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Arguing Religion in Environmental Judicial Review Before the Indonesian Constitutional Court: Exploring an Alternative Approach

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ABSTRACT

Indonesia, an archipelagic nation-state, faces multiple environmental challenges, including climate change. In the search for solutions, the significance of religion in Indonesian constitutional jurisprudence and politics led to the realization that constitutional arguments can be made based on religious doctrine and values to enforce environmental rights and duties – an alternative approach to environmental judicial review already observed in other Muslim-majority countries. This paper argues that the same can be achieved with constitutional arguments on the right to religious freedom before the Indonesian Constitutional Court, and with Islamic NGOs leading the charge. Arguments and outcomes of past religious freedom cases before the Court, how NGOs shape constitutional review, as well as Islamic environmentalism will inform the evaluation of the plausibility and strategy of the alternative approach in Indonesia.

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1. PROLEGOMENA: RELIGION AND ENVIRONMENTAL JUDICIAL REVIEW

Religion has been playing an important role in our collective endeavour to solve our environmental crisis. In 1986, representatives from five major religions in the world – Buddhism, Christianity, Hinduism, Judaism, and Islam – met at the Basilica of Saint Francis de Assisi in Italy under the invitation of the World Wildlife Fund for Nature (WWF) to celebrate its 25th year anniversary. The gathering resulted in the creation of 'The Assisi Declarations' containing statements on 'how [religion] could and should help save the natural world.'[1] In 1995, another interfaith gathering supported by WWF – the Conference on Religions, Land and Conservation – was organized in Ohito, Japan, with similar aims.[2] Religion has also emerged as the basis for environmental action in an unlikely forum – the courts. Specifically, religious principles have been invoked to advance environmental interests before Middle Eastern courts based on constitutional provisions on religion. It follows that, any law or administrative decision can be deemed unconstitutional when the religious content of these provisions is undermined. Interestingly, this also ushered the emergence of an 'alternative approach' to environmental judicial review in these countries, where provisions other than constitutional environmental provisions are utilized to achieve similar pro-environment objectives.

1.1. An Alternative Approach to Environmental Judicial Review

This alternative approach is made possible by constitutional provisions on religion. In the Middle East, these typically entrench a religion or its position in state law and decision-making. In Saudi Arabia for example, *Basic Law of Governance 1992* proclaims Islam to be the state religion, and that the constitution is the Shari'ah and the Prophetic Sunna.[3] It follows that since these primary sources of Islamic law is the basis from which all legislation in Saudi Arabia are derived, the Saudi *General Environmental Law 2001* are presumed to be grounded on Islamic law, or made to comply with Islamic law where international law is ratified by the state.[4] This is similarly the case in Iran where Islam is both the ideology that forms the backdrop to the formation of its 'Islamic republic',[5] and the source of principles for governance in the country.[6] However, in the Egyptian and Pakistani

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[1] Alliance of Religions and Conservation, 'The Assisi Declarations: Messages on Humanity and Nature from Buddhism, Christianity, Hinduism, Islam & Judaism' (Alliance of Religions and Conservation 1986) 2 < http://www.arcworld.org/downloads/THE%20ASSISI%20DECLARATIONS.pdf > accessed 16 October 2018.

[2] Alliance of Religions and Conservation, 'The Ohito Declaration on Religions, Land and Conservation' (Alliance of Religions and Conservation, 3 May 1995) <http://www.arcworld.org/news.asp?pageID=871> accessed 8 November 2018.

[3] Basic Law of Governance 1992, art 1.

[4] For an in-depth study of Saudi environmental law and how Islamic environmental law manifests in it, see Norah Hamad, 'Foundations for Sustainable Development: Harmonizing Islam, Nature and Law' (SJD Dissertation, Pace University 2017).

[5] Constitution of the Islamic Republic of Iran, Preamble.

[6] Constitution of the Islamic Republic of Iran, art 2.

courts specifically, where similar provisions can be found in their respective constitutions, the alternative approach has been observed.

In Egypt, Article 2 of the *Constitution of the Arab Republic of Egypt* explicitly recognizes 'the principles of Islamic Shari'ah as the main source of legislation'.[7] This provision alone has been used as a basis for Islamist legal activists to challenge the 'un-Islamic' character of laws and government actions in the courts.[8] Interestingly, one such case involved the non-performance of an environmental impact assessment (EIA) by a government agency prior to granting permits to construct and operate a cement factory. This resulted in the pollution of air in the adjacent housing district, affecting the health of its residents. The Islamist lawyers in that case argued that the failure of government officials in protecting 'the health of citizens when it continued to allow a local cement factory to emit harmful air pollutants' was un-Islamic, which consequently renders their decision to grant the permits authorizing the construction and operation of the cement factory unconstitutional.[9]

