ASSOCIATION FOR
ASIAN CONSTITUTIONAL STUDIES | VIETNAM NATIONAL UNIVERSITY, HANOI
SCHOOL OF LAW

8th ASIAN CONSTITUTIONAL LAW FORUM
(Conference Proceedings)

Asian Constitutional Law

RECENT DEVELOPMENTS AND TRENDS

Volume 1

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6th and 7th December 2019, Hanoi, Vietnam

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CONTENTS

Part 1. RECENT DEVELOPMENTS AND TREND IN PUBLIC LAW: A FOCUS IN ASIA

PREFACE 9

1. LEGAL STATUS OF RATIFIED INTERNATIONAL TREATY UNDER INDONESIAN HIERARCHY OF LAW
   Ni'matul Huda, Dodik Setiawan Nur Heriyanto and Alan Fatchan Ghani W. 11

2. DEVELOPMENT OF ADMINISTRATIVE LAW IN GLOBALIZATION AND INTEGRATION PERIOD: A CASE STUDY OF VIETNAM
   Dr. Phan Thi Lan Huong, Dr. Nguyen Huy Binh 21

3. INTERNATIONAL LAW CLAUSES IN THE CONSTITUTIONS OF NORTHEAST AND SOUTHEAST ASIAN STATES: A COMPARATIVE STUDY
   Prof.Lijiang Zhu 33

4. ACCESS TO JUSTICE AND LEGAL EMPOWERMENT FOR WOMEN: THE CASE OF VIETNAM
   Hoang Thi Bich Ngoc, Associate Professor. Vu Cong Giao 49

5. "HEAVENLY PRINCIPLE (天理), STATE LAW (国法, HUMAN SENTIMENT/COMPASSION)人情" AND NUCLEAR POLICY IN EAST ASIA
   Professor Emeritus Akihiko Morita 64

6. LEGAL AID MOVEMENT AND THE DEFENSE OF CONSTITUTIONALISM IN INDONESIA
   Dr.Herlambang P. Wiratraman, Siti Rakhma Mary Herwati 80

7. LABOUR RELATIONS IN VIETNAMESE LAW: HISTORICAL DEVELOPMENT AND PERSPECTIVES
   Nguyen Hoang Ha 97

8. THE RISE AND DYNAMICS OF 'CONDITIONAL DECISION' IN INDONESIAN CONSTITUTIONAL REVIEW
   Dian Agung Wi caksono and Faiz Rahman 110

9. THE CONSTITUTIONALITY OF COMPULSORY LAND ACQUISITION IN VIETNAM: THE SITUATION AND RECOMMENDATIONS
   Associate Professor Phan Trung Hien 130

10. THE "WAR ON FAKE NEWS" AND THE EMERGENCE OF TRUTH AS A PUBLIC INTEREST IN MALAYSIA, SINGAPORE AND THAILAND
Dr. Lasse Schuldt 143

11. THE NATIONAL ASSEMBLY AND THE POST-LEGISLATIVE SCRUTINY ISSUE UNDER THE CONSTITUTION OF VIETNAM
Dr. Nguyen Thi Hong Yen, LLM. La Minh Trang 164

12. THE POLITICS OF JUDICIAL REVIEW IN AFGHANISTAN: 2004-2019
Dr. Shamshad Pasarlay 179

13. CONSTITUTIONALISM IN SHAPING POLITICAL ORDER OF BANGLADESH
Assistant Professor Lokman Hussain 205

14. THE DEVELOPMENT OF VIETNAMESE CONSTITUTIONALISM: FROM MODERN TO CONTEMPORARY ERA
Professor Dao Tri Uc 220

15. WOMEN'S RIGHT TO POLITICAL PARTICIPATION IN VIETNAM: CHALLENGES AND OPPORTUNITIES SET FORTH BY THE 2013 CONSTITUTION
Dr. Nguyen Binh An 238

16. IMPROVING THE ELECTION LAW IN VIETNAM
Dr. Phan Van Ngoc, Professor Phan Trung Ly 249

17. VIETNAM: CONSTITUTIONS AS SIGNALLING INSTRUMENTS
Professor Pip Nicholson, Dr Do Hai Ha 263

18. SECULAR CONSTITUTIONALISM AND ISLAMIC LAW: ON THE SIGNIFICANCE OF RELIGION IN THE DESIGN OF THE INDONESIAN CONSTITUTION
Ahmad Rofii 272

19. KANT'S *RECHTSSTAAT* AND ITS RECEPTION IN JAPAN
Professor Yasuo Hasebe 291

20. THE MEANING OF THE JAPANESE EMPEROR IN JAPAN'S CONSTITUTIONAL SYSTEM
Associate Professor Shohei Eto 308

21. VIETNAM CONSTITUTIONAL LAW: ESTABLISHMENT AND DEVELOPMENT ORIENTATION
Dr. Phan Thanh Ha 317

22. THE EU EXTERNAL POLICY OF PROMOTING HUMAN RIGHTS AND VIETNAM'S LEGALIZATION OF HUMAN RIGHTS
Dr. Trinh Hai Yen 329

23. LAW ON THE RIGHTS OF JUVENILES IN CRIMINAL PROCEEDINGS: INTERNATIONAL AND VIETNAMESE PERSPECTIVES
Dr. Vu Thi Thu Quyen 342

24. LOCAL GOVERNMENT IN VIETNAM (1946 - 2000) IN COMPARISON WITH CHINA'S AND THE UNITED STATES' SYSTEMS
Pham Quang Huy ... 356

25. LIMITATION CLAUSE OF HUMAN RIGHTS IN THE 2013 VIETNAMESE CONSTITUTION
Le Quynh Mai ... 369

26. RIGHTS AS TRUMPS AND ORDER AS COUNTER-TRUMPS: RE-EXAMINING FREE SPEECH THEORY IN AN ERA OF FEAR, HATE AND LIES
Professor Thio Li-ann ... 380

27. POLICY ON ENFORCEMENT OF IMPRISONMENT SENTENCES IN VIETNAM AND CHINA - FROM THE PERSPECTIVES OF TRADITION, CONSTITUTION AND STATUTORY LAW
Dr. Le Lan Chi ... 405

28. DECENTRALISATION AND LOCAL GOVERNMENT AUTONOMY IN SOUTHEAST ASIA
Professor Andrew James Harding ... 419

29. DECONCENTRATION AND DELEGATION OF AUTHORITY IN VIETNAM AFTER THE 2013 CONSTITUTION
A/Prof Nguyen Hoang Anh ... 435

30. INDEPENDENCE OF JUDICIARY AND JUDGES AND TECHNIQUES OF INTERPRETATION IN JAPAN
Professor Yuichiro Tsuji ... 448

31. ENSURING THE RULE OF LAW BY THE COURT SYSTEM IN VIETNAM AFTER THE RATIFICATION OF THE 2013 CONSTITUTION: CHALLENGES AND PROSPECTS
A/Prof. To Van Hoa, Dau Cong Hiep, LLM., Dr. Le Thi Thu Mai ... 468

32. ANALYSING THE DIFFICULTY OF CONSTITUTIONAL REFORM IN THE PHILIPPINES
Michael Henry Yusingco ... 482

33. LEGISLATIVE REFORMATORY DEVELOPMENTS IN MALAYSIA: A DECADE IN REVIEW
Dr. Nizamuddin Alias ... 498

34. HUMAN RIGHTS EDUCATION IN THE ARMY: REFLECTION FROM VIETNAMESE CONTEXT
Dr. Nguyen Van Vi ... 506

35. LEGAL EDUCATION FOR HIGH SCHOOL STUDENTS IN VIETNAM: AN OBSERVATION FROM THE CONTEXT OF HANOI CITY
Dr. Nguyen Thi Thu Huong, Dr Mai Thi Tuyet, Dr Duong Van Khoa ... 518

PREFACE

The Asian Constitutional Law Forum (ACLF) is recognised as a venue for distinguished scholars and new academics to share their ideas on Asian constitutional law and to expand collabourative research networks. The Forum has been held eight times at prestigious universities in Asia: Seoul National University in 2005, Nagoya University in 2007, National Taiwan University in 2009, University of Hong Kong in 2011, Tsinghua University in 2013, National University of Singapore in 2015, Thammasat University in 2017, and Vietnam National University, Hanoi (VNU) in 2019.

