final stage that had been preceded

[28] Wohlrab-Sahr and Burchardt, "Multiple Secularities," 890.

[29] Kaelan, *Negara Kebangsaan Pancasila: Kultural, Historis, Filosofis, Yuridis, dan Aktualisasinya* [*Pancasila National State: Cultural, Historical, Philosophical, Juridical, and Its Actualization*] (Yogyakarta: Paradigma, 2013), 2-3.

[30] Deliar Noer, *Gerakan Modern Islam di Indonesia 1900-1942* [*Modern Islamic Movement in Indonesia 1900-1942*] (Jakarta: LP3ES, 1980) in Syafii Maarif, *Studi tentang Percaturan dalam Konstituante: Islam dan Masalah Keagamaan* [*The Study of the Constituent Assembly: Islam and Religious Issues*] (Jakarta: LP3ES, 1985), 79.

[31] M. Natsir, "Persatuan Agama dan Negara" [The Union of Religion and State] in M. Natsir, *Agama dan Negara dalam Perspektif Islam* [*Religion and State in Islamic Perspective*] (Jakarta: Media Dakwah, 2001), 93.

by social change. On the contrary, social change, especially among Muslims in consideration of Pancasila, occurred in phases in the period surrounding the declaration of independence and then long thereafter.

The first phase was the achievement of the first agreement between the Islamists and the nationalist group on the formulation of Pancasila containing the Jakarta Charter, which has the character of an Islamic state based on the first principle of "Belief in God, with the obligation to carry out Syariah Islam for its adherents". This principle implies the absence of separation between state and religion. The state has the authority to enter religious territory, namely to use the state power to ensure the implementation of sharia law for Muslims.

The second phase was an agreement at the promulgation of the 1945 Constitution by the Preparatory Committee for Indonesian Independence (PPKI) on August 18, 1945, including the preamble section containing Pancasila with the first principle "Belief in the One Almighty God". Omission of phrase "with the obligation to carry out Syariah Islam for its adherents" was to accommodate the aspirations of non-Muslim communities and the addition of the phrase "the One Almighty God" accommodated the principle of monotheism in Islam.[32]

With the formulation based on the second agreement in the Preamble to the 1945 Constitution, the state adheres to the principle of belief in God, but this is not related to a particular religion. The state has no obligation or authority to ensure the implementation of religious teachings by respective religious communities. This principle cannot simply be interpreted as a separation between state and religion, but affirms the existence of distinction. The state is not affiliated with any particular religion.

The second phase was intended to be a temporary agreement because the 1945 Constitution was originally created as a temporary constitution. Islamist groups accepted the omission of the Jakarta Charter with the promise that an Islamic state could be championed again after general elections were held to form organs

[32] John A. Titaley, "Hubungan Agama dan Negara dalam Menjamin Kebebasan Beragama di Indonesia [The Relationship between Religion and the State in Ensuring Religious Freedom in Indonesia]," in Chandra Setiawan and Asep Mulyana (eds.), *Kebebasan Beragama atau Berkepercayaan di Indonesia* [*Freedom of Religion or Belief in Indonesia*] (Jakarta: Komnas HAM, 2006), 21.

that would draw up a permanent constitution. Hence the debate on the basis of the state reappeared when the Constituent Assembly from 1957 to 1959 sought to form a new constitution. The nationalists wanted to defend Pancasila and the Islamist group proposed Islam as the basis of state. Discussions were tough and unable to reach a final decision because neither group controlled an absolute majority. The government proposed returning to the 1945 Constitution for the sake of political stability and replacing liberal democracy with a more guided democracy.[33] Returning to the 1945 Constitution meant upholding Pancasila.

President Soekarno concluded the debate in the Constituent Assembly by issuing the Presidential Decree of 5 July 1959, which restored the 1945 Constitution and dissolved the Constituent Assembly. The accommodation of the Islamic group's aspiration is embodied in the consideration of the Presidential Decree stating, "That we are certain the Jakarta Charter of July 22, 1945, inspired the 1945 Constitution and is part of the chain of unity with the Constitution." This consideration is viewed by Ismail Sunny as the basis that Islamic law has an authoritative ground in the Indonesian legal system.[34]

The Presidential Decree and the recognition of the Jakarta Charter inspiring the 1945 Constitution constitutes the third phase of Pancasila. After this phase, the issue of the state's basis was not debated in the legal constitutional sphere. The position of Pancasila grew stronger during President Soeharto's New Order administration, which firmly pursued a single ideology policy in both political life and religious social life.[35] The state monopolized the interpretation of Pancasila, which in its development was more directed to provide legitimacy for the state power and policies.

The fourth phase is the contestation of Pancasila's meaning, especially the principle of "Belief in the One Almighty God" in regard to the relationship

[33] Konstituante Republik Indonesia [*Constituent Assembly of the Republic of Indonesia*], *Risalah Perundingan Tahun 1959* [*Treatise of Negotiations 1959*] (Jakarta: Konstituante RI, 1959), 27.

[34] Ismail Suny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia [The Position of Islamic Law in the Indonesian Constitutional System]," in Amrullah Ahmad et al., *Dimensi Hukum Islam Dalam Sistem Hukum Nasional* [*The Dimensions of Islamic Law in the National Legal System*] (Jakarta: Gema Insani Press, 1996), 133-134; Ernst Utrecht, "Religion and Social Protest in Indonesia," *Social Compass* 25, no. 3-4 (September 1978), 399.

[35] Hasyim, *State and Religion*, 17.

between state and religion. Based on Pancasila, state and religion are two different entities, but there is not yet any agreed constitutional framework on whether they should be separated or not, and if they are related, what form should be taken by the relationship. This contestation is more intense in Indonesia's era of democracy, so it can be seen obviously in the reformation period that followed the resignation of Soeharto in 1998.

Although the meaning of Pancasila, especially the principle of "Belief in the One Almighty God" does not yet have an established constitutional framework, there have been many thoughts based on philosophical studies that try to explain and give meaning to Pancasila, especially in relations between state and religion.

The relationship between state and religion in the concept of Pancasila cannot be separated from the influence of religion in the formation of Indonesian national identity and the distinct function to resist colonialism. Islam has evolved by not only being in private territory, but becoming a spirit in managing public affairs. The Indonesian people have never experienced such bitter experiences as in Europe in the relationship between religion and state, so the policy of political secularization and a neutral state position against religion run by the Dutch colonial government was unsuccessful.[36]

Pancasila is a dynamic institutionalization of Indonesian secularity and experienced shifts of meaning and implementation.[37] Pancasila was born as the result of agreement needed to overcome the issue of the diversity of the Indonesian people, who needed unity or integration in order to realize nationality. Pancasila is a form of secularity for the sake of national unity in order to achieve progress, from independence to the welfare of Indonesian society.[38]

Pancasila is the result of a cultural process parallel to the political secularization since before independence, although it does not produce secularism.[39] With the Pancasila as the basis of the state, then religion is no longer a dominant factor

[36] Latif, *Negara Paripurna* [*Plenary State*], 56.
[37] Burchardt and Wohlrab-Sahr, "Multiple Secularities: Religion," 606.
[38] Ibid., 890.
[39] Rumadi, "Sekularisasi Politik Dalam Pemilu 2014 [Political Secularization in 2014 Elections]," *Koran Sindo*, April 23, 2014.

but must compete with other views. Religious life is more of an individual choice and not the domain of the state. As a profane entity, the state does not merge with any particular religious institution. Each religion retains its own institutions and systems, even if the state has the obligation to protect and facilitate religious life, both through the law and the action of the state. Herein lies Pancasila, which embraces the distinction between the territory of the state and religion as the root of modernization and the rationalization of the state political life.[40]

Pancasila does not embrace the separation between religion and state, but it also does not become the basis of a religious state. Both are distinguished and interconnected but still not mutually occupied. Religion is an area of society where the role of the state is to protect and facilitate. Governance is the territory of the state but religion can play a role by strengthening social ethics and influencing state policies and laws through the political and legal mechanisms. Theoretically, religion becomes a "public religion", different from the thesis of separation and privatization, and supports the thesis of differentiation. Religion and state are not separated, but are distinguished by the limits of their respective authorities called twin tolerations.[41]

In order to achieve twin toleration, the involvement of religious institutions in political societies must be subject to the principles of public reason and deliberation. Religious teachings may inspire but must be formulated substantially in order to fulfill rational democratic legitimacy, not just literally referring to the scriptural postulates. A public decision is rational if it is based on fact, oriented to the long-term public interest, and involves the participation of all groups. Nevertheless, before the debate on the territory of the state by promoting rationality and facts, the success of the democratic decision-making process is often won first in the internal religious groups. In this process of internal debate, the argument is not free but it must be rooted in a comprehensive religious doctrine.[42]

[40] Fuad, "Sekularisasi Politik [Political Secularization]," 92.
[41] Latif, *Negara Paripurna*, 43.
[42] Alfred C. Stepan, "Religion, Democracy, and the Twin Tolerations," *Journal of Democracy* 11, no. 4 (October 2000): 45.

Pancasila is an open ideology.[43] This has consequences of open interpretation by all community groups. The state does not need to monopolize the interpretation of Pancasila because that would definitely lead to a dictatorship. But without a single legitimate interpretation, there will be uncertainty over boundaries between the religious and state areas. Each group has an interpretive space to specify the demarcation between state and religion, and in what affairs and ways does the state have authority to regulate religion. Of course, the interpretation to be used is the interpretation of the state in the legal form. But since religion has room to influence state law then state law can be overrun by majority interpretation. For example, in the Blasphemy Law,[44] the determination of whether an action has deviated from the fundamental teachings of a religion comes from a majority religious group interpretation, which is of course detrimental to a minority. Another case is in the Marriage Law,[45] which determines that marriage is lawful if held according to religion. The terms and procedures of marriage according to a religion are determined by the majority religious views. The entry point of religion using formal legal instruments has become stronger since the Blasphemy Law only determines the six religions recognized by the state.

On the other hand, since the state has space to regulate religion, there is a space for state intervention in religion. The determination of a religion category made by the state to create a distinction between religion and belief, as well as a recognized and unrecognized religion, is a form of state intervention within the religious domain. Considering that the state is a secular institution, the more the area of religious life is governed by the law of the state, the greater the potential for the state's intervention in religion, which also means the more secularization that is formed and operated by secular institutions.[46] The community's adherence to religious law is no longer due to religious considerations, but the compliance of citizens to the law of the state.

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[43] Nurcholish Madjid, *Tradisi Islam: Peran dan Fungsinya dalam Pembangunan di Indonesia* [*Islamic Tradition: Its Role and Function in Development in Indonesia*] (Jakarta: Paramadina, 1997), 14.

[44] Government Regulation No. 1/PNPS/1965 on Prevention of Religious Abuse or Blasphemy, which was later made into law by Law No. 5/1969.

[45] Constitutional Court Law, Law No 1 of 1974 on Marriage.

[46] Iza Rumesten RS, "State Role in Balancing Harmony in a Diversed Society: Regulating Religions in Indonesia," *Brawijaya Law Journal* 5, no. 2 (October 2018): 195.

Based on the explanation above, Pancasila is the basis of Indonesian secularity, which was formed through a historical process since the preparation for independence. Pancasila is a collective agreement to achieve social integration that accommodates the religious character of the Indonesian people, especially the Muslim majority community, while still giving respect for freedom to adherents of other religions and belief. This is in accordance with the first and third models of multiple secularities, namely secularity for the sake of individual rights and freedom, and secularity for the sake of social integration and national development. Acceptance of Pancasila by Islamic groups is a form of secularity in order to balance or reconcile religious diversity.

