

Constitutionalism in Indonesia: An Islamic Governance Legal Perspective

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1 Constitutionalism in Indonesia: An Islamic Governance Legal Perspective

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Abstract: Islam is the most followed religion in Indonesia, making Indonesia contains the largest Muslim population of all countries in the world. However, Indonesia is not a religion state. This has become an issue in several Muslim groups in Indonesia, whether it is permissible to have a state under the Republic of Indonesia based on their beliefs.

Purpose: This paper will explain the relationship between Islam and The State of Indonesia and the study of Islamic government law related to the Indonesian government.

Design/Methodology/Approach: This research is qualitative. The approach used is statute, conceptual, and hermeneutics, while the assessment method used is comparative.

Findings: The system of government of Indonesia has a close relationship to the principles and substance of Islamic law. Although the State of Indonesia is not an Islamic state, Indonesia is also not a secular state, which separates religion and state. From the Islamic government law's perspective, it's called *tamyiz* or proportional. Indonesia takes Islam in the principles of state proportionally. Therefore, The State of Indonesia is not contrary to the principles of Islam.

Originality/value: Numerous studies have been undertaken to examine the correlation between religion and the government in Indonesia. This article builds

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1 upon the earlier research conducted by other scholars. This article affirms that the Indonesian State is not in conflict with Islam.

Keywords: islam; state; government; indonesia; tamyiz

Paper Type: Article-Research

Introduction

Indonesia is the country with the largest Muslim population in the world. The Central Bureau of Statistics publication in 2010 stated that Muslims in Indonesia were 207,176,162 people or 87.18% of the total population in Indonesia (BPS 2019). However, Indonesia is not a country that stands and proceeds in the state based on one religion only. There is no single phrase in Indonesia's constitution, namely the 1945 Constitution of the Republic of Indonesia, which states that the Indonesian state is Islamic. Even the basis of the Indonesian state, namely Pancasila, the phrase in the first principle, which was originally 'God with the obligation to implement Islamic law for its adherents,' was changed to 'God Almighty'. These juridical and historical facts emphasise that Indonesia is not a state based on one religion alone.

Nevertheless, within the context of community development in Indonesia, a faction harbors skepticism and raises inquiries over the Indonesian state's progression, grounded in their convictions. A coalition of organizations has started to scrutinize the fundamental principles behind the defense of the Indonesian state, particularly in relation to their views. They are examining whether the processes that form the basis of the Indonesian state align with their beliefs, and whether engaging in activities that promote nationalism is permissible according to their beliefs. These doubts and questions lead to the realization that Indonesia is a country that does not align with their values (in certain rigid perspectives, this is referred to

as the state system *Al-Kuffar* or *Thogut*), and they are unwilling to adhere to the Indonesian state system.

Surveys conducted by various institutions indicate the emergence of several narratives that oppose the Unitary State of the Republic of Indonesia and seek to replace the state system and the foundation of the state (Pancasila) with a system based on the beliefs of a specific group. The caliphate system is proposed as one of the systems for Muslims, who are adherents of Islam (BNPT 2020). Nevertheless, there is dissent among Muslims over this narrative. Multiple factions assert that the Republic of Indonesia is not in conflict with Islam. Nahdlatul Ulama, one of the largest Islamic social organizations in Indonesia, is recognized for its narrative of state defense, namely "*Hubbul wathan minal iman*" (Love of the country is part of religion), which was introduced by KH Abdul Wahab Chasbullah (Ibda 2017).

The problem formulation in this study is derived from the advantages and disadvantages discussed in the preceding introduction

1. What is the correlation between the Indonesian state process and Islam?
2. Do Indonesia's state processes and systems contradict Islam?

Several research establish a correlation between Islam and Indonesia. One of the articles is written by Ahmad Sadzali and titled "*Hubungan Agama dan Negara di Indonesia: Polemik dan Implikasinya dalam Pembentukan dan Perubahan Konstitusi*". This article accounts for the historical conflicts between religion and the state in Indonesia and examines the consequences for the Indonesian constitution. Another study was conducted by Moh. Dahlan titled his work "*Hubungan Agama dan Negara di Indonesia*". This article expands upon previous articles that explore the correlation between religion and the government in Indonesia.

The article integrates Islamic principles from the Qur'an with scientific notions from State Science and Legal Science, namely Constitutional Law.

The key distinction lies in the explicit affirmation made in the conclusion of this article, which asserts that the Indonesian State is not in conflict with Islam. This affirmation is based on an examination of both the formal aspects, such as the Indonesian State Constitution (specifically the 1945 Constitution of the Republic of Indonesia), and the overall state processes in Indonesia.