The 8th International Conference of the Asian Constitutional Law Forum ("Asian Constitutional Law: Recent Developments and Trends") provided a scholarly platform for the latest development in the field of constitutional law as well as a valuable opportunity to enable the exchange of experience and the promotion of international collabouration in this field. This was great for the VNU School of Law to host this globally recognised and prestigious academic forum. The Forum's general theme "Asian Constitutional Law: Recent Developments and Trends" covers the following sub-themes: 1) Developments in constitutional law in Asia in the context of globalization and regional cooperation; 2) Developments of administrative law in Asia in the context of globalization and regional cooperation; 3) Debates and trends in constitutionalism in Asia; 4) Universalism and particularism in Asian constitutional systems; 5) Constitutional review in Asia: Debates and trends; 6) Analysing models of developmental states in Asia; 7) Asian constitutional and administrative laws and the global challenges of terrorism, economic migration, human trafficking, environmental degradation, and other non-traditional security challenges.

The Forum welcomed over 250 scholars from almost 30 countries and 4 continents across the world. The Organising Committee received over 160 abstracts and selected over 100 papers to be presented at the conference. Full papers submitted for the Proceedings were subject to scholarly peer-review in several rounds by experts, the Selection Committee, and the Editorial Board. After rigorous peer-review, revision and editing processes, the Editorial Board and the Selection Committee accepted 78 papers for publication in the 8th ACLF Proceedings book. The Proceedings book comprises three volumes: Volume 1 - Recent Developments and Trends in Public Law: A Focus in Asia; Volume 2 - Public Law in Vietnam: Comparative Contexts; and Volume 3 - Thematic Workshop "Constitutional Rights in ASEAN".

We would like to acknowledge the success of the 8th ACLF and the publication of the Proceedings book by thanking the excellent contributions by and efforts of participants, authors, members of the Organising Committee, volunteers, reviewers, the Selection Committee, and the Editorial Board. We would like especially to thank Professor Andrew Harding, Chair of the Association for Asian Constitutional Studies, who has created this opportunity and always been on the journey with us in

organising this Forum. We also would like sincerely to thank Professor Pip Nicholson, Dean of the Law School, University of Melbourne for her support both technically and financially. Thank you also to Dr. Bui Ngoc Son (University of Hong Kong), Professor Sriprapha Petcharamesree (Mahidol University of Thailand), Professor Lijiang Zhu (China University of Political Science and Law, Beijing), Dr. Rosana Bratu (University of Sussex, UK), and Velizar Damyanov (the University of Tsukuba, Japan) for your very timely and valuable support.

In Vietnam, we are grateful for sponsorship from the National Foundation for Science and Technology Development (NAFOSTED) of Ministry of Science and Technology and Asia Research Centre (ARC) of Vietnam National University Hanoi. With great appreciation, we would also like to thank the Australian Embassy Hanoi and Aus4skills for supporting the Thematic Workshop on Constitutional Rights in ASEAN within this Forum. We are also thankful for supports of the Vietnam National University Hanoi, other state agencies and La Thanh Hotel who assisted with organising this event. Last but not least, we express our thanks to the Vietnam National University Press, Hanoi for the editing and publishing this Proceedings Book.

Hanoi, April 2020

The 8th ACLF Organising Committee and Editorial Board Hanoi

SECULAR CONSTITUTIONALISM AND ISLAMIC LAW: ON THE SIGNIFICANCE OF RELIGION IN THE DESIGN OF THE INDONESIAN CONSTITUTION

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Abstract

The Amendment of the 1945 Constitution has foiled the instalment of the sharia clause. This was celebrated as the failure of the Islamist aspiration and the persistence of non-theocratic constitutionalism. The Amendment, nevertheless, has brought about significant improvements to the role of religion, compared to the original Constitution. This development is evident from the insertion of new religion-related provisions. What is most important in this regard is the insertion of the religious judiciary clause. While previously Islamic law has been acknowledged by reliance only on several general religion clauses, this latter provision establishes the constitutional acknowledgment and support for Islamic law and its legitimate role in the public sphere. By examining the religion clauses in the provisions concerning the right to freedom of religion, religious values as a right limitation, legislation of religion, and religious judiciary, I argue that despite the increased constitutional support for Islamic law, the Indonesian Constitution could not be conceived as a religious constitution. Instead, it remains to adopt inclusive secular constitutionalism whereby the authority of religion is subordinated under the supremacy of the Constitution and the Rule of Law.

Introduction

Contemporary constitutional systems vary with regard to the state's relation to religion. There is a continuum from negative identification as in atheist states attempting at the abolition of religion, to positive identification as in theocratic/religious states[1]. Possible models of state-religion relations in between the two are many. Ran Hirschl, for instance, suggested some models[2]: assertive secularism like in Turkey and France, whereby the public appearance of religion is avoided and the notion of secularism is preserved as the polity's identity; separation-as-state-neutrality like in the United States, which maintains the state's impartial stance towards religions; the weak religious establishment like

1 See, e.g., Nadirsyah Hosen, 'Religion and the Indonesian Constitution: A Recent Debate' (2005) 36 *Journal of Southeast Asian Studies* 419; Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawaii Press 2008) Chapter 10-2; Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing 2012) Chapter 8; Dian AH Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka* (Cambridge University Press 2017).

2 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 55–57.

in Norway and Denmark, whereby a particular religion is declared as the state religion without any significant implication to the life of the polity; formal separation of church and state with de facto hegemony of one denomination, as apparent in many Latin American countries where Catholicism is predominant in society; separation of religion and state alongside multicultural accommodation like in Canada, which maintains common conceptions of nationality while making diversity of citizens' religious traditions as its constitutional identity; religious jurisdictional enclaves like in India and Israel, which is based on the Ottoman millet system, in which a legal system that is generally secular provides qualified autonomy for state bodies to exercise religious laws.

While the Indonesian Constitution might be grouped within one of the above models, this modelling does not explain whether the Indonesian case is categorically religious or secular. By reliance on the models I propose in the following section, this essay will examine the secularity/religiosity of the Indonesian Constitution by analysing the meaning of references to religion in the articles and their implication to the legitimacy of state incorporation of Islamic law.