IV. LEGAL POLICY ON RELIGIOUS (ISLAMIC) LAW

For colonial states, the reality of legal pluralism run by the colonial government is of serious concern as it places citizens in unequal conditions and often discriminates on the basis of race, religion, ethnicity, and regionalism. The struggle for freedom is not merely liberation but also to end discriminatory legal treatment. Therefore, one character of the post-colonial state is to reject legal pluralism. Legal unification is a state policy to replace the plural colonial law. Legal unification contains the consequences of not adopting different laws based on the religion held by the community. However, current developments have been different since many countries have adopted legal pluralism, particularly in private areas.[47]

A single, unified legal system development orientation can be seen in Indonesia mainly during founding President Soekarno's Old Order and the beginning of Soeharto's New Order. The orientation of the national law's development in the Broad Guidelines of State Policy (GBHN)[48] is the establishment of a national legal system based on the source of national law order originating from Pancasila and the 1945 Constitution. In the field of religious life, the policy is to improve

[47] Mirjam Künkler and Yüksel Sezgin, "The Unification of Law and the Postcolonial State: The Limits of State Monism in India and Indonesia," *American Behavioral Scientist* 60, no. 8 (July 2016): 988.

[48] The Broad Guidelines of State Policy (*Garis-Garis Besar Haluan Negara*, GBHN) were promulgated as a decision of the People's Consultative Assembly as the highest state organ, based on the pre-amendment 1945 Constitution.

the religious life and belief in God Almighty, which must be in harmony and in accordance with Pancasila.

The state stands between the two interests of realizing a simple and definitive legal unification and accommodating the plurality of laws in society. The existence of the Marriage Registration Law[49] during the Old Order, then later the Marriage Law, Compilation of Islamic Law (KHI),[50] Zakat Management Law,[51] Hajj Law,[52] Waqf Law,[53] Sharia Banking Law,[54] and State Sharia Securities Law (SBSN)[55] are widely seen as successes of the Islamic group in incorporating Islamic law into state law, but in fact it is more a necessity to unify the law. There are three objectives of those laws. First, is to unify the laws that apply to Muslims. Second, is to maximize the economic potencies of Muslims. Third, to protect and facilitate the implementation of religious life. These three objectives are secular because they are only related to social affairs and made by the state as a secular institution.

The goal of Islamic law unification, including the simplification of Islamic groups, can be clearly seen in the formation of the Marriage Law and KHI. The Marriage Law was established to be applicable to all citizens. This unity is manifested in the form of administrative and procedural unity, although substantively determined by the respective religions and beliefs. The KHI arose because of the need of the Ministry of Religious Affairs and the Supreme Court for streamlined Islamic law applicable in religious courts to decide cases of marriage, inheritance, and waqf.[56] The Supreme Court, as a judicial supervisor of religious courts, lacked an authoritative source of material Islamic law, which led to different verdicts among the courts, resulting in public unrest.[57]

[49] Law No. 22 of 1946.
[50] President Instruction, Law Number 1 of 1991.
[51] Law No. 23 of 2011 on Zakat Management.
[52] Law No. 13 of 2008 on Hajj Management.
[53] Law No. 41 of 2004 on Waqf.
[54] Law No. 21 of 2008 on Sharia Bank.
[55] Law No. 19 of 2008 on State's Sharia Securities.
[56] Mohamad Abdun Nasir, "The Kompilasi Hukum Islam and Debates on Shari'a: Reconsidering Islamic Law in Indonesia" [The Compilation of Islamic Law and Debates on Shari'a: Reconsidering Islamic Law in Indonesia], *al-ahkam* 22, no. 2 (2012): 198.
[57] Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia* [*Indonesian Fiqh: Compilation of Islamic Law and Counter Legal Draft of Compilation of Islamic Law in the Frame of Indonesian Legal Politics*] (Cirebon: Institut Studi Islam Fahmina [*Fahmina Institute of Islamic Studies*], 2014), 157.

The second goal, maximizing the economic potential of Muslims, can be seen in the formation of the Sharia Banking Law, Waqf Law, SBSN Law, and Zakat Management Law. The Zakat Law was established so that zakat can be utilized and accounted for to improve the welfare of the community, especially alleviating poverty and eliminating social disparities. The aim is to manage zakat professionally, including by the provision of consideration and supervision organs.[58] The Waqf Law does not merely place waqf as part of worship that should be facilitated but instead sees the high economic potential to advance general welfare as one of the goals of the state. Therefore, waqf should be developed for the social benefits in accordance with the principles of sharia.

The main objective of the formation of the SBSN Law is to increase state revenue in order to drive the national economy sustainably. The formation of SBSN is expected to mobilize public funds widely and develop the economic and financial sectors of sharia as part of the national economic system.[59] The Sharia Banking Law was made to respond to the needs of the people of Indonesia for sharia banking services and products that are increasing and varied.[60] Sharia banking arrangements are also needed to raise public funds to drive the national economy.

The purpose of facilitating worship can be seen from the formation of the Hajj Law. This law is a form of recognition of citizens' freedom to worship, which raises the obligation for the state to facilitate such worship to run safely, orderly, and smoothly.[61] The role of the state in pilgrimage management is also considered important because it concerns the good name and dignity of Indonesians abroad, especially in Saudi Arabia, considering the mass implementation of the hajj.[62]

One law that leads to legal pluralism is the Aceh Special Autonomy Law,[63] which provides space for the enforcement of Islamic law, through the establishment of regional law, which is different from national law. However, this condition

[58] General Elucidation, Law No. 38 of 1999 on Human Rights.
[59] Consideration of Law No. 19 of 2008 on State Sharia Bond.
[60] Ibid.
[61] Consideration of Law No. 17 of 1999 on Organizing the Pilgrimage.
[62] General Elucidation of Law No. 17 of 1999 on Organizing the Pilgrimage.
[63] Law No. 11 of 2006 on Aceh's Governance.

cannot be separated from the background of the conflict in Aceh province underlying the granting of special autonomy. Moreover, the Islamic law imposed thus far in Aceh relates only to some minor criminal offenses concerning decency.[64] Similarly, "sharia" local regulations in some areas of Indonesian generally only regulate decency.[65]

V. THE ROLE OF THE CONSTITUTIONAL COURT

To ascertain the Indonesian Constitutional Court's role in determining the Pancasila-based relationship between state and religion, and how the Constitutional Court's decisions affirm differentiation, an analysis of the following decisions is presented.

5.1 The Limitation of Religious Court Authorities

In case Number 19/PUU-VI/2008, a citizen named Suryani filed a petition for judicial review of Law Number 7 of 1989 as amended by Law No. 3 of 2006 (the Religious Court Law). The petitioner filed for Islamic criminal law to be enforced in Indonesia as one of the Religious Court's jurisdictions. The petitioner argued that Islamic law with all its branches, including criminal law (*jinayah*), must be applied because Indonesia is a state based on "Belief in the One Almighty God". The petitioner also argued that adherents of every recognized religion may ask the state to enforce his or her respective religious laws. According to the petitioner, Article 49 Paragraph (1) of the Religious Court Law is contradictory to Article 28I Paragraph (1) of the Constitution, which states, "the right of religion ... is a human right that cannot be deprived under any circumstances", and Article 28I paragraph (2), which states, "Every person has the right to be free from discriminative treatment based upon any grounds and has the right to protection from such discriminative treatment", for excluding the authority to try Islamic criminal cases.

[64] Amran Suadi and Mardi Candra, *Politik Hukum Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah* [*Political Law Perspective of Islamic Civil and Criminal Law and Sharia Economics*] (Jakarta: Prenadamedia, 2016), 390-392.

[65] Robin Bush, "Regional 'Sharia' Regulations in Indonesia: Anomaly or Symptom?" in Greg Fealy and Sally White (eds.), *Expressing Islam: Religious Life and Politics in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2008), 176.

The Constitutional Court rejected the petitioner's argument, declaring that Indonesia is not a religious state although it is also not a secular state. Indonesia is not a religious state based solely on one particular religion, but Indonesia is also not a secular state that does not pay any attention to religion and devotes full religious affairs to individuals and society. In relation to the foundations of the Pancasila philosophy, national law must ensure the integrity of the ideology and integration of the territory of the state, and establishing justice and civility religious tolerance. Thus, national law becomes the integrating factor that unifies the nation. The decision held that state service to citizens is not based on majority or minority adherents of religion, tribe, or race.

In the context of constitutional law, Islamic law is not a formal source of law, but the material source of law. Islamic law is indeed a source of national law, but it is not the only one, because in addition to Islamic law, customary law and Western law as well as other legal traditions became sources of national law. Therefore, Islamic law can be one of the material sources as an ingredient of national law. Islamic law may be used in conjunction with other sources of law.

5.2 Polygamy: State Authority to Regulate Muamalah

The petitioner, M. Insa, filed a petition for a judicial review of the Marriage Law, as it would not allow him to perform polygamy unless he could meet certain conditions, including his first wife's consent. Polygamy permits are granted by the courts if they meet the terms and conditions of the Marriage Law. The petitioner argued that some aspects of the Marriage Law are contrary to Islamic law, including Article 3 paragraph (1), which states that in principle marriage is monogamy.

In deciding this case (Decision No. 12/PUU-V/2007), the Constitutional Court not only used constitutional arguments, but also a sharia argument. According to the Court, polygamy is not an Islamic creation, because before Islam revealed polygamy has been practiced widely and for a long time. Instead, the coming of Islam is to gradually regulate the existing practice of polygamy to ensure it is not applied arbitrarily by men.

The Constitutional Court stated that the purpose of marriage is to create peace of heart (*sakinah*), which can only be created if both partners keep *mawadah*, which is to love each other without expecting something and being willing to sacrifice to give joy. To achieve this, the law requires the permission of an existing wife if the husband wants to be polygamous. The Constitutional Court also stated that according to Islamic law, polygamy is permissible (*mubah*), not a necessity or recommended, provided that it can do justice. If not able to give justice, polygamy may become *makruh* (objectionable, but not prohibited).

Furthermore, the Constitutional Court considered that the state is the highest organization in society formed based on agreement. The state not only has the authority to govern, but also the obligation to regulate to ensure justice. Therefore, the state also has an obligation to support the realization of a *sakinah* family.

The Constitutional Court affirmed that polygamy could be regulated by human beings because from the religion side, marriage is part of the human relationship (*muamalah*) and not the individual relationship with God (worship). Worship is arranged in detail in the Qur'an and cannot be changed, in contrast to *muamalah*, which only sets the basic principles in the Qur'an and leaves the detailed settings as human authority. Polygamy is not worship, but *muamalah*, so the state is not prohibited to determine the requirements that must be met.

5.3 Blasphemy Law

In response to a petition against Indonesia's Blasphemy Law, the Constitutional Court made a decision that affirmed the relationship between state and religion. This verdict can be interpreted as "religiousation" because it incorporates religious judgment as one element in criminal law. Decision Number 140/PUU-VII/2009 concerned the review of Law Number 1/PNPS/1965 on the Prevention of Religious Abuse and/or Blasphemy (the Blasphemy Law).

The case was filed by seven non-governmental organizations and four religious leaders, namely Abdurrahman Wahid, Musdah Mulia, M. Dawam Rahardjo, and Maman Imanul Haq. The provisions of the petition covered Articles 1 to 4 of the Blasphemy Law. The petitioners presented four main arguments. First, Article 1

of the Blasphemy Law is discriminatory because it gives the right to determine "deviant interpretations" and "deviant religious activities" to the state, which the state cannot essentially do. This is because the state is not entitled to declare a belief as deviated or perverted because the question of belief is the domain of God and the private domain of the individual. The petitioners argued Article 1 of the Blasphemy Law is contrary to the guarantee of freedom to believe, to express thoughts and attitudes according to conscience, and therefore contrary to the principles of the rule of law.