Methods

This research is descriptive qualitative research, which is a type of research intended to explore and clarify a social phenomenon/reality. The research technique is a library technique by examining library materials (normative), namely research conducted by examining library materials to compile a theoretical framework and to support the study and solution of problems (Ashshofa 2011). The study is a comparative method between Constitutional Law and Islamic Government Law. This method uses a statutory approach and a conceptual approach. (Marzuki 2017). Furthermore, the study incorporates Martin Heidegger's hermeneutic methodology, which posits an interpretive framework that establishes a connection between the interpreter and their existence. Consequently, comprehension becomes a dialectical process of unveiling the significance embedded within language.

Primary data sources consist of the original text of the Qur'an, including its translation, and the 1945 Constitution of the Republic of Indonesia. The secondary data sources utilized in this study include interpretations and other publications that augment the findings of the primary data sources, providing a basis for comparison and enhancing the overall debate.

Discussion and Findings

The State: Conceptual Frameworks and Theoretical Paradigms

There is a difference in meaning between state theory and state theory. In state theory, the central point of discussion is the authority and power of the government, meaning that it discusses the state as a power structure and why a person or group of people has power over a group/association. Examples are theories about the justification of state power (*rechtsvaardigings theorie*), including the theory of theocracy (*theocratieshe theorie*), the theory of power (*machten theorie*) and others. Meanwhile, the theory of the state focuses more on the self-organizing container of a society/national association. The state is considered as a container/embodiment where the people of the nation organise themselves (*de staat is een figuur in dit volksgemeenschap zichzelf organiseren van het gemeenschap wezen*). Jellinek coined the term "*staatbildung theorie*" to refer to this idea of the state. When examining the theory of the State, it is approached from a legal perspective, however when examining the theory of the state, it is approached from a social and philosophical standpoint (Kasimon 2015).

Jellinek introduced the theory of two facets (*zweiseiten theorie*) when discussing general state science. This theory examines two perspectives: the sociological aspect and the juridical aspect (Hakim 2019). The sociological perspective views the state as a construct of society or the entirety of the State, whereas the juridical perspective perceives the State in terms of its organizational structure or as a legal construct. The legal concept of a juridical entity or legal community is commonly referred to as *allgemeine staats-rechtlehre*.

In Constitutional Law, the two perspectives are inherently intertwined, as they strongly connect. Consequently, it is impossible to disentangle the same research object when approached from different perspectives. Examining State

authority solely from a legal perspective is insufficient without additionally considering its social-philosophical dimensions (Hadi and Ristawati 2020).

Merely reading the language and explanations of a country's Constitution is insufficient for comprehending its meaning and implications. An in-depth analysis of the historical context, prevailing circumstances, and the framers' mindset is important to comprehend the Constitution. Hence, by examining the Constitution alongside other methods, one can prevent any occurrence of misinterpretation or misunderstanding that deviates from the original purpose and essence of the Constitution.

State Theory and the Study of State Science: Unraveling Theoretical Underpinnings

When discussing the state, it is essential to explore several ideas that pertain to its nature, including the origin of the state, the concept of state sovereignty, the theory of legitimacy, and the theory of state objectives, among others. The Faculty of Law and Social and Political Sciences teaches students about the "State Science" field. Constitutional Law (*Hukum Tata Negara*) differs in that it examines the concept of the state in a theoretical manner, without being limited by specific circumstances, time, or location. The goal of learning can encompass an extant country, a historical country, or even a prospective country that may come into being in the future. Constitutional Law examines the specific manifestation of the state, such as Constitutional Law Indonesia, Constitutional Law United States, Constitutional Law United Kingdom, and others.

One area of study in political science focuses on the theoretical explanation of how states come into existence. There are three primary perspectives regarding this issue: Theocracy Theory, Social Contract Theory, and Power Theory (Atmadja 2012). Theocracy entails the absence of a separation between the

monarch and the state. This theory posits that power emanates from divine or supernatural sources that surpass human capabilities or natural forces. Subsequently, authority is bestowed upon an individual who possesses control over the government or exercises dominion. This belief was widely accepted in ancient times, as exemplified by the Egyptian Pharaoh who was proclaimed a direct descendent of the deity *Ra*, the Sun God. Friederich Julius Stahl, often known as the Modern Theocracy, is a prominent figure in this ideology.