Previous studies have generally discussed the issue of secular/religious nature of the Constitution by examining the Preamble, Article 29, freedom of religion in Article 28E and 28I and the religious values clause (Article 28J(2))[1]. In this essay, I will, in particular, analyse the religion clauses in the provisions of the right to freedom of religion, limitation of rights, legislation and the judiciary. By examining the uses of religion in the articled provisions and history of their making, I will argue that religion in the Constitution – except in the context of judiciary which would refer to Islamic judiciary – has inclusive meaning. With the incorporation of religious values, legislation on religion and particularly the establishment of Islamic courts, together with the protection of religious freedom, the state adoption of Islamic law would be legitimate. The legitimacy of religion as well as Islamic law, however, is dependent on the supremacy of the Preamble, the Constitution and the Rule of Law. This results in the Constitution being inclusively secular than religious.

Models of Religion-Constitutionalism Relations

There is a persistent debate among scholars on the nature of the normative model of constitutionalism with regard to religion; is secularism a non-negotiable aspect of constitutionalism? Is state endorsement of religion compatible with the ideal of constitutionalism? Ronald Dworkin has distinguished between two models of government: first, secular government which tolerates and accommodates religion and religious people; second, religious government which tolerates religious minorities and non-believers. While in practice there may be a mixture, these models reflect two competing ideal types of the relationship between state and religion[2].

In light of Dworkin's categorisation, I will divide constitutionalism into two main models, namely secular and religious constitutionalism. The measure of the modelling is the normative possibility of the state adoption of religious law, in particular, whether or not Islamic law is constitutionally possible to be part of the state legal system and to what extent such an adoption can be publicly justified.

1 Rajeev Bhargava, 'Political Secularism' in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2006) 641–642.

2 Temperman (n 2) 112.

Secular constitutionalism has two versions: exclusive and inclusive. Exclusive secular constitutionalism is normatively embedded in the idea of strict separation of state and religion. Being inherent in a democratic constitutional system, exclusive secularism requires that political authority and actions should be based on secular reasons and devoid of religious reasons. The appeal to the disengagement of religion is to be articulated in three levels: ends, institutions, and law and policy. A secular state, therefore, has its own ends independent of those of religion. It also rejects religious establishment. Additionally, it will detach its law and public policy from religion either for the sake of 'respectful indifference' or to control religion[1]. The secular state should maintain 'official impartiality in matters of religion'[2]. Secularism in this sense adheres to a thick conception of neutrality that requires consistent resistance to the public role of religion and 'sceptical suspicion' to any religious claims.[3]

Inclusive secular constitutionalism, on the other hand, offers a thinner conception of separation as it refuses absolute institutional separation and allows some religious establishment to be accommodated in political secularism. In what Tariq Modood calls 'moderate secularism'[4], both religion and state have independence, 'mutual autonomy', but not mutual exclusion. While rejecting the full establishment, moderate secularism can accommodate weak establishment, either formal or informal, like that found in Western Europe. Inclusive secularism is what Rajeev Bhargava calls 'contextual secularism' with 'principled distance'. It is contextual, and hence a 'multi-value doctrine', because a different context will result in different contents and forms of secularism. Secularism's principled distance requires 'a flexible approach on the inclusion/exclusion of religion and engagement/disengagement of the state, which at the level of law and policy should depend on the context, nature, or current state of relevant religions'[5]. Principled distance will make a law based on purely religion reasons, for example state sanctioned Islamic law, possible if it supports freedom or equality or other values of secularism. It allows religious exemptions and state intervention in religious matters.

Contrary to secular constitutionalism, religious constitutionalism presupposes the import or primacy of religion in structuring the state. It builds the political system on the foundation of or by reliance on faith. Such constitutionalism presumes the compatibility of religious values and doctrines with a constitutional system. There are two versions of this type of constitutionalism: strong and moderate religious constitutionalism. The strong version might be called 'theocratic constitutionalism'[6] or 'constitutional theocracy'[7]. It is theocratic not in the sense of a direct rule of God but as either the rule of religious law and norms or the rule of religious institutions[8]. This version of

1 Andras Sajo, 'Constitutionalism and Secularism: The Need for Public Reason' (2008) 30 *Cardozo Law Review* 2401, 2418.

2 Tariq Modood, 'Moderate Secularism, Religion as Identity and Respect for Religion' (2010) 81(1) *The Political Quarterly* 4; Tariq Modood, 'State-Religion Connections and Multicultural Citizenship' in Jean L Cohen and Cécile Labourde (eds), *Religion, Secularism, and Constitutional Democracy* (Columbia University Press 2016) 182.

3 Bhargava (n 5) 649, 68–651.

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

5 Hirschl, *Constitutional Theocracy* (n 2).

6 Perry Dane, 'Forward: On Religious Constitutionalism' (2014) 16 *Rutgers Journal of Law and Religion* 460, 468.

7 I say 'so-called' because Islamic constitutionalism may take a non-strong form of religious constitutionalism.

8 Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2002) 162–167; Saïd Amir Arjomand, 'Islamic Constitutionalism' (2007) 3 *Annual Review of Law and Social Science* 115. In strong religious constitutionalism where the state strictly adheres to non-Islamic religions, Islamic law will be most probably excluded from the public sphere, similar to that

religious constitutionalism is most represented by the so-called 'Islamic constitutionalism'[1]. Islamic constitutionalism has been formulated as a challenge to constitutional secularisation embedded in the dominant liberal constitutionalism. Regardless of its varied practices, this model is generally perceived as requiring the constitution to establish Islam as the state religion and Islamic *sharī'ah* as the or a source of the legal system[2].

The moderate version of religious constitutionalism is based on the belief that religious values and doctrines are to be considered in regulating the public sphere. It attempts to translate the political aspects of religion into an agreement with the core values and principles of constitutionalism. This marks the dividing line between this religious constitutionalism and inclusive secularism. In this model, religious institutions and / or religious norms are embedded. This is in addition to the embeddedness of constitutional principles on equal terms. This mutual foundation constitutes what distinguishes the moderate from strong religious constitutionalism. This moderate model maintains what Ronald Dworkin calls a 'tolerant religious state', a religious government which takes religious freedom seriously and tolerates all peaceful religious practices. This state will 'openly acknowledge and support, as official state policy, religion as such; it declares religion to be an important positive force in making people and society better'.[3]

The above-mentioned models could provide an analytical framework for better identification of the constitutional engagement of religion in Indonesia. At the same time, the framework might be used to critically understand the constitutional legitimacy of state policies dealing with religious matters.

The Amendment of the Indonesian Constitution

Following the general election in June 1999, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) conducted sessions, among others, to discuss the constitutional changes[4]. The MPR then decided to make amendments to the 1945 Constitution, instead of crafting a new constitution, at the commencement of the First Amendment process on 6 October 1999 during the General Views session of the MPR's factions. The constitutional text to be amended was the 1945 Constitution as promulgated by the Presidential Decree of 1959. The MPR also agreed that the Preamble, which contains Pancasila, was to remain unchanged, while the Elucidation was dropped and, where it contained normative provisions, transferred into the body of the amended constitution[5]. For the MPR, the Preamble remains the basis upon which all articles of the Constitution underlie[6].

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within exclusive secularism.