Second, Article 2 paragraph (1) and paragraph (2) of the Blasphemy Law are contrary to the principle of equality before the law and the principle of legal certainty because they allow the government to prohibit and dissolve religious activities that it considers to be deviant. Such norms constitute a restriction of freedom of association, assembly, and expression as guaranteed by the Constitution.

Religious manifestation (*forum externum*) including the right to associate, organize religious institutions, and to gather in worship *(forum internum)* are part of freedom of religion. Dissolution and prohibition of an organization or belief based on mere interpretations and activities considered in Article 1 of the Blasphemy Law cannot be justified in a rule of law, because it would violate human rights.

The petitioners argued Article 2 paragraph (2) of the Blasphemy Law is contradictory to the principle of the rule of law because the procedure of an organization's dissolution is contrary to the principle of tolerance and diversity. Organizational dissolution and prohibition should be conducted through an independent and open court process taking into account the right to freedom of religion, diversity, and tolerance.

Third, Article 3 of the Blasphemy Law is considered discriminatory because it imposes a five-year prison sentence for persons, adherents, and members of a banned organization. According to the petitioners, this is a form of legal uncertainty as it poses a coercion threat that would lead to criminalization of religious freedom.

The act of interpreting and conducting religious activities is the *forum internum* of the right to freedom of belief, expressing thoughts and attitudes, according to one's conscience. Meanwhile, deliberate actions that publicly convey, advocate or obtain public support for religious interpretation and activities are the realization of the right to freedom of thought, religion and belief, so that they cannot be arbitrarily restricted. Article 3 is a limitation for coercive purposes because to declare those certain interpretations or activities as deviant are based on only one single interpretation.

The general elucidation of the Blasphemy Law says, "in recent years belief has multiplied and evolved in a very dangerous direction to the existing Religions". This shows that one of the aims of the Blasphemy Law is to protect recognized religions rather than protect individuals to express their own religion and beliefs. The protection of these recognized religions lies in another section in the elucidation of the Blasphemy Law, which states, "this Presidential Decision first prevents the occurrence of misappropriation of religious teachings which are regarded as fundamental teachings by the scholars of the religion concerned".

Fourth, Article 4 point (a) of the Blasphemy Law, which supplements Article 156a in the Criminal Code, is considered contradictory to the 1945 Constitution. The words "hostility", "abuse" and "defamation" in Article 156a are not measurable as they relate to the subjective assessment of the character, religious feeling, and worship.

Historically, the concept of "offense against religion" sought to protect the sanctity of religion itself, not the religious freedom of its adherents (individuals). Religion needs to be protected from the actions of people who can degrade and defame religious symbols, such as God, the Prophet, and the scriptures. However, because of the absence of a single religious understanding, who can behave in the name of religion to stand as a defender of religion?

The Constitutional Court rejected the petition. This ruling was based on the basic argument of the recognition of religious values in the Constitution and the first principle of Pancasila, the "Belief in the One Almighty God". Based on that principle, the understanding of the Indonesian rule of law does not have to be

the same as the concept of *rechtsstaat* (law) and the rule of law. The principle of the Indonesian rule of law should be understood from the perspective of the 1945 Constitution, which puts the principle of "Belief in the One Almighty God" as the main principle, as well as the religious values underlying the nation, not the separation between religion and state.

The Constitutional Court acknowledged that belief in God is the domain of the *forum internum*. However, that does not include freedom of non-religion. In the name of freedom, a person or a group cannot erode the religiosity of society that has been inherited as the values that imbue various laws and regulations in Indonesia.

The Indonesian Constitution does not allow for the promotion of freedom of non-religion, freedom for anti-religious promotion and it is not permissible to insult religious teachings or scriptures that are the source of religious beliefs or insult the name of God. This element indicates the main difference between the rule of law of Indonesia and the Western rule of law. In the government, the establishment of law, as well as the judiciary, the divine base and the teachings and religious values become the measuring tool for determining good law or bad law, even to define constitutional or unconstitutional law.

Based on the framework as described above, the Constitutional Court refers to the restriction of human rights on the basis of "religious values" as mentioned in Article 28J paragraph (2) of the 1945 Constitution. This is in contrast to Article 18 of the International Covenant on Civil and Political Rights (ICCPR) that does not include religious values as a limitation of individual freedom. Consequently, the state has a role to balance between human rights and basic obligations to realize a just human right. The state has a role to ensure that in the exercise of religious freedom one does not hurt the freedom of religion of others. This is where the state will realize its goal to achieve the best life possible.

The Constitutional Court considered that the Blasphemy Law does not impose restrictions on religious freedom, but restricts the expression of feelings or acts of hostility, abuse or defamation of a religion and restricts interpretation or activities that deviate from the main religious teachings. The Blasphemy Law

is considered not to prohibit a person from interpreting a religion or performing religious activities that resemble a religion embraced in Indonesia individually. That which is forbidden is intentionally publicly conveying, advocating or seeking public support, to make interpretations of a religion held in Indonesia or to carry out religious activities that resemble religious activities of that religion, where such interpretations and activities deviate from the main religion. If it is not regulated then it is feared such action could cause clashes and horizontal conflict, unrest, division, and hostility in society.

Freedom of belief, according to the Constitutional Court, is a freedom that cannot be limited by coercion and cannot even be judged, because it is in the mind and heart of a person. However, if the freedom to express thoughts and attitudes according to their conscience *(forum externum*) has to do with relationships with other parties in society, then such freedom can be limited.

The Constitutional Court stated that although the interpretation of beliefs on religious teachings is part of the freedom of *forum internum*, the interpretation must be in accordance with the main religious teachings through the right methodology based on the relevant religious teachings of their respective scriptures, so the freedom to do interpret a religion is not absolute. Interpretations that are not based on methodologies commonly recognized by religious adherents and not based on the relevant scriptural sources will generate reactions that threaten public order and security when presented or performed in public. In such cases, according to the Constitutional Court, restrictions can be applied. In this consideration, the Constitutional Court does not consider that in the Blasphemy Law there is no element of security and public order threats.

The Constitutional Court views that every religion has a commonly accepted main doctrine, so that the main religious teachings are determined internally by respective religions. Indonesia, as a religious state, has a Ministry of Religious Affairs that serves and protects the healthy growth and development of religion. The Ministry of Religious Affairs has organizations and tools to collect opinions from within a religion. The state does not autonomously determine the main religious teachings of a religion, but only based on the internal agreement of

religion concerned, thus there is no statism in determining the main religious teachings on the Blasphemy Law.

The Constitutional Court declared that decisions in the form of "orders and stern warnings" against a belief or idea is not a form of coercion that violates human rights. The State has a function as a social control and is given authority based on the mandate of the people and the constitution to regulate the social life in accordance with the 1945 Constitution. Therefore, in the event of a situation that causes conflict and disruption of public order, the only authority authorized to impose such compulsion is the state. If this authority were to be revoked, the state would no longer have a role to exercise law enforcement against irregular acts that abuse and/or tarnish religion, violate the law and disrupt public order. Revocation of Article 2 paragraph (1) of the Blasphemy Law would lead to more dangerous anarchy.

The Constitutional Court actually advised that the Blasphemy Law should be revised, both within the formal scope of legislation and substantially, in order to have material elements that are more clarified so as not to cause misinterpretation in practice. However, since the Constitutional Court does not have the authority to edit laws, but only to declare them constitutional or unconstitutional, then considering the substance of the Blasphemy Law as a whole, the Constitutional Court declared the Blasphemy Law to be constitutional. The amendment of the law is the authority of legislators through the legislation process.

5.4 Inter-religions Marriage

Case Number 68/PUU-XII/2014 involved a petition for a judicial review of Article 2 paragraph (1) of Marriage Law, which states, "a marriage is legitimate if it has been performed according to the laws of the respective religious beliefs of the parties concerned". The petitioners argued this provision is contrary to the equality before the law and government under the 1945 Constitution's Article 27 paragraph (1) and Article 28D paragraph (1) on the right to form families and have children through legal marriages, as well as the right to freedom of religion and belief. They argued the provision is also contrary to the Constitution's Article

28E Paragraph (1) and Paragraph (2), Article 29 Paragraph (2), and the right to freedom from discriminatory treatment under Article 28I Paragraph (2).

According to the petitioners, the provision implies the illegality of marriage that is carried out outside the state's interpretation of the bride and groom's respective religions and beliefs. The state "insists" that every citizen be subject to its interpretation of a religion or belief. The simplest example can be seen in the issue of inter-religious marriage. Each religion and belief have different views on inter-religious marriage. In fact, there can be different views in one religion about the validity of inter-religious marriage. The result is a lack of clarity on the legal status of the inter-religious marriage, whether it is legal or illegal.

The petitioners requested that the provisions of Article 2 paragraph (1) of the Marriage Law be amended to, "Marriage is valid, if carried out according to the law of each person's religion and belief, as long as the interpretation of religion and belief is submitted to the prospective bride."

The Constitutional Court did not answer the problem on the interpretation of religious law, but emphasized the relationship of state and religion, and its consequences on the Marriage Law. The Constitutional Court declared that the "Divine Principle" in the 1945 Constitution is a manifestation of religious recognition. As a state based on the belief in the "One Almighty God", actions or deeds committed by citizens have a close relationship with religion. One of the actions closely related to religion is marriage.

The aim of marriage is forming a happy, everlasting family or household based on belief in the "One Almighty God". A marriage is considered valid if carried out in accordance with the law of each religion or belief and is recorded according to such law. As a contract or agreement, marriage is a legal relationship between a man and a woman to live together as husband and wife. The contract is a formal relationship, both for those who bind themselves or for others in society. As an inner or spiritual bond, marriage is the affinity based on same willingness and sincerity between a man and a woman to live together as husband and wife. The contractual and spiritual bond in marriage is also a clear form of

assertion that a man and a woman want to form a happy and mortally durable marriage and family.

In the life of the nation and state based on Pancasila and the 1945 Constitution, religion becomes a foundation and the state has an interest in marriage. Religion is a foundation for the individual community. The state also plays a role in providing guidance to ensure the legal certainty of life together in the bonds of marriage. In particular, the state provides protection to form families and to have children through legitimate marriages that are manifestations and guarantees of human survival. Marriage should not be seen only from a formal aspect, but must also be seen from the spiritual and social aspects. Religion establishes the validity of substantive marriage, while the state establishes administrative legitimacy.

5.5 Recognition of Beliefs

Indonesia's recognition of six official religions means that native-faith groups had long been unable to state their beliefs on their mandatory identity cards, thereby denying their right to freedom of belief. This situation prompted four citizens of indigenous beliefs to petition the Constitutional Court for a review of Law Number 23 of 2006 as amended by Law Number 24 of 2013 on Population Administration (the Population Administration Law).

On 7 November 2017, the Constitutional Court ruled on case Number 97/PUU-XIV/2016 on the review of the Population Administration Law. In this decision, the Court emphasized that religion and belief are two different things but have equal status.

The petitioners complained they could not put their beliefs on their ID cards since their beliefs are not recognized by the state based on Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law. The petitioners argued the provisions are contrary to the rule of law principles as contained in the 1945 Constitution's Article 1 paragraph (3), the equality of citizens before the law in Article 27 paragraph (1), and the right of citizens not to be discriminated as guaranteed by Article 28I paragraph (2).

The Constitutional Court stated that the right to adhere to a religion or belief is a constitutional right, not a gift from the state. The state is formed precisely to protect (which also means respecting and guaranteeing the fulfilment of) such rights. In the context of Indonesia, this statement is no longer merely something of doctrinal value but has become the norm in the Constitution and therefore binds all branches of state power and citizens.

Article 28E paragraph (1) and paragraph (2) of the 1945 Constitution covers the state's recognition of the right to freedom of religion and belief for anyone, and Article 29 of the 1945 Constitution is an affirmation of the role that must be carried out by the state to ensure that every citizen is free to embrace religion and beliefs. Article 28I paragraph (1) of the 1945 Constitution affirms that the right to freedom of religion and belief is included in the group of rights that cannot be deprived under any circumstances. The state, especially the government, has the obligation and responsibility to respect, protect, and fulfil these rights under Article 28I paragraph (4) of the Constitution.