In Pakistan, Article 2 of the *Constitution of the Islamic Republic of Pakistan* (1973 Constitution) entrenches Islam as the state religion,[10] and the religion is ideologically recognized to be foundational to its statehood.[11] Additionally, Article 227 requires that '[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah'.[12] Interestingly, in the landmark case of *Benazir Bhutto v The Federation of Pakistan*, the Supreme Court of Pakistan held that its constitutional framework makes compatible Islamic principles of justice, equality, and democracy with secular fundamental rights.[13] This is affirmed later in the case of *Chaudhry Akbar Ali*, where the court also added how Islamic principles are embodied by the public interest litigation (PIL) mechanism in Article 184A of the 1973 Constitution: 'in the entire Constitutional set up … the right to obtain justice as is ordained by

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[7] Constitution of the Arab Republic of Egypt, art 2. The positioning of this provision remains unchanged since 1971, although there was a change in the wording from '*a* main source of legislation' to '*the* main source of legislation' in 1980 (emphasis added). See Clark B Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a* (Brill 2006) 123–140. For examples in other Middle Eastern countries with similar provisions, see Clark B Lombardi, 'Constitutional Provision Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?' (2013) 28 American University International Law Review 733.

[8] Clark B Lombardi and Connie J Cannon, 'Transformations in Muslim Views about "Forbidding Wrong": The Rise and Fall of Islamist Litigation in Egypt' in Robert W Hefner, *Shari'a Law and Modern Muslim Ethics* (Indiana University Press 2016) 145–149; Tamir Moustafa, 'The Islamist Trend in Egyptian Law' (2010) 3 Politics and Religion 610; Clark B Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State' (1998) 37 Columbia Journal of Transnational Law 81.

[9] ibid Lombardi and Cannon (2016) 151; case in Helmi al-Namnam, *Al-Ḥisba wa Ḥurriyat al-Ta'bīr* [*The Hisba and Freedom of Speech*] (Al-Shabaka Al-'Arabiyya l-Ma'lūmāt Ḥuqūq al-Insān 2012) 186–190.

[10] 1973 Constitution, art 2.

[11] ibid art 2A. This provision adopts the Objectives Resolution which set out the incorporation of Islam and Islamic principles of governance and democracy into Pakistani constitutionalism.

[12] ibid art 227(1).

[13] *Benazir Bhutto v The Federation of Pakistan* (1988) PLD SC 416 (Supreme Court of Pakistan). See Muhammad Afzal Zullah, 'Human Rights in Pakistan' (1992) 18(4) Commonwealth Law Bulletin 1343, 1346.

Islam, has become [an] inviolable right of citizens of Pakistan.'[14] Hence, PIL cases involving environmental rights in Pakistan such as *Shehla Zia v WAPDA*[15] and *Human Rights Case (Environmental Pollution in Baluchistan)*,[16] can all be said to manifest this Islamic right to access to justice.[17]

1.2. God and Indonesian Environmental Constitutionalism

The Egyptian and Pakistani cases above form the basis for the paper's inquiry into the alternative approach in Indonesia. It is trite that Indonesia is the largest Muslim-majority country in the world, and religion has always been a core component of Indonesian society. However, religious principles have not been made grounds for environmental judicial review in Indonesia. From the outset, the location of religion in Indonesian constitutionalism differs from that in Egypt and Pakistan. *The Constitution of the Republic of Indonesia* (1945 Constitution) does not entrench a state religion; although it acknowledges religion as primordial to statehood. Considering developments in other Muslim-majority countries where religion is a valid source of norms to advance public interest arguments concerning the environment, God is an untapped resource for such an endeavour in Indonesia.

Arguably, environmental law in Indonesia is one of the most developed in Southeast Asia, if not Asia.[18] It has been responsive to and receptive to developments in international environmental law, especially since the 'emergence of complex environmental problems … were neither easily anticipated nor resolved' by pre-existing environmental laws that were sectoral in nature.[19] The latest umbrella legislation on the environment – *Law No. 32/2009 on Environmental Protection and Management* (2009 Environmental Law) – is a comprehensive statute that improved the mechanisms for implementation, supervision, and enforcement of its predecessors, while also emphasizing the need for principles of good governance such as transparency and accountability to be observed 'in each step of policy formulation and implementation.'[20]

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[14] *Chaudhry Akbar Ali v Secretary, Minister of Defence, Rawalpindi* (1991) SCMR 2114 (Supreme Court of Pakistan) at 2116. For a brief summary of this phenomenon, see Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 90–91.

[15] PLD 1994 SC 416.

[16] PLD 1994 SC 102.

[17] Martin Lau, 'Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 296–301; Martin Lau, 'The Right to Public Participation: Public Interest Litigation and Environmental Law in Pakistan' (1995) 4 Review of European Community & International Environmental Law 49.