Another hypothesis is the Community Covenant Theory. This philosophy encompasses multiple perspectives. Hugo de Groot (Grotius) posited that the state sprang from a social contract known as *pactum*, with the primary objective of establishing societal order. At the heart of his thesis lies the notion that individuals had an inherent inclination towards benevolence towards their fellow beings. John Locke posited that the presence of a social contract within society serves the purpose of safeguarding the fundamental rights of individuals. Without a social compact, the situation can devolve into anarchy due to the potential human rights clash amongst individuals, as each person possesses inherent rights that may conflict if left unregulated. An alternative hypothesis is the concept of power, often known as *Machttheorie*. This thesis is categorized into the physical power theory, which asserts that the strong exert dominance over the weak, and the economic power theory.

However, the focal point lies in sovereignty, disregarding the aforementioned three perspectives. Sovereignty comes from the Arabic "*Daulah*" which means supreme power. The characteristics of sovereignty consist of 4 (four) things, namely: 1) Single; 2) Original; 3) Eternal; and 4) It cannot be divided. From the theory of sovereignty, it is divided into 5 types, namely: 1) Sovereignty of God; 2) Sovereignty of the King; 3) State

Sovereignty; 4) Legal Sovereignty; and 5) People's Sovereignty (Kusnardi and Saragih 1994).

Unity in Diversity: Islamic Principles and State Science in the Indonesian Context

As previously stated, despite having **1** the largest Muslim population in the world, Indonesia is not exclusively founded on a single faith. The correlation between religion and the state has emerged in contentious discussions and arguments in the first decades of current century. Two prominent factions are examining the correlation between religion and **2** the state. There are two main forms of government regarding the relationship between religion and the state. The first is theocracy, where religion and the state are inseparable. The second is secularism, which distinguishes religion and the state (Gunawan 2017).

The link between religion and state in Islam remains a subject of ongoing controversy among Islamic scholars. This argument is fueled by the complex and sometimes uneasy connection between Islam as a religious belief system (*din*) and the governing authority of the state (*dawlah*). Regarding the matter of state and government, along with the fundamental principles involved, at least three paradigms represent the Islamic perspective on the state. These paradigms are:

- a) Integrative paradigm, namely the integration between Islam and the state, according to this paradigm, the concept of religion and state relations is an inseparable unity. Both are two institutions that are integrated. This implies that the state is a political institution as well **3** as a religious institution.
- b) The symbiotic paradigm, in which the relationship between religion and the state is understood to need each other and is reciprocal. Religion needs the state as an instrument in preserving and developing religion. Vice versa, the state needs religion, because religion also helps the state foster morals, ethics and spirituality.

- c) According to the paradigm of secularity, there is a separation (disparity) between religion and the state. Religion and the state are two different forms and each has its field of work, so their existence must be separated and neither should intervene.

What is the current situation in Indonesia? From the perspective of the theory of sovereignty in State Science, Indonesia follows the principles of God's sovereignty, people's sovereignty, and legal sovereignty. The Indonesian State acknowledges the presence of supernatural intervention in the establishment of the country, concerning Islam. The third paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia articulates the declaration of independence by the Indonesian people, motivated by a noble aspiration for a liberated national existence, and acknowledging the role of God Almighty.

This can also be related to the words of Allah SWT in the Qur'an, surah Al-Maidah verse 11:

يَا أَيُّهَا الَّذِينَ آمَنُوا اذْكُرُوا نِعْمَتَ اللَّهِ عَلَيْكُمْ إِذْ هُمْ قَوْمٌ أَنْ يَبْسُطُوا
إِلَيْكُمْ أَيْدِيَهُمْ فَكَفَّ أَيْدِيَهُمْ عَنْكُمْ وَاتَّقُوا اللَّهَ وَعَلَى اللَّهِ فَلْيَتَوَكَّلِ

“Remember Allah's favour upon you, when a people intended to attack you with their hands, but Allah withheld their hands from you. And fear Allah, and to Allah alone should the believers put their trust.”

According to the Ministry of Religious Affairs, this verse reminds believers to express gratitude for the blessing of being protected from the enemy's intrusion. The specific groups involved were the pagans of Mecca and the Jews of Banu Nadhir. Their purpose was to launch a deceitful attack on Muslims to cause harm. However, Allah intervened and prevented them

from executing their malicious plans. Similarly, this occurred when Indonesia achieved independence after enduring colonization by the Dutch, Japanese, and other European powers for an extended period of time. Hence, the Indonesian populace demonstrated their enduring gratitude towards Allah by incorporating the expression "by the grace of Allah the Almighty" within the preamble of the 1945 Constitution of the Republic of Indonesia (Kementerian Agama Republik Indonesia).