Article 28E paragraph (1) and paragraph (2) and Article 29 paragraph (2) of the Constitution place religion in relation to belief, where religion is belief itself. However, this provision can also be interpreted that religion and belief are two different things or not the same, but both are recognized for their existence. Such understanding arises because textually Article 28E paragraph (1) and paragraph (2) of the Constitution regulates religion and belief separately.

The formula used by the Constitution mentions the word "religion" and the word "belief" simultaneously by using the conjunction "and". From the technical aspect of norm formulation, the use of the word "and" shows a cumulative nature. Thus, the word "religion" and the word "belief", which are formulated cumulatively, indicate that "religion" and "belief" are two things that can indeed be grouped differently.

Article 61 and Article 64 of the Population Administration Law are under the sub-chapter "Population Documents". A population document is one that has legal force as authentic evidence, which includes the regulation of a number

of citizens' rights, including freedom of religion and belief. Efforts to carry out an orderly population administration must not reduce the rights of the citizens, including freedom of religion and belief.

The provisions in Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law, regulate that the "religion" is recognized religion in accordance with statutory regulations. In other words, freedom to adhere a religion is limited to religion that recognized in accordance with statutory regulations. Consequently, *a contrario*, the responsibility or constitutional obligation of the state to guarantee and protect freedom of religion is limited to citizens who adhere to a recognized religion. This is not in line with the spirit of the 1945 Constitution, which explicitly guarantees that every citizen is free to embrace religion and belief and to worship according to that religion and belief. More fundamental, Article 61 paragraph (1) and paragraph (2) as well as Article 64 paragraph (1) and paragraph (5) of the Population Administration Law implicitly construct the freedom to adhere to a religion as a gift of the state.

The Constitutional Court stated that the word "religion" as contained in Article 61 paragraph (1) and Article 64 paragraph (1) of the Population Administration Law must be declared contrary to the 1945 Constitution as long as it is not interpreted as including "belief". That is, the word "religion" in Article 61 paragraph (1) and Article 64 paragraph (1) of the Population Administration Law must be interpreted as including "belief". Therefore, the religion column on Family Cards and ID cards for believers is filled with "believers" and not left blank or marked with a line.

Based on the analysis of decisions above, it shows that the Constitutional Court has used the pattern of relations between the state and religion based on Pancasila to review several laws related to religion. The Constitutional Court places Pancasila as a reference in determining the differences and relations between the state and religion. There is no decision of the Constitutional Court that shows a tendency toward becoming a religious state or becoming a secular

state. The state and religion are interrelated within certain limits. This is in line with Hosen's research, which concludes that there is no indication of efforts to change the ideology or put the sharia Islam above the Constitution. Islamic law goes along with national law and can even be restricted by national law. On the other hand, the decisions of the Constitutional Court also emphasize an understanding different to that of Western rule of law, which uses religion as one measure of whether a law is good or not, or even constitutional or not.[66]

In line with that, Alfitri argues that the Constitutional Court declares itself as a legal authority in interpreting the Constitution, and therefore has the power to interpret and limit Islamic law in Indonesia under the Constitution. The Constitutional Court declares itself not bound by the classical interpreters of Islamic law and their opinions. The Constitutional Court has established its power to interpret and limit Islamic law in accordance with the state agenda (such as the enforcement of human rights).[67]

The analysis of the decisions above also shows that the secularity of Pancasila fulfills four models of secularity based on the theory of multiple secularities. In Decision Number 19/PUU-VI/2008 it was emphasized that based on Pancasila, national law must be able to ensure the ideological and territorial integrity of the state as well as uphold justice and religious tolerance. National law is a unifying factor for the nation that serves not on the basis of adherents of the majority or minority religions. This represents all models of secularity, namely for the sake of individual rights and freedoms; in order to balance or reconcile religious diversity; for the sake of social integration and national development; and for the sake of the independent development of the functional domains of society.

Decision Number 19/PUU-VI/2008 also confirms that although religious interpretation is an area of freedom in the *forum internum*, interpretation must be in accordance with main religious teachings so as not to cause reactions that threaten public order and security. This limitation of interpretation is a model of

[66] Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law* 16, no. 2 (March 2016): 8-9.

[67] Alfitri, "Putusan Mahkamah Konstitusi Sebagai Tafsiran Resmi Hukum Islam di Indonesia [Constitutional Court Decisions as the Official Interpretation of Islamic Law in Indonesia]," *Jurnal Konstitusi* 11, no. 2 (June 2014): 313.

secularity that is needed to achieve social integration and national development. The secularity model for social integration and national development can also be found in Decision Number 12/PUU-V/2007, which states that the state has an obligation to support the formation of a *sakinah* family by limiting polygamy even though according to religious law it is permissible.

Decision Number 140/PUU-VII/2009 recognizes that belief in God is the domain of the *forum internum*. However, the state has a role to ensure that in the exercise of religious freedom does not hurt the freedom of religion of others. The state can limit activities that are part of religious freedom so as not to interfere with the rights of others and to further the quality of life of the community. On the one hand, this is a form of guarantee of rights and freedoms, and on the other hand it is an effort to realize social integration.

In Decision Number 68/PUU-XII/2014, the Constitutional Court stated that marriage is not only a contract but also a spiritual bond based on religion. Therefore, the legal requirements for marriage based on religion, which are the substance of the Marriage Law, do not conflict with Pancasila. However, a marriage must be registered according to state law. State law and religious law have different domains in the marriage process. This is a form of secularity for the sake of individual rights and freedoms and for the sake of social integration and national development.

Decision Number 97/PUU-XIV/2016 affirms that the state was formed to protect rights, including the right to adhere to a religion or belief. Every religion and belief should get the same service. Religion and belief are two different things, but both must be treated equally based on their position towards the state, not against other religions or beliefs. Therefore, "belief" must also receive the same and equal services as "religion", including to be included on the national ID card. The view of a religion toward another religion or belief may not be the state's view. This is a form of differentiation between religious and state areas that is needed for the sake of individual rights and freedoms.

VI. CONCLUSION

The Constitutional Court has a significant role in determining the differentiation and relationship between state and religion. The decisions of the Constitutional Court affirm and sharpen the differentiation and relations between state and religion based on Pancasila. There is a clear distinction between state institutions, state law and religion. The state remains in a profane or worldly realm with all its rules and devices, which are also established and carried out in a secular manner. Religion could influence and enter as the substance of state law, but the state could limit the religious law that becomes the substance of state law.

Through its decisions, the Constitutional Court plays a role in affirming Indonesian secularity based on Pancasila, thereby fulfilling four models of multiple secularities, namely secularity for the sake of individual rights and freedoms, secularity in order to balance or reconcile religious diversity, secularity for the sake of social integration and national development, and secularity for the sake of the independent development of the functional domains of society.

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Fake News and Internet Shutdowns in Indonesia: Symptoms of Failure to Uphold Democracy

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Abstract

The Indonesian government limited or shut down internet access during separate riots in Jakarta and Papua in 2019. The justification for blocking the internet and disabling certain features of social media platforms was to quell the unrest by ceasing the spread of fake news. Nevertheless, the government did not declare a state of emergency in response to either situation, triggering debate on whether the internet restrictions had any strong constitutional basis or if they were out of proportion and unconstitutional. This study evaluates the government's policy on internet shutdowns to reduce the spread of fake news amid riots, and explicates when the state of emergency "feature" might be activated. The research method of this article is a doctrinal legal approach, which critically examines whether the government policy was excessive, and to what extent a state of emergency can be implemented by minimum standard requirements. The result of this study shows the riots in Jakarta and Papua ought not be categorized as national threats; hence, the internet shutdown was out of proportion. Fake news is part of the price we pay for a free society; thus the article argues that an internet shutdown is not a proper way to combat fake

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news. Furthermore, the government has failed to fulfill the minimum standards to justify the internet shutdowns. Access to the internet is a new face of democratic pillars, so blocking internet access without any sufficient legal instruments and correct constitutional interpretation might indicate symptoms of a failure to uphold democracy.

Keywords : Democracy, Fake News, Human Rights, Internet Shutdown, State of Emergency.

I. INTRODUCTION

The Indonesian government restricted access to certain features of social media platforms in Jakarta and some other cities over May 22–25, 2019, amid concerns that dissemination of fake news would exacerbate riots in the city's center, following the announcement of the results of that year's presidiental election. From August 21 to 11 September, 2019, the government blocked[1] internet access in Papua in response to widespread rioting that had been sparked by the arrest of Papuan students in Surabaya, East Java, for allegedly disrespecting the Indonesian flag.[2] The government announced the internet restrictions through press releases, Number 106/HM/KOMINFO/05/2019 and Number 155/HM/KOMINFO/08/2019, issued by the Minister of Communication and Information.[3] During the unrest, the government also blocked 2,184 websites and restricted social media access to counter the spread of what it deemed to be fake news. The shutdowns were criticized as a potential violation of the constitutional right to freedom of access to information. Indeed, the media and information are pillars of democracy, protected under Article 28F of Indonesia's 1945 Constitution, which states, "Every

[1] Internet shutdown means that an intentional disruption of internet or electronic communication, rendering them inaccessible or effectively useless to exert control over the flow of information, see Media Defence, "What is an Internet Shutdown?", Media Defence, 2020, https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/what-is-an-internet-shutdown/, accessed on May 30, 2022.

[2] Desy Setyowati, "Kominfo Tutup 2.184 Akun dan Situs Selama Pembatasan Media Sosial [Kominfo Closes 2,184 Accounts and Sites During Social Media Restrictions]," Kata Data, 2019, https:// katadata.co.id/desysetyowati/digital/5e9a5189f1e60/kominfo-tutup-2184-akun-dan-situs-selama-pembatasan-media-sosial, accessed on April 2020.

[3] The Ministry of Communication and Information in 2019 issued a series of press releases to announce social media restrictions and internet bans. The press release was used to become the legal basis of the Ministry of Information and Technology to declare the state of emergency and internet shutdown in Papua.

person has the right to communicate and to obtain information for the purpose of self-development and social environment, and has the right to seek, obtain, possess, store, process and convey information using any channels available."

The internet shutdown sparked a major debate over whether internet shutdowns were proper and constitutional when merely using a press release as a legal basis. Article 28J (2) of the 1945 Constitution states, "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 other words, the state may limit a person's human rights, but such restrictions must be regulated by law and in accordance with considerations of morality, religion, security and public order. In addition, when Indonesia wants to determine a state of emergency, as regulated in Article 12 of the 1945 Constitution, the President declares a state of emergency through law.

During the periods of blocking social media features and the internet, the government used Indonesia's mainstream media to dominate coverage of the events, as most of the country's media owners are partisan and support the coalition of the incumbent president. The country's media therefore carried the government's press conferences and press releases on the issues. The underlying reason for blocking social media features, such as video and photo sharing, and pushing the official news, was to combat the spread of fake news. This approach was not in line with the international standard on protecting human rights: freedom to access information and freedom of expression.

Thus, this article critically evaluates several matters. First, it evaluates the government's action on the social media restrictions and the internet shutdown. It then discusses the relation between a state of emergency and the spread of fake news. Next, the analysis explicates the minimum standard and criteria of the state of emergency doctrine. It also examines online speech freedom and internet curbs in both India and the United States of America.