1 Dworkin (n 4) 58.

2 The primary source for the debates of the MPR during the amendment processes from 1999 to 2002, which this thesis relies upon, is a collection of minutes of the MPR sessions provided in Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Sekretariat Jenderal 2010). It consists of seventeen volumes.6.

3 These are among the 'fundamental agreements' of the MPR. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Panduan Dalam Memasyarakatkan Undang-Undang D6asar Negara Republik Indonesia Tahun 1945: Later Belakang, Proses Dan Hasil Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Sekretariat Jenderal MPR RI 2003) 20–256.

4 Ibid 25 (emphasis added).

5 Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (ISEAS 2007) 95.

6 Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-Making in Transition* (Kompas Book Publishing 2008) 250.

Unlike in the previous constitutional changes, no Islamic parties proposed an amendment to the Preamble to adopt the Islamic ideology or the seven words of the Jakarta Charter, '*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*' (with the obligation to carry out Islamic sharia for its adherents)[7]. The agreement on the unchangeability of the Preamble is significant for this confirms both the indisputability of Pancasila as the state ideology and the rejection of Islam and Sharia from gaining the constitutional preference.

The four amendments of the Constitution (1999-2002) have largely transformed the original 1945 Constitution. By making comprehensive revisions, the constitutional reform processes were best considered as the crafting of a new constitution rather than merely making amendments. The amendments are enormously larger in quantity (only 11 percent of articles remains unchanged) and totally different in substance from the original 1945 Constitution[8]. They have changed the structure and functions of the Government (parliament, executive and judiciary). Together with the adoption of a new chapter (Chapter XA) on human rights, these amendments have transformed the original 1945 Constitution into a more liberal constitution[9].

In terms of religion, the Amendment not only entrenches the Preamble in which the state ideology, Pancasila, is secured, and maintains the chapter on religion and the provision of the presidential oath, but it also provides more references to religion than the original Constitution. The Amendment refers to religion when dealing with human rights, education, the power of the Regional Representative Council and the judiciary. As will be examined in the following sections, this increased appearance of religion has brought a significant change to its constitutional status. Even though the seven words of the Jakarta Charter failed to be adopted in the Amendment[10], Islamic law acquires more of its constitutional status through other provisions. The four case studies below (the right to religious freedom, religious values as a right limitation, legislation of religion, and the religious judiciary) demonstrate how the uses of the word religion in various provisions suggest what might be called unpredictably overt constitutionalisation of Islamic law.

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7 Butt and Lindsey (n 3).

8 On the debates among the MPR's members on the inclusion of the seven words in Article 29, see Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002, Buku VIII Warga Negara Dan Penduduk, Hak Asasi Manusia Dan Agama* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010) Ch 5; Umar Basalim, *Pro-Kontra Piagam Jakarta Di Era Reformasi* (Pustaka Indonesia Satu 2002); Hosen (n 19) Ch 6; Salim (n 3) 88-107.

9 Many factions of the MPR had in fact proposed the full adoption of constitutional rights during the first meetings in 1999. Proposals for the constitutional reform should be understood against the background of the revolutionary Constitution which was made without giving much credence to the idea of human rights. There was a strong suspicion towards the idea due to its perceived roots in western individualism and liberalism. It was because of Mohammad Hatta and Muhammad Yamin's insistence on installing some fundamental rights in the constitution that the original article of 28, which provides freedom of association, assembly and of expression, was finally adopted. See the debates in the making of Article 28 in AB Kusuma (ed), *Lahirnya Undang-Undang Dasar 1945: Memuat Salinan Dokumen Otentik Badan Oentoek Menyelidiki Oesaha2 Persiapan Kemerdekaan* (Badan Penerbit Fakultas Hukum Universitas Indonesia 2009) 349–355, 366–367, 402–404.

10 Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Tujuh* (Sekretariat Jenderal 2010) 246-247, 250, 252-253, 297, 311, 441.

The Constitutional Right to Religious Freedom

The right to freedom of religion is enshrined in the chapter of human rights (Chapter XA) as a result of the Second Amendment. The making of the chapter was aimed at strengthening the ideals of constitutionalism which were deemed less guaranteed under the original 1945 Constitution[1].

Article 28E Paragraph 1 stipulates that ‘Every person shall be free to profess religion and to worship in accordance with his/her religion, to choose education and teaching, to choose work, to choose citizenship, to choose a place of residence within the territory of the State and to leave it, and be entitled to return to it’. In Paragraph 2 it is stated that ‘Every person shall have the right to freedom to possess conviction of a belief, to express thoughts and attitudes in accordance with his/her conscience’.

The first draft of the chapter provided two alternatives to the constitutional right to religious freedom in Article 28E: *First*, ‘Every person shall be free to profess religion and to worship in accordance with his/her religious belief (*kepercayaan agamanya*)’; *secondly*, ‘Every person shall be free to profess religion and to worship in accordance with his/her religion and belief (*kepercayaannya*).’ The two alternatives reflected the enduring unbridgeable conflict with regard to religion/belief distinction. They are to be read together with the debates on Article 29. Muslim parties-based factions including F-KB, F-Reformasi and F-PDU opted the first alternative since it used belief as religious belief. On the other hand, the secular nationalist factions such as F-PDIP, F-KKI and F-TNI/POLRI chose the second alternative, the text of which was similar to Article 29(2)[2].

In order to ascertain the difference between religion and belief, Lukman Hakim Saifuddin of F-PPP suggested putting freedom of religion in Paragraph 1 and freedom of belief in Paragraph 2 of Article 28E. Some other Muslim parties-based members supported Saifuddin’s view, assuming that parallelism of religion and belief would be unacceptable among Muslims[3]. In agreement with this suggestion and to avoid such parallelism, it was then drafted that Article 28E included (1) Paragraph 1 which stipulated religious freedom accompanied by some rights including the right to choose education and occupation; (2) Paragraph 2 which guaranteed freedom of belief together with freedom of expression and conscience. For the same reason, the wording of the paragraphs with regard to religion and belief also differed: for religion Paragraph 1 used ‘*memeluk agama*’ (to profess religion), while for belief Paragraph 2 used ‘*meyakini kepercayaan*’ (to possess conviction of a belief)[4]. This was also the final draft which was eventually agreed and promulgated as part of Article 28E.

In addition to Article 28E, the right to religion is stipulated in Article 28I (1) as a non-derogable right together with the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right not to be enslaved, the right to be individually recognised before the law, and

1 Ibid 440–441, 445.

2 Ibid 445-449. For the final draft article, see 510.

3 Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Lima* (Sekretariat Jenderal 2010) 518–531; Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Tujuh* (n 24) 462–474. Some members suggested to remove this article because their meaningless, contradictory stipulation, but others especially Hendi Tjaswadi of F-TNI/POLRI insisted its adoption.

4 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 350, 414.

the right not to be prosecuted under retrospective laws. These rights 'may not be reduced under any circumstances'. This formulation was similar to Article 37 of the 1998 MPR's decree and Article 4 of the 1999 Law on Human Rights. What was disputed among the members is whether these 'non-derogable rights' – according to the categorisation of the MPR's decree – cannot be restricted under any circumstances at all. Due to their wording, some members assumed that the rights were absolutely non-limitable, and this would make the existing punishment by the death penalty and punishment on crimes against humanity (genocide), for example, illegitimate because it contradicted the right to life and the right not to be prosecuted under retrospective laws respectively. However, by referring to Article 28J(2) on limitation of rights, it was then concluded that those rights might be legitimately restricted[1]. A similar conclusion may be drawn in the case of the right to freedom to manifest religion, even though it may be unacceptable in the case of the right to hold religion, the right not to be enslaved and tortured because these latter rights are absolute rights.