Regarding the concept of sovereignty embraced in Indonesia, Professor Jimly Asshiddiqie, an expert in Constitutional Law at the University of Indonesia, presents the following argument:

"To address these conceptual requirements, drawing from the concept of '*Khalifah alrasul*' during the '*khulafau alrasyidin*' era, it can be affirmed that the Indonesian nation indeed upholds the idea of the Supreme Authority of God Almighty alongside the ideas of People's Sovereignty and Legal Sovereignty within a cohesive modern constitutional framework. To comprehend the Almighty God, we must acknowledge the omnipotence of God Almighty. This implies that God is the ultimate authority and controls every aspect of human existence. Contrary to theocracies that represent God's ultimate authority through the King's authority, the Indonesian nation represents God's ultimate authority through the notions of the people's authority and the authority of law." (Asshiddiqie 2012).

In addition, Indonesia's state process is characterized by deliberation and consensus in decision-making. This aligns with Islamic principles, as the concept of deliberation, known as "*shura*" in Arabic, is emphasized in the 42nd Surah of the Qur'an. This highlights the significance of deliberation as a fundamental aspect of the Islamic system of governance.

According to Professor Philipus M. Hadjon (Hadjon 2007), an expert in State Administration Law, Indonesia has a unique

legal system that distinguishes it from other countries. This system is known as the Pancasila State of Law, which emphasizes using deliberation to reach consensus. This approach is applied in resolving disputes and legal matters, prioritizing consensus. Consequently, in Indonesia, the preferred method of legal settlement through deliberation is referred to as "*primum remidium*" (main settlement), while resorting to the judiciary is considered a last resort, known as "*ultimum remidium*" (last means or remedy).

Regarding the discussion on reaching a consensus, Professor Jimly Asshiddiqie presents the following argument:

"...Thus, the conviction that God is the singular and omnipotent being leads to the emergence of the principle of human equality or egalitarianism in societal existence." Everything is subjective or relative, except for God, who is omnipotent and absolute. According to the concept of 'tawhid', as every individual is considered 'Khalifah Allah', the Prophet stated that each person is a leader with specific duties in their domains. Hence, individuals need to engage in discourse to reach judgments pertaining to shared interests becomes unquestionable. Consultation is a necessary and essential aspect of social interaction. The principle of deliberation holds great significance in Islamic teachings concerning public life." (Asshiddiqie 2012)

The Caliph of Allah referred to above is related to the Word of Allah in Surah Al-Baqarah verse 30:

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً قَالُوا أَتَجْعَلُ فِيهَا مَنْ يُفْسِدُ فِيهَا وَيَسْفِكُ الدِّمَاءَ وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ
وَتُقَدِّسُ لَكَ قَالَتْ إِنِّي أَعْلَمُ مَا لَا تَعْلَمُونَ

"And (remember) when your Lord said to the angels, "I want to make a caliph on earth." They said, "Do you intend to make one who will destroy and shed blood therein, while we praise

and sanctify your name?" He said, "Indeed, I know what you do not know."

According to certain interpretations, the Quran refers to the Prophet Adam A.S. as the caliph. However, alternative interpretations suggest that the caliph represents the entirety of humanity (Lisnawati, Abdussalam, and Wibisana 2015). If all humans bear collective responsibility for the management of the earth, then to prevent conflicts, discourse is conducted. The passage elucidates the concept of contemplation, wherein Allah SWT pre-informed the Angels about His actions on earth. However, in contemporary times, the passage has been adopted as a rallying cry by a faction of individuals or organizations seeking to supplant the existing Indonesian governmental structure with a system known as *Khilafah*. The current effort by proponents of *Khilafah* emphasized the global solidarity of Muslims under a sole leadership, represented by a single caliph.

When analyzing the aforementioned opinion, it is imperative to do a full study including multiple perspectives, linguistic analysis, interpretations, and historical context. For instance, the historical viewpoint of the selection of the chief executive. Each caliph during the Khulafaur Rashidin period had a unique appointment mechanism. Abu Bakr was chosen unanimously. The previous caliph directly appointed Umar bin Khattab. Uthman bin Affan was chosen by a committee of experts, whose members were selected by the previous caliph. Ali bin Abi Talib was appointed due to the absence of a governing authority during that period (Wulandari 2018).