II. RESEARCH METHOD

This article uses a doctrinal legal research method with a conceptual and comparative approach to critically evaluate the government's policy on the social media restrictions and internet shutdown during the Jakarta and Papua riots to identify whether such action was constitutional or unconstitutional. It also analyzes in what conditions and cases a state of emergency "feature" can be declared, as such a measure will affect basic rights and freedoms. This study begins by analyzing the doctrine of the state of emergency and considers whether the government should activate a state of emergency to combat fake news. It also explicates that the local riots cannot be categorized as a national threat since the impact was only at local level. The government could use ordinary substitutional efforts rather than an internet shutdown. In addition, some jurisprudence from other democratic societies indicate that internet shutdowns to tackle fake news are unconstitutional. A precautionary principle plays an important role prior to declaring a state of emergency.

III. RESULT AND DISCUSSION

3.1. Brief Introduction of Fake News

The Fake News Challenge, a project that encourages the development of algorithms aimed at reducing the spread of misinformation, states that fake news means an utterly fabricated claim or story created and intended to deceive, often for secondary gain. Likewise, economists Hunt Allcott and Matthew Gentzkow[4] have said fake news is news articles that are intentionally and verifiably false and could mislead readers. Eventually, the domino impact of this phenomenon is social conflict, mistrust toward the media, and defamation.

As a propaganda technique, fake news was famously termed a "firehose of falsehood" by Russia's *Komitet Gosudarstvennoy Bezopasnosti*

[4] Hunt Allcott and Matthew Gentzkow, "Social Media and Fake News in the 2016 Election," *Journal of Economic Perspective* 31, no.2 (2017): 213.

(Committee for State Security) during the annexation of the Crimean Peninsula to disseminate partial truths or outright fictions. In these circumstances, Christopher Paul and Miriam Mathews[5] give some analysis. In the firehose of falsehood technique, there shall be high volume, repetitive and continuous information, no commitment to objective reality, and no commitment to consistency.

To manifest the firehose of falsehood technique, the content creator has to produce fake news in huge quantities without considering the truth. Before discussing how governments or private entities may address the widespread issue of fake news, it is necessary to define the background that contributes to the current problem. A definition for fake news should consider past appearances of misinformation, disinformation, and propaganda, analyze their purposes, and examine their effects for the current incarnation to be addressed.

3.2. Basic Right to Use Internet and Social Media: Indonesian Constitutional and International Perspectives

The internet and social media are now classified as modern democratic forums, even though they carry the harmful risks of fake news, false statements, misinformation, and misleading information. Despite those risks, the media is a part of the democratic tools to embody the sovereignty of the people. Fake news is one of the most talked about topics in the world, especially since the 2016 United States presidential election, in which Donald Trump attacked the media by labeling critical coverage as "fake news", while at the same time using social media to disseminate propaganda. Republicans used fake news as a campaign model to influence voters, a move that was echoed in Indonesia's 2019 presidential election.[6]

Fake news causes horizontal conflict, which threatens the way of life of Indonesian society and can also affect national security. This has prompted the

[5] Christopher Paul and Miriam Mathews, "The Russian "Firehose of Falsehood" Propaganda Model: Why It Might Work and Options to Counter It," Rand Corporation, 2019, https://www.rand.org/pubs/perspectives/PE198.html, accessed on January 30, 2020.

[6] Kate Lamb, "Fake News Spikes in Indonesia ahead of Elections," The Guardian, March 20, 2019.

government of Indonesia to filter, block and even shut down the internet, as well as restrict social media. This repressive policy action is taken on the grounds of protecting the positive development of the internet and social media from such negative impacts.[7]

3.2.1. Indonesian Perspective

Freedom of expression embodies the spirit of democracy and is a fundamental right guaranteed by Indonesia's 1945 Constitution. Article 28E Paragraph (3) of the Constitution states that every person has the right to freedom of association, assembly, and expression. This freedoms of speech is limited by Article 28J Paragraph (1) and (2), which state:[8]

(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.

Those two articles mean that human rights fulfilment in Indonesia can be restricted for the sake of protecting national security and the public interest. This restriction may be construed as cultural relativism or particularism, as it appears contrary to the universalism principle. The government has argued that internet and social media shutdowns were relevant because Indonesia faced the threat of violence, as well as separatist sentiments in Papua province.[9]

The original intent of the 1945 Constitution's drafters allowed limitations on human rights. When the Constitution was amended over 1999-2002, such limitations were clearly stipulated in Article 28J, which comes at the end of the section on human rights provisions.[10] The interpretation of Article 28J can

[7] Ika Karlina Idris, "The Internet Shutdown in Papua Threatens Indonesia's Democracy and Its People's Right to Free Speech," The Jakarta Post, https://www.thejakartapost.com/academia/2019/09/02/the-internet-shutdown-in-papua-threatens-indonesias-democracy-and-its-peoples-right-to-free-speech.html, accessed September 2, 2019.
[8] The 1945 Constitution of Indonesia Article 28E Paragraph (3) and Article 28J Paragraph (1) and (2).
[9] Idris, "The Internet Shutdown."
[10] Colman Lynch, "Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case," *Columbia Human Rights Law Review* 40, (2009): 582.

be seen in the Constitutional Court's decision Number 21/PUU-VI/2008 on the case of the "Bali nine" heroin smugglers. The Constitutional Court argued that the death penalty could be imposed in Indonesia by taking Article 28J as a legal basis. This means that the restriction of human rights is lawful as long as regulated into law.[11]

Soeharto, Mahathir Mohamad, and Lee Kuan Yew were three leaders of Southeast Asian nations who rejected the universalist conception of human rights and instead espoused "Asian values" that put communitarian values over individual rights. They believed that universalism comes from liberal Western human rights, and that particularism is a nationalist ideology with local values. A relatively similar view was shared by former Indonesian president B.J. Habibie, who led the country over 1998 to 1999 in the initial stage of its transition from authoritarianism to democracy. He argued that the international human rights conception has no absolute value. He said that even though human rights are inherent to all human beings, humans do not live alone as a "*zoon politicon* (political animal)" or human society. Hence, people must respect the rights of other people for the sake of social stability.

Consequently, in addition to defending individual rights, humans also must respect other people's rights, namely the obligation of human rights.[12] Even though human rights are inherent in each individual, humans cannot avoid social interaction. Because of that, under human nature, a balance and harmony between the freedom of individual rights and social responsibility should be kept.[13] Another principle that must be upheld is the balance between universal human rights values and recognition of national values. This means that the international community must also recognize and agree that implementing human rights values is the authority and responsibility of the government or country concerned. Habibie emphasized the importance of respecting the rights

[11] Constitutional Court Decision No. 21/PUU-VI/2008 (2008).
[12] Habibie, Detik-Detik yang Menentukan: Jalan Panjang Indonesia Menuju Demokrasi [Decisive Moments: Indonesia's Long Road Towards Democracy] (Jakarta: THC Mandiri, 2006): 44.
[13] Ibid., 44.

of others. Respecting other people's rights is an obligation of humans; hence, there is the theory of right and obligation.[14]

The social obligation concept is also clearly stipulated in Decree No. XVII/MPR/1998 on Human Rights, issued by the People's Consultative Assembly, and in Article 28J paragraph (1) of the 1945 Constitution. Indonesia realizes and recognizes that each individual is part of society. The community consists of people who have rights, which means they also have to respect the rights of others in order to balance the nation's life. This means that in addition to having human rights protection, humans must also respect, protect, and fulfil the rights of others as an obligation for everyone.

Polarization of thinking about human rights is also reflected in the 1945 Constitution, with particularism on human rights stemming from Article 28J. The theoretical debate and implications of human rights protection and obligations also arise from existing law, especially in the Indonesian Criminal Code, which was inherited from the Dutch colonial government. Article 53 and Article 54 of the Criminal Code regulate particularism that restricts freedom of the press. The purpose of those articles is the protection of newsmakers and publishers. As long as they can provide correct information, they would be free from prosecution. Otherwise, they could face punishment under criminal law for defamation.[15] This arrangement is different from the principle of freedom of the press in a universal perspective that does not recognize any exceptions. Universalism may be regarded an another name of liberal human rights.

In 2004, the Constitutional Court rejected a challenge to Article 43 of the Human Rights Court Law submitted by former East Timor governor Abilio Jose Osorio Soares, who was being prosecuted for alleged human rights violations. Soares wanted his trial at the Human Rights Court halted, arguing there was no legal basis for retroactive prosecution. His petition challenged Article 43

[14] Ibid., 480.

[15] Suparman Marzuki, "Perspektif Mahkamah Konstitusi Tentang Hak Asasi Manusia: Kajian Tiga Putusan Mahkamah Konstitusi: Nomor 065/PUU-II/2004; Nomor 102/PUU-VII/2009 dan Nomor 140/PUU-VII/2009 [Perspective of the Constitutional Court on Human Rights: A Study of Three Decisions of the Constitutional Court: Number 065/PUU-II/2004; Number 102/PUU-VII/2009 and Number 140/PUU-VII/2009]," Journal of Yudisial 6, no. 3 (2013): 194-195.

Paragraph (1) of the Human Rights Court Law as being contrary to Article 28I of the 1945 Constitution. He argued the Human Rights Court had no jurisdiction to examine his case because the alleged violations had occurred in 1999, before the Human Rights Court existed. Using the retroactive principle, the Human Rights Court can examine paste cases of human rights violations.

According to the petition, the Human Rights Law contradicts Article 28I Paragraph (1) of the 1945 Constitution on the right not to be prosecuted on the basis of a retroactive law. Soares's lawyers therefore argued that Article 43 Paragraph (1) should declared be null and void. But the Constitutional Court, in decision Number 065/PUU-II/2004, decided that Article 43 (1) is constitutional because the right to be free from retroactive prosecution could be set aside under Article 28J of the Constitution.

Even though Indonesia recognized cultural relativism by having Article 28J Paragraphs (1) and (2), which became the legal basis for the government to conduct internet and social media shutdowns, the government failed to explain or formally declare a state of emergency. The government can block internet access in Papua as long as it fulfills the formal requirement of the declaration of a state of emergency, prescribed by law, especially through a government regulation-in-lieu-of-law. Constitutional emergency powers mean that the executive body under the president can declare a state of emergency and rule by extraordinary actions and policies.

3.2.2. Internet and Social Media Use: An International Perspective

The right to freedom of expression and access to information is provided in Article 19 of the Universal Declaration of Human Rights, stating that everyone has the right to freedom of opinion and expression. The declaration regulates the right to hold opinions without interference and seek, receive, and impart information and ideas through any media regardless of frontiers. It was regulated in the International Covenant on Civil and Political Rights (ICCPR), Article 19, that 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 print, in the form of art, or

through any other media of his choice. Therefore, the internet has become an important tool for expression.[16]

All rights are universal, indivisible, interdependent and interrelated. While international human rights law allows legitimate limitations, derogations and reservations, they must be exercised under strict circumstances. Even in exceptional situations, particular core human rights must apply at all times.[17] According to the ICCPR, which Indonesia ratified in 2005, some rights can never derogate, even in times of public emergency that threaten the state's life. Those non-derogable rights under the ICCPR are: the right to life (Article 6); prohibition of torture, cruel, inhuman and degrading treatment (Article 7); prohibition of medical or scientific experimentation without consent (Article 7); prohibition of slavery, slave trade and servitude (Article 8); prohibition of imprisonment because of inability to fulfill contractual obligation (Article 11); principle of legality in criminal law (Article 15); recognition everywhere as a person before the law (Article 16); and freedom of thought, conscience, and religion (Article 18).

According to General Comment 34 of the ICCPR, the United Nations (UN) Human Rights Committee considers freedom of opinion is an element that can be restricted. Restrictions on human rights need to follow certain principles to be legitimate. The ICCPR underlines the criteria of necessity and transparency. The principle of proportionality is also cited.