The inclusion of the right to freedom of religion in Chapter XA was aimed at guaranteeing such a right as a human right, while the same right in Article 29(2) was designated as the right of residents. As a human right, freedom of religion was considered by some religiously oriented factions as the most fundamental right[2]. This is probably because of their belief that religion was the foundation and origins of all other rights: it was religion that made the adoption of all other constitutional rights plausible and justifiable[3].

The adoption of the right to religious freedom in Article 28E seems to articulate what many members of the MPR believed in the distinction between religion and belief. Belief in this context would be understood as local beliefs, meaning that local beliefs are not considered as religion. However, no definition or clarification of what was qualified as religion and belief has ever been proposed and agreed. Given that the text uses these words in a general form, it, therefore, would be unjustified to restrict religion here to few religions and to identify belief merely as vernacular beliefs. Religion is arguably an inclusive word. It includes world and local religions. In this sense, Indonesian local beliefs could be considered as religion, either as local expressions of world religions or as local religions. On the other hand, the use of the word belief instead of the so-called a 'stream of belief' (*aliran kepercayaan*), in Paragraph 2 would suggest that it does not exclusively mean local beliefs. Freedom of belief protects every person to be free to believe in, for instance, spiritual beings or doctrines either in accordance with religion or non-religions. Belief in this article accordingly would

1 In accepting the adoption of constitutional rights, members of the F-KB and F-PDU referred to the Islamic concept of *maqāṣid al-sharī'ah* (the objectives of Islamic law), such as the right to profess religion and to worship (*hifẓ al-dīn*), the right to personal security and dignity (*hifẓ al-nasl*), the right to personal property (*hifẓ al-māl*), and the right to occupation and decent life (*hifẓ al-kasb*). On the other hand, the F-PDKB justified the adoption of human rights from a Christian conception of human beings as *Imago Dei*. See Ibid 350–351, 355, 378, 357.

2 The lexical meaning of belief supports this broad interpretation. See WJS Poerwadarminta, *Kamus Umum Bahasa Indonesia* (Perpustakaan Perguruan Kementerian P. P. dan K. 1954) 532. The notion of 'belief' in international human rights law, such as the International Convention of Civil and Political Rights is also interpreted as covering both religious and non-religious beliefs. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd ed) 414–5.

3 In its recent decision on the religion column in the ID card of followers of indigenous beliefs, the Constitutional Court affirms the same constitutional protection for religion and belief. See *Constitutional Court Decision No 97/PUU-XIV/2016* (7 November 2017).

include religion and non-religions[1]. The constitutional protection to freedom of belief is similar to religion, namely that every person is entitled to be free to hold a belief and express it in accordance with a believer's conscience[2].

There was, however, no consideration given by the drafters of the Amendment to the scope of freedom of religion. But it would be acceptable to argue that on the basis of the right to religious freedom, especially the right to freedom of worship (Article 28E(1)), one is free to believe in and to practice religious norms, including Islamic law for a Muslim. The extent to which the exercise of such a right is constitutionally guaranteed is when it violates others' rights or it is subject to legitimate limitations by law, as stipulated in Article 28J(2), the discussion of which will be presented in the following section.

Whether the right to religious freedom provides a justification for the state acknowledgment and regulation of religious norms, particularly Islamic law, is not certain. One possibility is that this preferential support is unjustified because it would be contrary to the principle of equality of citizenship and non-discrimination stipulated in the Constitution, Article 28D(1) and 28I(2) respectively[3]. However, as is the case with Article 29, the right to religious freedom would implicate, among others, the state supports for Muslims' manifestation of Islamic law. This interpretation also follows from the provision stipulated in the fourth paragraph of Article 28I, which states that 'the protection, advancement, enforcement and fulfilment of basic human rights is the responsibility of the State, especially the Government'. Similar to Article 29(2), the implication of this article could be that the state, in protecting, advancing, enforcing and fulfilling Muslims' right to their religious manifestation, provides facilities and supports, for instance, by enacting law on Islamic institutions and matters which are materially derived from Islamic law. This constitutional possibility must be read in conjunction with other constitutional norms and constitutional values such as the state fundamental principles, Pancasila par excellence, which will put constraints on the state incorporation of Islamic law.

1 See Salim (n 3) 170.

2 See the reference to the international instruments, for instance, in Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 519-520. The wording seems to be somewhat similar to the general limitation clause in the UDHR Article 29(2) which requires protection of the rights and freedoms of others, morality, public order and general welfare. On the other hand, the ICCPR's limitation of rights is stated in several articles following certain rights, including Article 12(3) on freedom of movement, Article 14(1) on procedural guarantees in civil and criminal trials, Article 18(3) on freedom of thought, conscience, religion and belief, Article 19(3) on freedom of opinion, expression and information, Article 21 on freedom of assembly, and Article 22(2) on freedom of associations and trade unions. Generally, the ICCPR's limitation clauses consist of national security, public order, public health, morality, and the protection of the rights and freedoms of others. The International Covenant on Economic, Social and Cultural Rights (ICESCR) approaches the rights limitation in a more general way than the UDHR, namely only by reference to 'the general welfare in a democratic society' (Article 4). See Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 288–308.

3 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 335-336.

Religious Values and Limitation of Human Rights

Another instance where religion is stated in the Constitution is in relation to values (*nilai-nilai agama*, religious values) in the context of the statutory limitation of human rights. The other context of religious values is education (Article 31(5)), that is the advancement of science and technology. The reference to religious values in the Second Amendment undeniably gives more appearance of religion than the original 1945 Constitution did. This might imply further support for state acknowledgment of religion in the public sphere, although the limits upon which such acknowledgement is legitimate remains ambiguous.

For the drafters of Chapter XA, human rights were always subject to limitations, even though they were believed to be fundamental for Indonesian constitutionalism. These limitations including, forexample, the right to freedom of religion, according to Article 28J(2), will be legitimate provided that they are determined by legislation, with the sole purpose of guaranteeing recognition and respect for the rights and freedom of others and of meeting the just requirements based upon considerations of morality, religious values, security, and public order in a democratic society.

The text above is similar to Article 36 of the MPR's Decree No. XVII of 1998 on human rights, with one particular exception, namely the phrase 'religious values'. Previously, based on this earlier article, the draft constitutional article did not provide 'religious values' as a limiter of rights. The basis of limitations upon which the limiting law is considered legitimate refers to the similar provisions found in international human rights instruments, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)[1]. What is peculiar here is, therefore, the adoption of the religious values in the final stage of the making of the chapter.

When the idea of human rights was first debated following the discussion on citizens and residents, the Reformasi faction suggested the inclusion of religious values, in line with the principle of the *Ketuhanan Yang Maha Esa*, as a limiter of human rights[2]. The first draft chapter, however, did not make any reference to the religious values. They were then proposed again with the reason that they would constraint the unbridled exercise of freedom and the excessive enjoyment of rights[3]. The Reformasi faction initially proposed the inclusion of the words directly after the Statute (*undang-undang*), as a limiter of rights, which might be understood as that the religious values would have authority equivalent to a statute in limiting rights[4]. Notwithstanding, the religious values were again absent from the second draft chapter[5].