MaHFud MD, in his capacity as a speaker, has often said that the fundamental sources of Islamic law (Al-Qur'an and As-Sunnah) do not mention *Khilafah* as a standardized system of Government, as advocated by Hizbut Tahrir Indonesia. The text refers to the concept of designating a caliph as the leader of a country, with each country having its system based on its

characteristics, including Indonesia (Mahfud MD 2017). In relation to leadership, Alhafiz Kurniawan, via the official website of Nahdlatul Ulama, stated that the leadership of Muslims has historically been characterized by a lack of singularity, dating back to the era of the caliphs. To elaborate further, he specifically cites the following:

“According to Imam Haramain from Abu Ishaq, as stated by Imam Ibn Kathir, it is permissible to have multiple legitimate governments in a large area or when the distance between them is significant. For example, all these governments existed simultaneously during the reign of the Abbasids in Iraq, the Fatimids in Egypt, and the Umayyads in the Maghrib.” (Kurniawan 2021)

Even the Prophet himself, at one point, temporarily set aside the outward signs of his divine and apostolic status while negotiating the Hudaibiyah accord. The Prophet approved it even though the essence of Islamic religious principles could be effectively implemented. Following a peace between the Muslims in Medina and the Quraysh of Makkah, the Prophet and his companions could engage in the religious pilgrimage of Umrah in Makkah one year after the agreement (Dahlan 2014). The Medina Charter is widely acknowledged as the inaugural contemporary constitution that established the interrelations among the Muhajirin, Anshor, and Jews in Medina.

Countries who proclaim themselves as Islamic governments or adopt shari'a as their legal framework exhibit varying models or configurations of governance in contemporary times. Certain countries, such as Saudi Arabia, are governed by monarchy, where a king or queen has supreme power. However, there exists a republic similar to Iran. Prof Mahfud MD refers to this as a resultant, specifically the political consensus reached by the institution authorized to establish it, in accordance with the socio-cultural-economic political context at the time of its creation (Mahfud MD 2010). Therefore, based on this theory,

Indonesia has determined it is a constitutional state founded on Pancasila.

Indonesia, despite not being an Islamic state, is not a secular society that completely removes religion from the state. Islam serves as the foundation for several facets of community life. Islamic law is applied in the adjudication of court matters. An explicit illustration of this is the presence of the Compilation of Islamic Law (*Kompilasi Hukum Islam*), which is acknowledged within the legal framework of Indonesia. Indeed, the state also plays a role in overseeing the organization of Islamic religious ceremonies in Indonesia. Some examples include Law No. 8/2019 for the execution of Hajj and Umrah, Law No. 41/2004 regarding Waqf, Law No. 23/2011 regarding Zakat Management, and so forth. The state plays a role in regulating private concerns such as marriage through Law Number 1 Year 1974 concerning Marriage, which incorporates many principles of Islamic Sharia. Article 63 establishes the existence of a specific court, known as the Religious Court, for Muslims to handle matters related to marriage.

From a comprehensive analysis, it cannot be definitively concluded that Indonesia may be classified as a *kuffar* or *thogut* state. The governance system in Indonesia incorporates numerous Islamic themes. *Tamyiz* (sorting) is considered the suitable style of the Islamic Government system in contemporary Islamic Government Law research. Pancasila, serving as the foundation of the state, categorizes Indonesia as neither a secular nor a religious state. There exists no complete division between the realms of state and religion. The state also regulates religion in a way inherent to the constitution. However, there is a lack of integration between the state and religion, similar to a theocratic system. The 1945 Constitution does not designate any specific faith as the official state religion. This concept aligns with the

notion of the *Tamyiz* state, which aims to categorize objects in a proportional manner (Sadzali 2020).

A mutually beneficial concept shows the interdependence between religion and the state. Religion can serve as a means to bolster the power of the state. Conversely, the state has the ability to safeguard religion. The state regulates, implements, and facilitates religious issues to ensure smooth, secure, and organized functioning. Suppose the State of Indonesia is not considered a *kuffar* or *thogut* state. In that case, there should be no further uncertainty among Muslims in Indonesia regarding their obligation to follow and demonstrate loyalty to the state. In this scenario, the notion of Muslims as citizens is applicable according to the directive of Allah in Surah An-Nisa verse 59, which states, "You who believe! Obey Allah and obey the Messenger (Muhammad), and the Ulil Amri (those in authority) among you...". Every adherent must adhere to this principle within the framework of the Indonesian nation, which is devoted to the Republic of Indonesia and the many elements or methods of governance, including compliance with the lawful authorities.

Conclusion

Based on the discourse in the study results sub-section, it can be inferred that Indonesia does not embrace secularism, which entails the separation of religion and the state. Indonesia does not distinguish between Islam and the state, but rather incorporates Islam in a balanced manner. A mutually beneficial concept shows the interdependence between religion and the state. Religion can serve as a means to bolster the power of the government. Conversely, the state has the ability to safeguard religion. The concepts and system of governance in Indonesia align with the principles of an Islamic-based government, such as debate and consensus, which are also present in Islam. Therefore, it is incorrect to characterize Indonesia as a state that is in opposition to Islam.

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