Article 4 of the Indonesian Human Rights Law states that freedom of expression and thoughts are part of non-derogable rights. In that article, freedom of expression and thoughts must align with social values and religion.[18] Furthermore, the restriction of human rights must be prescribed in the law. Unfortunately, the Indonesian government did not declare a state of emergency and stipulate it into law when it cut or limited internet access.[19] The government only acted through the Minister of Communication and Information, who said

[16] Iland, "Freedom of Expression and Opinion in Wartime: Assessing Ukraine's Ban on Citizen Access to Russian-Owned Websites," *American University of International Law Review* 33, no. 4 (2018): 955-956.
[17] UNHR, Core Human Rights in the Two Covenants, September (2013).
[18] Indonesian Human Rights Law 1999, 4.
[19] Ibid., 73.

Papua was in a serious situation, so the government would shut down internet activity in the province to prevent provocation through the internet and social media.[20]

3.3. National Security Justifications

The internet and social media have been subjected to shutdowns in countries such as Myanmar, Venezuela, Sudan, Sri Lanka, and India.[21] The ten countries with the most censorship are Eritrea, North Korea, Turkmenistan, Saudi Arabia, China, Vietnam, Iran, Equatorial Guinea, Belarus, and Cuba. The general motive of repressive action to restrict the internet, social media and the press is to secure a regime's power and order.[22] Some countries said they restrict the internet to ensure their sovereignty amid a state of emergency.

There are various reasons for declaring a state of emergency. German legal scholars A. Hamann and Hans-Ernst Folz divided emergencies into seven categories. Hamann identified them as: foreign invasion, public actions aimed at subervsion of the constitutional regime (*coup d'état*), serious violations that threaten public order and security, disasters, public riots in vital areas of the economy, public service disruptions, and problems in financial and economic development. [23]

In 2019, the Indonesian government restricted access to certain social media features in Jakarta and shut down the internet in Papua. The government said the action was necessary to prevent the spread of fake news that could provoke Papuans and destabilize Papua's political situation. Unrest had occurred in Papua following the racial abuse and arrest of 43 Papuan students in Surabaya, East Java, for allegedly disrespecting the Indonesian flag. However, the rioting was only at the local level in Papua. The central government could have solved the problem in Papua without turning off the internet in the province. Government

[20] Ministry of Communication and Information Press Release No. 159/HM/KOMINFO/08/2019.
[21] Richie Koch, "All the Internet Shutdowns of 2019 so far," Security Boulevard, 2019.
[22] Committee to Protect Journalists, "10 Most Censored Countries," Committee to Protect Journalists, September 10, 2019., https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist/, accessed April 10, 2021.
[23] Domrin Alexander, *The Limits of Russian Democratisation Emergency Powers and State of Emergency* (London: Routledge, 2012): 206.

officials in Papua and East Java said the unrest was due to miscommunication between Papuans and the government in Surabaya. In Jakarta, the government restricted social media access in May 2019 in response to riots that occurred after losing presidential election candidate Prabowo Subianto made unsubstantiated allegations of massive, systemic voting fraud. Specifically, the sharing of videos and images was slowed or stopped on certain social media platforms, such as WhatsApp and Facebook. Opponents of the move claimed the restrictions were unjustified. Demonstrations are a normal situation in a democratic society and guaranteed as freedom of expression.[24] Therefore, the reason to switch off the internet in Papua and curb social media functions in Jakarta to quell demonstrations was deemed baseless as it did not fulfill the requirement of a state of emergency. The riots were part of a domestic problem and could be solved by the respective local governments.

The government must formally declare the enforcement of a state of emergency, describing the situation as an emergency. This action has an important role to let people know the current condition, so they will see the scope of what is going on with the state and the effect on human rights protection.[25] That action could be the justification for the government to violate or restrict human rights lawfully. That action also reduces the possibility of negative social reactions that could prompt calls for impeachment of the government. The question arises as to who should be given the authority to decide that the country is experiencing an emergency. It is important to maintain the principles of legality and legal certainty when an emergency is enacted. Carl Schmitt argued that the authority to decide is the holder of sovereignty. He wrote,[26]

"*Sovereign is he who decides on the exception.... Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations.... For a legal order to make sense, a normal situation*

[24] Emily Howie, "Protecting the Human Right to Freedom of Expression in International Law," *International Journal of Speech-Language Pathology* 20, no. 1 (2018): 13.
[25] Osgar S. Matompo, "Pembatasan Terhadap Hak Asasi Manusia Dalam Prespektif Keadaan Darurat [Restrictions on Human Rights in the Perspective of Emergencies]," Journal of Media Hukum 21, no. 1 (2014): 67-68.
[26] Ibid., 77-79.

must exist, and he is sovereign who definitely decides whether this normal situation actually exists."

According to the principles above, Indonesia unfortunately did not give a clear explanation or firm legal basis when curbing or shutting down the internet. The authority to shut down the internet was exercised by the Ministry of Communication and Information by issuing a press release and holding a press conference. Issuance of a ministerial press release was not a strong enough basis to warrant such serious action. According to legal principle, if the government wants to shut down the internet, it must declare first that Indonesia is in a state of emergency and the government will take over all forms of mass communication, including the internet. Any internet shutdown must also be stipulated into law as martial law or emergency law, as mandated by Article 28J of 1945 Constitution on human rights restriction. A shutdown is only valid by prescription of the law and the restriction must be in line with moral, social, and public order values. A press release or a press conference by the Minister of Communication and Information is not part of legislation and not equivalent to law.

Under Article 12 of the 1945 Constitution, the president has the right to declare a state of emergency. The conditions for such a declaration and the subsequent measures regarding a state of emergency are regulated by law. In the case of the internet restrictions in Jakarta and Papua, the government failed to show that Indonesia was in a state of emergency that required a shutdown of the internet.

The conditions for limiting and reducing human rights are interpreted in more detail in the Siracusa Principles, which state that restrictions on human rights must not jeopardize the essence of the rights. All limitation clauses must be interpreted expressly and aimed at supporting rights. This principles also emphasize that rights restrictions must not be enforced arbitrarily. Restrictions on human rights can only be done if they meet the following interpretive principles: prescribed by law, in a democratic society, public order, public health, public morals, national security, public safety, rights and freedoms of others or the rights or reputations of others.

General Comment No. 29 on Article 4 of ICCPR outlines two requirements that must be met for the restriction of human rights: the situation must amount to a public emergency that threatens the nation's life, and the state party must have officially proclaimed a state of emergency.[27] If we go back to the internet curbs in Indonesia, the government failed to describe that Indonesia faced an emergency that would bring the country to a detrimental situation. The situation in Papua was a local conflict that could be settled without violating human rights via the internet shutdown. The government said the legal basis of its action was the Electronic Information and Transactions Law, but that law is for prohibiting illegal electronic transactions and documents that are deemed immoral, defamatory or hate speech.

Implementing a state of emergency principle in a country is essential to legitimize the state action of declaring an emergency. The government must follow the declaration principle, legality principle, communication principle, temporary principle, special threat principle, and proportionality principle.[28] Those principles are notable because they will give legal certainty, so the restriction of human rights will have a strong legal basis and reasoning. Due process must also be respected since it is the heart of the law. Therefore, if the state respects human rights, the rule of law must be implemented, even in a state of emergency.

When the Indonesian government curbed social media features in Jakarta and shut down the internet in Papua, it could not prove that Indonesia was in an emergency. The government used its power for political purposes. When demonstrations took place in Jakarta in May 2019, the government was afraid that the protesters would be provoked by the spread of fake news that the presidential election was unfair.[29]

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[27] Jennifer Corrin, "Cultural Relativism vs. Universalism: The South Pacific Reality," in *The Universalism of Human Right,* ed. Rainer Arnold (Dortrecht: Springer, 2013): 103.

[28] Jimly Asshiddiqie, Hukum Tata Negara Darurat [Emergency Constitutional Law] (Jakarta: Raja Grafindo Persada, 2007): 9.

[29] Anthony Cuthbertston, "Indonesia Blocks Facebook and Whatsapp Features after 'Fake News-Inspired' Riots and Deaths", The Independent, May 23, 2019, https://www.independent.co.uk/tech/indonesia-facebook-whatsapp-ban-blocked-election-riots-a8926706.html, accessed August 17th, 2019.

3.4. State of Emergency and Derogation of Human Rights

Derogation refers to the legally mandated authority of states, which are otherwise bound by the obligations of treaties or constitutions, to suspend certain civil and political liberties in response to crises. Derogation can be justified solely by the state's aim to return to normality.[30] This mechanism has several purposes – defining specific human rights, allowing states to derogate from certain rights, and outlining the situations in which these actions are considered lawful – to provide necessary flexibility with minimal or monitored rights infringement. The legal consequences of adopting international treaties into national law is that the state must respect and commit to the agreement it signed.[31]

There are some important legal bases for derogating human rights in Indonesia during an emergency. Those three legal bases are the ICCPR General Comment No. 29 on the Derogations of Human Rights during a State of Emergency, the Siracusa Principles, and Articles 12 and 28J (2) of the 1945 Constitution. First, in ICCPR, the derogation of human rights is allowed as long as extreme conditions occur. Several requirements, outlined in the previous section, must be fulfilled, such as wartime, illegal impeachment, disasters, etc. These provisions are broadly reproduced in the ICCPR, which means that the human rights are not absolute. As the ICCPR underlines, the exercise of the rights provided carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be provided by law as necessary:

a) For respect of the rights or reputations of others
b) For the protection of national security or public order, or public health or morals.

Second, under General Comment No. 29 on the Derogations of Human Rights during a State of Emergency, a situation must amount to a public emergency that threatens the nation's life, and the state party must have

[30] Emilie M. Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties," International Organization 65, no. 4 (2011), 673; See also N. Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, UN Commission on Human Rights, 35th Sess., Agenda Item 10 at 20, UN Doc. E/CN.4Sub.2/1982/15 (1982), 69.

[31] Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties," 674.

officially proclaimed a state of emergency. The latter requirement is essential for maintaining the principles of legality and the rule of law when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the ICCPR, states must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers. it is the task of the UN Human Rights Committee to monitor the laws in question, concerning whether they enable and secure compliance with Article 4 of the ICCPR. In order for the Committee to perform its monitoring task, state parties of the ICCPR should include in their reports sufficient and precise information about their law and practice in the field of emergency powers.[32]

Looking at the internet shutdown in parts of Indonesia, the government did not fulfill those criteria mentioned above, such as declaring an emergency and prescribing emergency law. The government only made an announcement based on its perspective without considering the voice of the people. The government decided that Indonesia was in an emergency, but the Papua conflict is a local conflict that the local government could have handled. If the government was worried about the rise of separatism, it could use local police to deal with the issue.

Furthermore, there are the Siracusa Principles on the limitation and derogation of provisions in the ICCPR. The UN High Commissioner for Human Rights noted that national security and public order are often pretexts to safeguard a government. National security may be used as a reason for arbitrary restrictions. Even suppressing opinions in certain cases is allowed when there is a severe political or military danger to the state. Complete internet shutdowns will rarely meet the necessity test.[33] The aforementioned instruments require states to comply, for example, in restricting the right to freedom of expression. Such limitations must pursue a legitimate aim and be necessary for a democratic society.

[32] General Comment No. 29 Article 4 on the Derogations of Human Rights during a State of Emergency.
[33] Wolfgang Benedek and Matthias, *Freedom of Expression and The Internet* (Strasbourg: Council of Europe Publishing, 2013): 112.

In Indonesia, the Constitution states that conditions for a declaration of emergency and the subsequent measures shall be regulated by law. Thus, if the government intends to block internet access, it must declare and enact martial law or emergency law. Article 28J (2) states the human rights may be restricted under law. If the restriction of human rights is not established by law, it is an abuse of power which is not in line with the rule of law.