Aware of the failure, A. M. Luthfi of the Reformasi faction complained and reminded other members about the religious values. Instead of placing them immediately after legislation, the suggestion now assigned the religious values after 'morality' consideration. Some members from the

1 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Tujuh* (n 24) 253, 296.

2 Ibid 253, 305. See also Salim (n 3) 110.

3 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Tujuh* (n 24) 512 (the draft was presented by Hamdan Zoelva as the chairperson of the meeting).

4 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 520–530.

5 On the 'Sharia supremacy clause', see Clark B Lombardi, 'Designing Islamic Constitutions: Past Trends and Options for a Democratic Future' (2013) 11(3) *International Journal of Constitutional Law* 615; Dawood I Ahmed and Tom Ginsburg, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2013) 54 *Virginia Journal of International Law* 615.

secular-nationalist factions (F-TNI/POLRI and F-PDIP) opposed this inclusion because the words had not been raised in the debates prior to the agreement on the draft. On the other hand, other members, particularly from the Muslim parties-based factions. supported the idea, arguing that the inclusion was a means to perfect morality consideration and to elucidate its contents in accordance with the religious nature of the nation. All factions with their own consideration finally agreed with the insertion of the religious values[1].

Although the religious values were introduced and supported by Muslim-based factions, which were implicitly aimed to advance Islamic aspirations, the words used – 'religious values' rather than 'Islamic values' – and their final adoption by all factions from different political ideologies and religious affiliations demonstrate the inclusiveness and generality of the words' meaning. They are also ambiguous as they entail different conceptions from various religious worldviews and their different schools or denominations. A reasonable meaning of these words, therefore, should refer to values of religions that are general and universal enough so that they would be reasonably accepted by respective religious traditions.

The word 'values' is not crafted accidentally. It was deliberately chosen so that all MPR factions could possibly agree with the insertion of religion. By employing the word 'values', the consideration of rights limitation should refer to more general doctrines and principles of religion rather than its rules and practical norms. This formula is different from what is known as the 'Sharia supremacy clause' found in many Islamic constitutions[2]. This meaning is consistent not only with the textual meaning of the word[3], but also its historical significance as it was used during the amendment process. In the draft amendment proposed by the F-PG, for instance, religious doctrines are distinguished between values, norms and laws of religion[4]. Moreover, the F-KB in its suggestions for amending Article 29 divided religious doctrines into four: creeds, rituals, social relations and universal values and morality. Religious values as used in this context were understood as the most abstract and universal teachings of a religion such as honesty and kindness and as providing ethical foundations for the state[5].

Religious law, Islamic law in particular, would have different roles in the face of the religious values clause. It may act either as an object of right limitation or one of the limiters of rights. Religious values constitute a measure for legitimate limitation on constitutional human rights. The exercise of the right to express religious freedom in the form of implementation of Islamic law might subject to state restriction whose legitimacy is determined by its consistency with, among others, religious values, in other words the values of all religions. In the internal Islamic legal tradition, Muslims' application of

1 Value (*nilai*) is 'important or beneficial qualities for humanity'. See Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia* (Balai Pustaka 2001).

2 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 421-422 (Rosnaniar, F-PG), 566 (Amidhan, F-PG).

3 Ibid 423; Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2001, Buku Satu* (Sekretariat Jenderal 2010) 427.

4 On the concept of *maqāṣid al-sharīʻah*, see Jaser Auda, *Maqāṣid Al-Sharīʻah as Philosophy of Islamic Law: A Systems Approach* (The International Institute of Islamic Thought 2007); Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008) 27-36.

5 Article 24C(1) of the 1945 Constitution establishes the power of the Court to review legislation against the Constitution.

Islamic law is constitutionally confined by its compliance with the values and objectives of Islamic law itself (*maqāṣid al-sharīʻah*)[1].

On the other hand, whether the religious values clause provide a basis for Islamic law to be considered in limiting rights is not conclusive. Even if that is the case, the consideration of Islamic law should be based on its shared values or principles. Except in the case of a law that is specifically binding only for Muslims, in which case the compliance with *maqāṣid al-sharīʻah* is necessary, the consideration of religious values should reasonably be general enough so that it could unlikely be in conflict with values of other religions.

It is possible that what is considered by religious authorities as a value in one religion would not be seen so by other religions. In this circumstance, such a value would not satisfy the requirement of generality and inclusiveness of constitutional religious values. Most importantly, whether the requirement is fulfilled is not to be relegated to religious authorities to determine, since they are not sanctioned by the Constitution.

Because the limitation of rights is possible only if it is provided by legislation, the determination of whether the legislation fulfils the requirements of the legitimate limitation, including by religious values, is left to its authoritative interpreters. In line with this, as a result of the constitutional amendment, the Constitution secures the authority to review whether the legislation in question has legitimately restricted the rights to the Constitutional Court, in accordance with the principle of the supremacy of the Constitution[2]. It is up to the Court then to decide, for instance, whether a legal restriction on a manifestation of religious freedom is consistent with religious values and other considerations (protection of others' rights and freedoms, morality, security and public order).

Legislation of Religion

In conjunction with the previous constitutional incorporation of religion, the chapter of Regional Representative Council (*Dewan Perwakilan Daerah*, DPD), Chapter VIIA, gives religion a constitutional status in relation to statutory law.

Article 22D(2) stipulates that the DPD 'submits its advice to the People's Representative Council [DPR] on bills of the State Budget and bills relating to taxes, education and religion'. In Article 22D(3), the DPD may 'supervise the implementation of laws regarding… the implementation of the State Budget, taxes, education and religion'. According to the article, the DPD is granted the power to render consideration to the DPR regarding a bill in matters of religion. Having been promulgated the bill becomes a binding law whose implementation could be the subject of the DPD's supervision. The adoption of this article would likely generate serious concerns regarding its implication for religion being legislated, in what sense and to what extent religion might be legislated.

The word religion in the amended chapter (Chapter VIIA) was added in draft Article 22E, a draft of then-Article 22D, during the Second Amendment process. It first appeared in the draft article suggested by the F-PBB in which the regional representatives would have the power to agree or

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1 Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Empat* (Sekretariat Jenderal 2010) 661-662.

2 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 54; Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2000, Buku Enam* (Sekretariat Jenderal 2010) 391.

disagree to a bill on religion[1]. The F-PG later suggested a similar draft provision with regard to the DPD's agreement to a bill on religion, and an additional power to supervise the implementation of law on religion[2]. These suggestions were then accepted as a draft article produced by the MPR after the conclusion of the Second Amendment[3]. The insertion of religion in this draft article was related to the jurisdiction of the Central Government in matters of religion as mandated by Law of Regional Government[4]. The reasoning was that the DPD as regional representatives should be asked for their views and considerations on the significance and implication of legislation in matters of religion for the interests of regions. In the Third Amendment process, the draft article on the powers of the DPD (Article 22D) was discussed and, after some changes to the original version, eventually accepted by the MPR[5].