[18] Yanti Fristikawati, Kristianto P Halomoan and Muhammad Nurshazny Ramlan, 'Environmental Law of Indonesia' in Elizabeth Burleson, Lin–Heng Lye, and Nicholas A Robinson (eds), *Comparative Environmental Law and Regulation* (Thomson Reuters 2018) 28A–18.

[19] ibid § 28A:52.

[20] The 2009 Environmental Law, among other statutes, were created pursuant to the environmental right under Article 28H(1): ibid 28A–21; A M Yunus Wahid, *Pengantar Hukum Lingkungan* [*Introduction to Environmental Law*] (2nd edn, Prenadamedia Group 2018) 234–235.

It has also been responsive to political reforms in the country, with the democratization era in the late 1990s including public and NGO participation in environmental decision-making, as well as statutorily installing a PIL mechanism.[21] These are supported by the 1945 Constitution's environmental provisions. Article 28H(1) of the 1945 Constitution guarantees the right to a good and healthy environment, and this right is further affirmed under Article 9(3) of *Law No. 39/1999 concerning Human Rights* (1999 Human Rights Law). Article 33(3) of the 1945 Constitution further creates an obligation for the natural environment and resources of the country 'to be used to the greatest benefit to the people', while Article 33(4) requires the organization of the national economy to be conducted based on, inter alia, environmental considerations. Nevertheless, there is scholarly agreement about continued problems in enforcing Indonesian environmental laws.[22]

This is not to say that religion cannot be found in environmental legal discourse in Indonesia. Indonesian environmental law scholars such as Kosnadi Hadjasoemantri and A M Yunus Wahid argue that in fact, religion plays a foundational role in environmental law-making in Indonesia. To be precise, religion informs environmental normativity concerning the legal, moral, and social relationships between humanity and nature.[23] More specifically, religious norms inform 'local wisdom' (*kearifan lokal*) that guides the implementation of environmental laws at the local level.[24] Constitutionally, the link between religion and the environment is less direct. One may argue that the constitutionalization of statehood under One Almighty God (*Ketuhanan yang Maha Esa*) in the Pancasila (ie, the five foundational principles of Indonesian statehood)[25] and Article 29(1) of the 1945 Constitution[26] sufficiently draw such a link, where environmental protection is necessarily guided by a consciousness of religious values – whatever these may be. However, where substantive constitutional arguments can be fielded, I argue that the cause for the environment may be incorporated into the existing discourse on violations to the right to religious freedom. More specifically, an argument can be made to posit that the protection of the right to religious freedom necessarily implies, if not presumes, the protection of environmental rights such that the deprivation of the latter creates conditions that would also deprive persons from exercising the former.

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[21] ibid 28A–19.

[22] Adriaan Bedner, 'Access to Environmental Justice in Indonesia' in Andrew Harding (ed), *Access to Environmental Justice: A Comparative Study* (Brill 2007); Aalt W Heringa, 'Human Rights and General Principles and Their Importance as a Legislative Technique. Do They Matter in Legislation? An Analysis with Specific Reference to Environmental Protection' in Michael Faure and Nicole Niessen (eds), *Environmental Law in Development: Lessons from the Indonesian Experience* (Edward Elgar Publishing 2006).

[23] Wahid (n 20) 97–106.

[24] ibid 97.

[25] 1945 Constitution, Preamble. The other four are: Just and Civilized Humanity (*Kemanusiaan yang Adil dan Beradab*), the Unity of Indonesia (*Persatuan Indonesia*), Democracy (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam Permusyawatan/Perwakilan*), and Social Justice (*Keadilan Sosial bagi seluruh Rakyat Indonesia*). See also Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart 2012) 13–16.

[26] 1945 Constitution, art 29(1): 'The State shall be based upon the belief of the One and Almighty God.'

The paper proceeds as follows. Part 2 explores arguments with which the right to religious freedom can be argued as an environmental right, ie the 'alternative approach' arguments. This will provide a basic framework to crafting arguments on religious freedom with a view of achieving environmental objectives. Part 3 delves into the religious freedom jurisprudence before the Indonesian Constitutional Court, which is the forum for constitutional review in Indonesia. From this, the arguments and outcomes of these cases will be assessed of the strategy and precautions litigants of the alternative approach should account for. Part 4 argues for the candidacy of Islamic NGOs for arguing the alternative approach before the Indonesian Constitutional Court. Part 5 concludes.