Therefore, if the government shuts down the internet, it must declare a state of emergency to prove Indonesia is facing a serious threat which affects national security or public order, so extraordinary action is required to tackle the problem. However, the internet curbs and shutdowns showed the government refused to comply with the standards laid down in the instruments of legal basis. The right to freedom of expression is not the only right violated. Other rights such as access to information, freedom of association and assembly and right to privacy are violated together with other socio-economic rights. If the government wants to derogate such rights, then the above principles must be followed. Unfortunately, this important prerequisite was ignored by the government in shutting down the internet.

While the Indonesian government has legal bases, from international and national standards, for restrictions of human rights, it must ensure they are heeded. Article 12 of the Constitution allows the president to declare a state of emergency, while Article 28J Paragraph (1) states that every person shall respect human rights of others in the order of life of the society, nation, and state. Article 28J Paragraph (2) states that 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.

An internet shutdown could be done if it meets the absolute requirements that must be fulfilled. If the government cannot fulfill those requirements, then it has violated human rights. Put simply, the internet shutdown is unconstitutional. Moreover, as Indonesia is a law-based state, all state conduct must align with

existing law. According to Julius Stahl, the concept of the state of law has three characteristics. First, the protection of human rights. This means there is constitutional protection of human rights by a fair legal process. The establishment of state and government shall not derogate the core of fundamental rights. So, if the state cannot give fairness to people and fails to settle human rights violations, the state cannot be called a rule of law state (*rechtstaat*).

Second, is the division of power, which means dividing powers within state organs by implementing the concept of separation of powers vertically or horizontally. The separation of powers to prevent the government from having absolute power. As Lord Acton said, power tends to corrupt and absolute power corrupts absolutely. The separation of power is for avoiding abusive government action. In this regard, an internet shutdown is an abusive policy as it is baseless.

The third characteristic is a government based on law. In exercising its authority, the government must obey various organs of law in conducting state policy or meeting the state's needs, and the last of these is the Administrative Court. In every *rechstaat* there shall be transparency for all people, so there will be scrutiny if the government (executive) commits misconduct in its decision-making.[34] This highlights that every government action must have a legal basis. In the context of the internet curbs and shutdown, when the government has no legal basis for internet blackouts, it conspicuously displayed authoritarianism and violated the concept of the rule of law state envisioned by Indonesia's founding fathers.

3.5. Internet and Social Media Shutdowns in Some Countries

Fake news is a threat to democracy. If the phenomenon of fake news cannot be solved, it will lead to chaos. Nevertheless, if Indonesia is heavy-handed in curbing freedoms in its effort to quash fake news, it may be accused of democratic backsliding or be labeled as a "flawed democracy".[35] Many nations have been

[34] Bahder Johan Nasution, *Negara Hukum dan Hak Asasi Manusia* [*Rule of Law State and Human Rights*] (Bandung: Mandar Maju, 2011): 1.

[35] Rofi Aulia Rahman, et al., "Calon Tunggal Pilkada: Krisis Kepemimpinan dan Ancaman Bagi Demokrasi [Single Candidate Pilkada: Leadership Crisis and Threat to Democracy]," Jurnal Konstitusi 19, no. 2 (2022): 64.

afflicted by the problem of biased popular media. In Italy, for example, media tycoon Silvio Berlusconi, who served three times as prime minister, used his media power for his election campaigns. His media companies endorsed his political statements with the aim of influencing voters, no matter whether it was true or false news, regardless of the negative impact on society.[36] Public trust in the media is essential for the development of democracy since the press is a pillar of democracy that can balance government power, becoming a mouthpiece of public opinion to deliver aspirations to the government.[37] Hence, the media must be independent and neutral, ensuring its news is valid.

3.5.1. Indonesia

On May 22, 2019, the Indonesian government partially restricted social media and instant messaging platform features in Jakarta. On August 21, 2019, it blocked telecommunications data services in parts of Papua and West Papua provinces, effectively shutting down the internet.

Through Press Release No. 106/HM/KOMINFO/05/2019 issued on May 22, 2019, Communication and Information Minister Rudiantara said the government had temporarily and gradually restricted access to social media platforms and instant messages with the aim of limiting the spread or virality of hoax information related to demonstrations following announcement of the results of the 2019 presidential election. The release said the consequence of this restriction will be a slowdown in access, especially for uploading and downloading image and video content. It said the restrictions were aimed at "avoiding the negative impact of the dissemination of irresponsible and provocative content and messages". The minister said the restrictions are based on the Electronic Information and Transactions (ITE) Law. "So the ITE Law basically has two points. First, increasing literacy, ability, capacity and capability of the community to go digital. And second, content management, one of which is content restriction," he said.

[36] Roberto Mastroianni, "Fake News, Free Speech and Democracy: A (Bad) Lesson from Italy?" *Southwestern Journal of International Law* 25, no. 1 (2019): 50.

[37] Andrea Butler, "Protecting the Democratic Role of the Press: A Legal Solution to Fake News," *Washington University Law Review* 96, no. 2 (2018): 426.

On May 27, 2019, the Ministry issued Press Release No. 108/HM/KOMINFO/05/2019, which outlined three steps the government was taking "to keep the cyber world peaceful":

1. Blocking access to content links or accounts that are indicated to be spreading hoaxes.
2. Cooperating with digital platform providers to close accounts.
3. Restricting access to some digital platform features or file sharing.

On August 21, 2019, the minister issued Press Release No. 155/HM/KOMINFO/08/2019, which simply stated that telecommunication data services were being blocked in Papua and West Papua in order to speed up the process of restoring security and order in Papua and its surroundings. A follow-up press release, issued on 23 August, said the data blocking was continuing. It said at least 33 pieces of content and 849 hoax and provocative information links related to the Papua issue had been distributed to hundreds of thousands of social media account holders on Facebook, Instagram, Twitter and YouTube.

The government justified its decisions on the basis of the Ministry of Communication and Information's Regulation No. 19 of 2014 on Controlling Internet Websites Containing Negative Content, as well as on the basis of the ITE Law. However, the ITE Law does not cover a blanket shutting down of the internet. The law was originally intended for validating electronic documents and transactions. Any internet shutdown must be regulated through a special law. If there is a state of emergency, the government must use the constitutional emergency powers stipulated in a government regulation-in-lieu-of-law to declare Indonesia faces a serious threat in settling the problem of Jakarta's post-election violence and the unrest in Papua. Using ministerial press releases and regulations is the wrong way to derogate such rights. Also, the regulation has no legal basis for legalizing the internet shutdown, as Indonesia has never had such a specific regulation for that purpose.[38]

[38] Hesti Rika, "Dasar Hukum Kemenkominfo Blokir Internet [The Legal Basis of the Ministry of Communication and Information Blocking the Internet]," CNN Indonesia, September 4, 2019, https://www. cnnindonesia.com/teknologi/20190904081344-185-427339/dasar-hukum-kemenkominfo-blokir-internet, accessed on February 15, 2020.

On January 22, 2020, Jakarta State Administrative Court began hearing a lawsuit, against the internet shutdown, filed by the Press Freedom Defender Team, which consisted of the Alliance of Independent Journalists, SafeNet, the Indonesian Legal Aid Foundation (YLBHI), the Legal Aid Institute for the Press (LBH Pers), the Commission for Missing Persons and Victims of Violence (KontraS), the Institute for Policy Research and Advocacy (Elsam), and the Institute for Criminal Justice Reform (ICJR). Proceedings commenced without the presence of one of the defendants, Indonesian President Joko Widodo. The president was sued for not exercising due control and correction of his subordinates in the internet shutdown.

In the absence of the president, the court heard a response from the co-defendant, the Ministry of Communication and Information.[39] The petitioners claimed the government's action has violated the freedom of the press and the core of democracy, which is the freedom to obtain information. They said the government should never repeat such action because it was an abuse of power.

On June 3, 2020, Jakarta State Administrative Court ruled the government violated the 1959 State of Emergency Law because it had conducted the internet blackout without declaring a state of emergency. The bench said the government failed to prove during the trial that Indonesia was in a state of emergency that required authorities to shut down the internet. The judges ruled that the act of throttling and reining in internet access in parts of Papua and West Papua provinces in August and September by Defendant I (the Ministry of Communication and Information) and Defendant II (the President of the Republic of Indonesia) was against the law. The judges ordered the defendants to pay the court's costs of 457,000 Indonesian rupiah (equivalent to about USD30).

The judges considered the act of obstructing access to the internet violated several statutory provisions. Among others, Article 40 Paragraphs (2a) and (2b) of the ITE Law had become the legal basis for the Communication and Information

[39] Safenet, "President Jokowi Is Absent from the First Court of Internet Shutdown Lawsuit," Safenet, January 22, 2020, https://safenet.or.id/2020/01/president-jokowi-is-absent-from-the-first-court-of-internet-shutdown-lawsuit/, accessed March 21st, 2020.

Ministry in curbing and blocking internet access. The panel of judges viewed that the authority granted in the Article was limited to terminating access or instructing the electronic system operators to terminate access to electronic information and or electronic documents with unlawful content. The interpretation Article 40 paragraph (2b) of the ITE Law as grounds for restricting the right to internet access only applies to electronic information and or electronic documents with unlawful content and does not warrant termination of internet access, the panel of judges said in their ruling.

Moreover, the judges said the Communication and Information Ministry's reason of exercising its discretion to obstruct and curb the internet did not meet requirements regulated in the 2014 Government Administration Law. The discretionary arrangement as regulated in the Administration Law is a cumulative unit, not an alternative, that is to: streamline government administration, fill a legal vacuum, provide legal certainty, and overcome government stagnation in exceptional circumstances for the advantage and benefit of the public.

The judges considered the Communication and Information Ministry's citing of a legal vacuum as justification for the internet blocking was inappropriate. Measures that restrict human rights, such as curbing and blocking the internet, are only permissible when based on law – for instance, the 1959 State of Emergency Law, and not on anything inferior to it. The government did not apply such a law when dealing with the spread of hoaxes in Papua. The judges believed the termination of internet access did not follow the procedures to restrict human rights as regulated in the Constitution and other human rights conventions. The internet shutdown was therefore deemed to be against those regulations.

On October 27, 2021, the Indonesian Constitutional Court ruled the government had acted lawfully by implementing the internet shutdown in Papua. The Court decided the government's blocking and throttling of the internet is within reason and constitutionally acceptable, as the government has a responsibility of "preventing the dissemination and use of electronic information and/or electronic documents that have prohibited contents in accordance with statutory provisions".

3.5.2. The United States

In American law, a definition of fake news cannot be too broad lest it come under the scope of freedom of speech protected under the First Amendment. False information is protected under US law because its suppression could also lead to the curtailment of factual information and free expression. Hence, the First Amendment allows "breathing space" so that individuals are not afraid to express their thoughts and ideas. This explains, in part, why fake news should be narrowly defined.[40] The internet kill switch has been used in the US several times to prevent the spread of fake news.[41]

According to Soroush Vosoughi et al., false news stories are 70% more likely to be retweeted than true stories, and it takes true stories about six times as long to reach 1,500 people as it takes false stories to achieve the same number of people. Falsehoods are also retweeted more widely than true statements at every depth of a cascade – an unbroken tweet chain. Such chains travel 10 to 20 times more quickly than facts.[42] *The Washington Post's* Fact Checker column in March 2019 calculated that then-US President Donald Trump had made 9,179 misleading claims up to that point of his presidency.[43] Misleading claims by politicians have become an increasing phenomenon in the US.