The article makes it constitutionally possible to have legislation which regulates religion. A bill on religion can be submitted by members of the DPR who have the right to submit a bill (Article 21), or by the President who also has the right to submit a bill to the DPR (Article 5(1)). The bill can only become law if it has been discussed and agreed by both the DPR and the President (Article 20(2)). The DPD has no power either to submit or discuss a religion-related bill. They only have the power to give advice on such a bill and to supervise the implementation religion-related legislation. The phrase 'submit its advice' would mean that the DPD may provide their consideration on the bill but may not take part in discussing it together with the DPR and the President as is the case with bills related to regional interests.

Although the article seems to suggest the possibility of religion-related legislation, it is by no means clear what the article means by religion here[6]. It might be interpreted as legitimising the enactment of religious norms for the sake of religions themselves. However, this interpretation seems to be inconsistent with the wording of the paragraph. Similar to legislation regarding taxes and education, there could be legislation that regulates religious institutions, the relationship between religious communities, or religious activities in terms of facilitation, support, administration or restriction that are all aimed at maintaining the state objectives. In this case, as is also the case with

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1 See draft Article 22E in the Attachment of *Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor IX/MPR/2000 Tentang Penugasan Badan Pekerja Majelis Permusyawaratan Rakyat Republik Indonesia Untuk Mempersiapkan Rancangan Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.

2 Article 7(1), Law No. 22 of 1999 on Regional Government. The reference to the substance of this statute was frequently made in the discussions on the powers of the DPD during the Second and Third Amendment processes.

3 Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2001, Buku Empat* (Sekretariat Jenderal 2010) 688–689.

4 Rudi Supriatna of the F-TNI/POLRI was concerned with the use of 'religion' in the draft article during the Second Amendment process. See Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Tujuh* (n 24) 344.

5 See further Daniel S Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institution* (University of California Press 1972); Nur Ahmad Fadhil Lubis, 'Islamic Justice in Transition: A Socio-Legal Study of the Agama Court Judges in Indonesia' (Ph.D., University of California, Los Angeles, 1994). On a recent development of religious courts, see Mark E Cammack, 'The Indonesian Islamic Judiciary' in R Michael Feener and Mark E Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Islamic Legal Studies Program, Harvard University Press 2007) 146; Timothy Lindsey, *Islam, Law and the State in Southeast Asia: Volume 1 Indonesia* (I.B. Tauris 2011) 255–360.

6 Majelis Permusyawaratan Rakyat Republik Indonesia, *Tahun Sidang 2000, Buku Lima* (n 27) 171, 178, 202.

its other constitutional uses as discussed earlier, religion that could be the subject of legislation would include all religions. Such legislation might regulate the expression of a particular religion, such as Islam, relating to private matters such as marriage and business, on the basis of freedom of religion. This would be possible provided that all constitutional requirements are fulfilled.

Religious Judiciary

Unlike the general and inclusive meaning of religion in all other constitutional articles, the word religion as used in the context of judiciary suggests a discrete meaning. Religious judiciary (*peradilan agama*) has been a special court for Muslims. It has been institutionalised for the enforcement of part of Islamic law.

The original, pre-amendment Constitution provided that 'The judicial power shall be exercised by a Supreme Court and other judicial bodies in accordance with law' (Article 24(1)). When the Constitution was adopted, in accordance with the Transitional Provision, all state bodies and laws of pre-independence Indonesia, including those related to judicial power, were considered valid and should be in place provided that they were not contrary to the Constitution or until new institutions and laws were made. As a consequence, pre-independence religious courts which decided cases of personal law between Muslims according to Islamic law were accepted as legitimate courts, part of what the Constitution stated as 'other judicial bodies.' This recognition was demonstrated, among others, by the Government's regulation to transfer of the administration of Appellate Islamic Court (*Mahkamah Islam Tinggi*, literally High Islamic Court) from the Ministry of Justice to the Ministry of Religious Affairs in 1946 following the establishment of this latter ministry.[1]

Following the development of judicial power, particularly since the promulgation of Law No. 14 of 1970, the Third Amendment of 2001 adopted a new formulation of judicial power which differs to a great extent from the original article. Article 24 Paragraph 2 stipulates that: 'The judicial power shall be exercised by a Supreme Court and judicial bodies below it in the respective environments of general courts, religious courts, military courts, administrative courts and by a Constitutional Court'. In this amended article, the Supreme Court constitutes the highest court. The four judicial bodies below the Supreme Court are mentioned including religious courts.

The idea to constitutionalise religious courts appeared during the Second Amendment process. Members of Islamic parties-based factions (F-PPP and F-PDU) proposed a draft of Article 24 in which religious courts together with other courts were stated in draft paragraph 3[2]. With this proposal, there were two alternatives to the formulation of the paragraph: one that made a general reference to judicial bodies below the Supreme Court, similar to the original version; the other that mentioned categories of courts including religious courts and special courts according to the Law of Judicial Power[3]. The latter alternative demonstrated the attempts to make Islamic courts having constitutional status.

1 Article 10(1) Law No. 14 of 1970. Ibid 214, 274–277.

2 Pataniari Siahaan of the F-PDIP suggested a short version similar to the original paragraph with an addition of a Constitutional Court. This proposal, however, does not mean that he was against the establishment of religious courts. Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2002, Buku Tiga* (Sekretariat Jenderal 2010) 396–397.

3 Ibid 404.

The MPR's session in 2000 produced a draft paragraph which adopted the second alternative and would be used as a source of amendment in the next year. During the Third Amendment process, all factions debated where the judicial power would be vested in and what courts should be mentioned. Despite the fact that almost all members[1] agreed to stipulate the four jurisdictions of judiciary, all of which culminated in the authority of the Supreme Court, they differed in whether those four were the only jurisdictions recognised by the Constitution or it should make others (such as tax or human rights courts) possible to be established independently, and how a constitutional court should be placed in relation to the Supreme Court. Eventually, a formulation as currently provided by the Third Amendment was agreed[2].

Different from its uses in other instances as previously demonstrated, the word religion in the context of judiciary historically and conventionally would only mean Islam. Religious courts have been the courts for Muslims in deciding cases of personal status since pre-independence Indonesia. Its institutionalisation has acquired a constitutional status and developed to a great extent since the Third Amendment. The religious judiciary would mean courts for all religions only if there is a radical change to this long-standing practice by establishing courts for different religious communities.

As it appeared in the deliberation during the Second and Third Amendment processes, no view and argument directed to the denial or criticism on the establishment of (Islamic) religious courts. Rather, it was suggested by some members that the establishment of Islamic judiciary was acceptable because it has been part of the country's long-standing tradition and that it applies only to Muslims that would not unfairly discriminate against the interests of other believers.[3] The acceptability of religious judiciary by the secular-nationalist and Christian factions seems to be an opposite of their insistence to reject the inclusion of the seven words of the Jakarta Charter in the case of Article 29(1). In other words, if the seven words were rejected because of their explicit reference to the bindingness of Islamic law, it is questionable why the constitutional establishment of Islamic judiciary was unanimously accepted. One possibility is that the acceptance was based on the subordinate nature of Islamic courts since they were under the authority and supervision of the Supreme Court. After all, with the incorporation of 'religious judiciary', the legitimacy of a special court for enforcing (part of) Islamic law for Muslims is not only undisputed but also strengthened by granting it a constitutional legitimacy.

Religion, Islamic Law and Inclusive Secular Constitutionalism

The constitutionalisation of religion implicates the state acknowledgment and support of religion, which should not be limited to a particular religion. However, nowhere in the Constitution

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1 Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Tahun Sidang 2002, Buku Lima* (Sekretariat Jenderal 2010) 240.

2 Article 27(1): All citizens have equal status before the law and in government and shall abide by the law and the government without any exception. Article 28D(1): Each person has the right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law. Article 28H(2): Each person has the right to assistance and special treatment in order to gain the same opportunities and benefits in the attainment of equality and justice. Article 28I(2): Each person has the right to be free from discriminatory treatment on any grounds and has the right to obtain protection from such discriminatory treatment.

3 Hirschl, *Constitutional Theocracy* (n 2) 31–32. Such acknowledgment of Islamic law or Islamic courts can be found in some secular constitutional systems, such as India, Nigeria and Singapore.

might suggest what constitutes religion that secures state acknowledgment. Such a determination is accordingly vested in authorities outside the Constitution but bound by it. One exception to this inclusive meaning is when religion is used in the context of the judiciary (religious judiciary) as a result of the Third Amendment. The use of religion here may not be interpreted in the same way as in other contexts as this would be contrary to the long-standing convention predated since the pre-independence Indonesia. As the historical narrative of its making and adoption also demonstrates, the religious judiciary would mean Islamic courts for enforcing part of Islamic law for Muslims. With this understanding, the establishment of religious courts would result in the acceptability of state preference of Islamic law as substantive law for the courts.

The establishment of Islamic courts is in fact a radical change to the original Constitution. It has added to a significant extent the religious character already robust after the Amendment. Yet, it might be in tension with the constitutional value of equality of citizens irrespective of their religious affiliations as endorsed by the Preamble and the constitutional articles (27(1), 28D(1), 28H(2), 28I(2))[1].

The adoption of Islamic judiciary and hence the legitimacy of state incorporation of Islamic law, what might be called 'religious jurisdictional enclaves'[2], would not place the Indonesian Constitution within the group of assertive or exclusive secular constitutionalism. Such acknowledgment and support demonstrate the impossibility of strict separation of state and religion, as adopted in many secular constitutions. On the other hand, in comparison with strong religious or theocratic constitutions, wherein state acknowledgment of Islamic law and judiciary is a common feature, the Indonesian case differs in respect of both a reference to the state religion and the scope of jurisdiction. In contrast to Indonesia, those constitutions establish Islam as the state religion and Islamic law as the main or supreme source of law[3].

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1 The reference to Islam does not necessarily make a constitution theocratic. In the case of Malaysia, for instance, although the Federal Constitution stipulates that Islam is the religion of the Federation (Article 3(1)), the enforcement of (limited) Islamic law and establishment of Islamic courts are state (not federal) matters. See further Shad Saleem Faruqi, 'The Malaysian Constitution, the Islamic State and Hudud Laws' in KS Nathan and Mohammad Hashim Kamali (eds), *Islam in Souteast Asia: Political, Social and Strategic Challenges for the 21st Century* (ISEAS 2005) 256; Andrew Harding, 'Malaysia: Religious Pluralism and the Constitution in a Contested Polity' (2012) 4(2–3) *Middle East Law and Governance* 356; Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press, 2018).

2 Unlike the rule of law concept, *rechtsstaat* was meant 'state rule through law' and accordingly gave emphasis on the primacy of (modern) state. Historically concerned a mere formal aspect of rule of law, today's *rechsstaat* is embedded with substantive aspects. See Martin Krygier, 'Rule of Law (and Rechtsstaat)' in James R Silkenat, James E Hickey Jr. and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer International Publishing, 2014) 45. Originated from *rechtsstaat*, the conception of *negara hukum* has been subject to controversy since its insertion in the Elucidation of the original 1945 Constitution. With the Amendment being promulgated, the *negara hukum* now adopts substantive elements of rule of law. See Tim Lindsey, 'Indonesia: Devaluing Asian Values, Rewriting Rule of Law' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge, 2004) 281; Hosen (n 19) Chapter 5.

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Isaiah Berlin, 'The Pursuit of Ideal' in his *The Crooked Timber of Humanity* (Henry Hardy ed, Princeton University Press 1990) 19; 'The Romantic Revolution' in his *The Sense of Reality*, (Henry Hardy ed, Farrar, Straus and Giroux

With the overwhelming support for religion and the establishment of Islamic courts, the Indonesian case might be deemed to be a religious constitution, albeit in a moderate sense. This implies that religion(s) would have a defining role in matters of laws and policies and that the state should provide more support for religious causes. However, the fact that the Constitution does not establish a state religion or religions and it subordinates religion stipulations to the Constitution itself and limits the exercise of religion by state regulation makes it unlikely to be (moderately) religious. This brings to my argument that the design of the Indonesian Constitution is inclusively secular that implicates that state support for religion and Islamic law in particular should be contingent upon and bound by the constitutional values and provisions according to the idea of the supremacy of the Constitution. Article 1(2) stipulates that 'Sovereignty is in the hands of the people and is exercised in accordance with the Constitution'. Before the state, religion *per se*, therefore, has no authority independent of the Constitution. The earlier reference to the Preamble also suggests that the Preamble in which the state ideology (Pancasila) is located should be the basis of all constitutional provisions. This means that the support of religion in the articles is acknowledged as long as religion is consistent with the Pancasila.

In addition, religion is governed under the principle of *negara hukum* (or *rechtsstaat*, the Indonesian version of 'rule of law')[1] as stipulated in Article 1(3), which implies that it is the state, a secular agency, that defines *through law* the boundaries of religion.

From the discussion in the previous sections, it is clear that the constitutionality of religion is always determined by the state under the principle of constitutional supremacy and not independent from secular considerations: the right to religious freedom is limited by legislation; legislation on religion should adhere to the constitutional limitations; religious values that could limit constitutional rights are defined by the state and should be channelled through legislation; religious courts are subordinate courts below the Supreme Court that is established to uphold law and justice.

Conclusion

This essay has attempted to examine what might be called an unpredictably overt constitutionalisation of Islamic law. The four religion-related issues in the constitutional articles –the right to religious freedom, religious values as a right limitation, legislation of religion, and the religious judiciary– seem to suggest that despite the fact that the seven words of the Jakarta Charter failed to be constitutionalised, Islamic law acquires more of its constitutional status through other provisions. It is acknowledged through the respectful uses of religion in the articles. With the references to the word religion in an inclusive meaning, the status of Islamic law there would be similar to laws and norms of other religions. Nonetheless, the inclusion of the religious judiciary clause is critical in the constitutional establishment of Islamic law. A state court is now constitutionally authorised to decide cases on the basis of (parts of) Islamic law. Notwithstanding this establishment, the Constitution itself is not religious or theocratic and remains secular though in an inclusive way, since religion and Islamic law there are dependent on the supremacy of the Constitution and the Rule of Law.

1998) 192; 'Montesquieu' in his *Against the Current* (Henry Hardy ed, Princeton University Press 2001) 148; 'Letter to Elena Levin, 30 November 1954' in his *Enlightening: Letters 1946-1960* (Henry Hardy and Jennifer Holmes eds, Chatto & Windus 2009) 454.

1 In Immanuel Kant, *Political Writings* (Hans Reiss ed, 2nd edn, Cambridge University Press 1991).

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