The First Amendment of the US Constitution protects the right to freely exchange ideas and points of view, regardless of whether they are controversial or false. Censorship and prior restraint, a government action prohibiting speech or other expressions before it can occur, are generally unconstitutional. This implies that fake news cannot be banned. This statement is strengthened by the decision of the US Supreme Court in *New York Times vs. Sullivan* in 1964[44] that false speech must also be protected to ensure that the First Amendment is for everyone, but with a special occasion, which is actual malice and the

[40] Ahran Park and Kyu Ho Youm, "Fake News from A Legal Perspective: The United States and South Korea Compared," *Southwestern Journal of International Law* 25, no. 1 (2019): 103.
[41] William D. Toronto, "Fake News and Kill-Switches: The U.S. Government's Fight to Respond to and Prevent Fake News," *Air Force Law Review* 79 (2018): 177.
[42] Soroush Vosoghi, et.al, "The Spread of True and False News Online," *Science* 359, no. 6380 (2018): 1149-1150.
[43] Fact Checker, The Washington Post, "In 787 Days, PresidentTrump Has Made 9,179 False or Misleading Claims," The Washington Post, March 17, 2019.
[44] New York Times Co. v. Sullivan, 376 US 254 (1964).

case was categorized as defamation. Actual malice is the standard of proof that public figures must satisfy to win a defamation lawsuit. Essentially, actual malice is present when a defendant knowingly publishes or broadcasts a false statement as fact. Reckless disregard for the truth amounts to actual malice in some jurisdictions.

Moreover, in other claims, a plaintiff must prove actual malice to recover presumed or punitive damages.[45] In plain English, actual malice is when someone deliberately lies to hurt another person. When famous people sue over lies, they must prove that the mendacity of the defendants was intentional.

A landmark case involving free speech and falsehood is *The United States v. Alvarez*. This case centered around Xavier Alvarez, who falsely claimed to have received the Congressional Medal of Honor for military service, when he had actually never served in the US military. He was later convicted for violating the Stolen Valor Act of 2005, which makes it a crime to lie about military service or awards. Alvarez appealed, arguing the statute had violated his First Amendment right to free speech. The US Supreme Court in 2021 decided that the act was unconstitutional. Justice Anthony M. Kennedy argued that false news is not unprotected by the First Amendment. The Court emphasized other mechanisms to counter the false speech rather than criminally punishing the speaker.[46] An alternative legal effort to punish fake news or false newsmakers is through the Defamation Law, otherwise known as slander and libel. Defamation involves the publication of material that causes serious harm to the reputation of an individual. Libel can be in many forms, such as broadcasts and printed media, which are permanent. Slander relates to the spoken word.

The US Supreme Court has handled several cases related to internet access and blocking. One such case was *Packingham v. North Carolina*, in which the Supreme Court considered a law that prohibited registered sexual offenders from accessing any social media website. While the Court found the government may be permitted to restrict specific conduct on the internet, it held that

[45] Black's Law Dictionary.
[46] United States v. Alvarez, 567 U.S. 709 (2012).

altogether banning a person from accessing any websites integral to the fabric of our modern society and culture violates their First Amendment rights. The Court's decision in Packingham means that even if the government identifies an individual responsible for spreading harmful fake news, it will not protect the public by banning that person's access to social media.[47] Justice Samuel Alito agreed with the judgment but warned that the Supreme Court "should be cautious in applying our free speech precedents to the internet".

An instance of telecommunication blocking occurred when mobile phone services in San Francisco Bay Area subway stations were shut down for three hours in July 2011 in an effort to prevent protests after Bay Area Rapid Transit (BART) police fatally shot a man.[48] The shutdown prompted criticism that it was an excessive restriction of free speech.

Civil libertarians contend that fake news is a necessary evil if a society is to be truly free. It is part of the marketplace of ideas, an economic analogy – taken from Justice Oliver Wendell Holmes's dissent in *Abrams v. United States* – that has often been invoked by US judges to oppose censorship. In essence, it holds that an open battle between ideas will allow society to choose what is right. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," wrote Holmes.[49]

The US has a law to tackle fake news, as well as online defamation, libel and slander. The issue of online content is covered in the Communications Decency Act of 1996, Section 230:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

In this section, the law protects the internet service provider (ISP), developer, or republisher. The reason for this is to prevent ISPs, developers, and republishers

[47] Packingham v. North Carolina, 137 S. Ct. 1730, 1744, 198 L. Ed. 2d 273 (2017).

[48] See Jennifer Spencer, "No Service: Free Speech, the Communications Act, and Bart's Cell Phone Network Shutdown," *Berkeley Technology Law Journal* 27 (2012): 767.

[49] Ari Ezra Waldman, "The Marketplace of Fake News", *University of Pennsylvania Journal of Constitutional Law* 20, no. 4 (2018): 847-848.

from being prosecuted under common-law defamation.[50] Even if they republish fake news, the users cannot be convicted under the defamation act because their status is not the publisher or speaker. The publisher or speaker here is the one who created the news first, no matter whether false or actual news.

The Federal Communications Commission prohibits the media from broadcasting information that it knows to be false on crime and catastrophes, stating:

> No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:
> 1. The licensee knows this information is false;
> 2. It is foreseeable that the broadcast of the information will cause substantial public harm, and
> 3. Broadcast of the information, in fact, directly causes substantial public harm.
> 4. Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer characterizes the program as fiction and is presented in a way that is reasonable under the circumstances.51

This is part of the prevention method to avoid the spread of dangerous fake news in society. Even though fake news may present a danger to democracy, its regulation poses a greater threat. Neither the US federal government – its legislators, courts, or judges – nor the social media companies who would bear the burden of identifying fake news are in a good position to determine what constitutes the same.[52]

Besides the legal litigation approach to tackling fake news, the US has also prepared some technology and websites such as politifact.com and factcheck.org, to combat fake news. These fact-checkers are platforms to neutralize fake news, so that US citizens can double-check the veracity of content and claims.[53]

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[50] Brittany Vojak, "Fake News: The Commoditization of Internet Speech," California Western International Law Journal 48, no. 1 (2017): 150.

[51] FCC Broadcast Radio Services, 47 C.F.R. 73.1217 (2017).

[52] Nina I. Brown and Jonathan Peters, "Say This, Not That: Government Regulation and Control of Social Media," *Syracuse Law Review* 68 (2018): 542.

[53] See, Emily Gillespie, "69% of Americans Don't Think Trump's Border Wall is a Priority, Poll Says," Fortune, December 13, 2018, https://fortune.com/2018/12/12/trump-border-wall-poll/, accessed January 29, 2020.

3.5.3. India

The internet was shut down 95 times in India in 2019, according to a local monitoring organization.[54] Authorities usually demand internet providers postpone services on the pretext of upholding public order. Under Indian law, the government can direct telecom companies to shut down services or take down websites, among other measures. For example, the Indian government directed internet restrictions in the country's only Muslim-majority state, Jammu and Kashmir, following student protests and political unrest there.

Internet services were shut down in Kashmir in August 2019, after a local organization called for a general strike to protest rising incidents of mob lynchings. An altercation between a television journalist and Aligarh Muslim University students resulted in internet services being switched off in the city. Services were restored in February 2021, but the area has remained subject to intermittent shutdowns, despite the Indian government saying it had already secured Kashmir. Kerala High Court declared the right to access the internet as a fundamental right. The court was hearing a petition by a student who was denied access to the internet in a hostel at night. Internet access cannot be denied on arbitrary grounds.[55]

Indian Prime Minister Narendra Modi in 2019 introduced a new citizenship bill that excluded Muslim immigrants from three neighboring countries. The Citizenship Amendment Act upset Indian Muslims because it excludes Muslim immigrants from Afghanistan, Bangladesh and Pakistan from gaining Indian citizenship[56] The law, which came into effect in January 2020, resulted in nationwide protests. The right of citizenship is a fundamental right, but the law discriminates against Muslims. During the demonstrations against the law, at

[54] Syadab Nazmi, "Why India shuts down the Internet more than any other democracy," BBC News, December 19, 2019.

[55] Arpan Chatirvedi, "Indian Internet Shutdown Rules Need a Relook: Expert Say," Bloomberg, October 27, 2019, https://www.bqprime.com/law-and-policy/indias-internet-shutdown-rules-need-a-relook-experts-say, accessed April 2021.

[56] Amit Chauduri, "The BJP Wants to Silence Indian Voices. But We Will only Grow Louder," The Guardian, December 22, 2019, https://www.theguardian.com/commentisfree/2019/dec/22/bjp-citizenship-amendment-act-indians, accessed January 29, 2020.

least 65 died in clashes with the police and Modi's followers. The tension raised concern over the potential for civil war between Indian Muslims and Hindus.[57]

To stabilize the situation, the government shut down the internet around Kashmir, resulting in criticism that it was against the Constitution, as internet access is part of the fundamental right to freedom of speech. The case was brought to the Supreme Court of India, where judges decided the internet shutdown was unconstitutional, "Freedom of internet access is a fundamental right," said Supreme Court Justice N.V. Ramana.[58]

The cases above show that governments have blocked internet access for security and political reasons, with the stated aim of preventing violence. Court rulings have tended to regard internet blocking and shutdowns as unconstitutional in India and Indonesia.

IV. CONCLUSION

The Indonesian government erred on two points when it blocked internet access to quell the spread of fake news during separate riots in Jakarta and Papua in 2019. First, the spread of fake news in Jakarta and Papua could not be categorized as a national threat because fake news is the price we pay for a free society. The only way to counter the spread of fake news is by producing more true news than there is fake news. Second, the riots were local cases that regional officials could resolve peacefully without resorting to the extraordinary action of curbing or shutting down internet access. The government did not declare a state of emergency, as such a declaration would have failed to meet standards and criteria, and the local riots were not part of the emergency doctrine. Therefore, the internet curbs and shutdown, which lacked sufficient legal instruments and strong argument, were a failure to uphold the rights inherent in democracy.

[57] Suhasini Raj and Maria Abi-Habib, "2 Dead in Protests over India's Religion-Based Citizenship Bill," New York Times, December 12, 2019, https://www.nytimes.com/2019/12/12/world/asia/india-protests-citizenship-bill.html, accessed December 28, 2020.

[58] Sankalp Phartiyal and Fayaz Bukhari, "India's Top Court Says Indefinite Kashmir Internet Shutdown is Illegal," Reuters, January 10, 2020, https://www.reuters.com/article/us-india-kashmir-internet-idUSKBN1Z90FR, accessed on February 14, 2020.

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Subject Index

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AUTHOR GUIDELINE

Constitutional Review Journal is a medium intended to disseminate research or conceptual analysis on constitutional court decisions all over the world. The journal is published twice a year in May and December. Articles published focus on constitutions, constitutional court decisions, and topics on constitutional law that have not been published elsewhere. The journal is aimed for experts, academicians, researchers, practitioners, state officials, non-governmental organizations, and observers of constitutional law.

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1. Manuscripts have to be written in English.
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   Example:

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   Corte Costituzionale Italiana [Italian Constitutional Court]. Sent. 194/2013 Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality] No. 194/2013 (July 17, 2013).

   Foreign language in footnote:

   Carlo Azeglio Ciampi, Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d'oro ai benemeriti della cultura e dell'arte [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the delivery of the Gold Medals for Culture and Arts merit], May 5, 2003.

Foreign language in body text:

Therefore, the founding fathers of the Indonesian Constitution made the Negara Kesatuan [Unitary State] the central feature of the new Indonesian statehood, as it is set out most prominently in article 1(1)6 and 25A.

3. The authors who are not native speakers of English need to seek the assistance of a native speaker to proofread their articles before submitting them to the committee.
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9. The following is the structure of the journal:

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   - Title of manuscripts should be specific and concise in no more than 10 words or 90 hits on the key pad which describes the content of the article comprehensively.
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- The identity covers the author's name, affiliation, and e-mail address.
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Example of identity with the asterisk

INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

Theunis Roux*
The University of New South Wales (UNSW), Sydney, Australia
t.roux@unsw.edu.au

Example of the explanation of the asterisk:

of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

* Professor of Law at The University of New South Wales (UNSW) Sydney, former, Secretary-General of the International Association of Constitutional Law (IACL), and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.

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The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/ aim of the article.
- **Method:** It is an optional section for articles which are based on research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
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