2. CONSTITUTIONAL ARGUMENTS ON RELIGION FOR THE ENVIRONMENT: A BASIC FRAMEWORK

2.1. The Right to Religious Freedom as an Environmental Right

Substantive environmental rights hinge on the argument that environmental protection and sustainable development is necessary for human flourishing.[27] The clearest example of this is the right to life, which is premised on the idea that 'without the environment, life is not possible'.[28] It is also trite that the right to human health can be interpreted as an environmental right. However, a 2017 advisory opinion by the Inter-American Court of Human Rights (IACHR) suggests a much broader relation between environmental protection and human rights beyond what is conventionally perceived:[29]

> [T]he right to a healthy environment as an autonomous right is different from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity. However, in addition to the right to a healthy environment, as mentioned earlier, *environmental damage can affect all*

[27] See Boyle and Anderson (n 17); David R Boyd, *The Environmental Rights Revolution* (UBC Press 2012); Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015); John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

[28] Eckard Rehbinder and Demetrio Loperena, 'Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation' (2001) 31 Environmental Policy & Law 282, 283. This is famously demonstrated by the environmental PIL cases in India, including *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* AIR 1988 SC 652 (Supreme Court of India); *Virendra Gaur and Others v State of Haryana* (1995) 3 SMK 577; *MC Mehta v Kamal Nath and Ors* (2000) 6 SMK 213, 218–220 (Supreme Court of India); and *Milkmen Colony Vikas Samiti v State of Rajasthan* (2007) 2 SMK 413 (Supreme Court of India).

[29] Inter-American Court of Human Rights, On the Environment and Human Rights (State Obligations in Relation to the Environment and the Protection and Guarantee of the Right to Life and Personal Integrity – the Interpretation and Scope of Articles 4.1 And 5.1, in relation to Articles 1.1 and 2 of the American Convention on Human Rights), Advisory Opinion OC 23/17 (15 November 2017), para 63 [translated from Spanish], <http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf> accessed 17 October 2019.

> *human rights, in the sense that the full enjoyment of all human rights depends on an enabling environment*. However, *some human rights are more susceptible than others to certain types of environmental damage* ... Rights especially linked to the environment have been classified into two groups: (i) *rights whose enjoyment is particularly vulnerable to environmental degradation*, also identified as substantive rights (eg, the rights to life, personal integrity, to health or property), and (ii) *rights whose exercise supports a better formulation of environmental policies*, also identified as procedural rights (such as rights to freedom of expression and association, to information, to participation in the decision making, and effective remedy). [Emphasis added]

Essentially, the advisory opinion suggests the possibility of arguing that environmental damage can violate any human right, although some rights 'are more susceptible than others' depending on the type of environmental damage suffered. The IACHR also noted that these rights do not just encompass substantive environmental rights, but also 'rights whose exercise supports a better formulation of environmental policies', or procedural rights.[30] The possibility of crafting arguments in the context of the judicial review in Indonesia, where the right to religious freedom is violated as a result of environmental damage, will now be explored.

The right to religious freedom is 'the oldest of the internationally recognised human rights',[31] going back to the genesis of the modern international order in 1648.[32] Today, the right is articulated in international, regional, and national human rights instruments.[33] The most important of these instruments, the United Nations Declaration of Human Rights (UDHR), provides for the right to religious freedom in two provisions: Article 2 on non-discrimination on the basis of 'distinction of any kind' including religion, and Article 18 where:

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[30] cf Cases before the European Court of Human Rights where the scope of the human right to a healthy environment is narrower. See Greta Reeh, 'Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect' (EJIL: *Talk!*, 9 September 2019) <https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/> accessed 29 October 2019.

[31] Cole Durham Jr, 'Perspectives on Religious Liberty: A Comparative Framework' in Johan D Van der Vyver and John Witte Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspectives – Part 2* (Martinus Nijhoff Publishers 1996) 2.

[32] That is, the Peace of Westphalia that defined 'the state'. The treaty, which ended a thirty-year war between Roman Catholic and Protestant states in Europe, recognized *inter alia* the equality of religions before the law and religious toleration. Malcolm D Evans, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict' in Tore Lindholm and others (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer Science + Business Media 2004) 1. See also Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 1997).

[33] International and human rights instruments here include the International Covenant on Civil and Political Rights (IMKPR), the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), and the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (AHRD). In the case of the AHRD, the right to religious freedom is much more nuanced to account for the 'Asian values' espoused by the region's developmental states. See Jaclyn L Neo, 'Realizing the Right to Freedom of Thought, Conscience and Religion: The Limited Normative Force of the ASEAN Human Rights Declaration' (2017) 17 Human Rights Law Review 729.

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

These two provisions encapsulate three primary freedoms that constitute the above right: (1) the freedom to manifest religion or beliefs ('external freedom'), (2) the freedom to adopt, maintain, and change (or leave) one's religion or beliefs ('internal freedom'), and (3) the freedom from discrimination on the basis of one's religion or beliefs ('non-discrimination').[34] The most relevant freedom for the purposes of this paper is the right to manifest one's religious beliefs. The scope of the right to manifest one's religious beliefs covers most aspects of religious life, while Article 18 defines the scope to entail 'teaching, practice, worship and observance'. In his *Study of Discrimination in the Matter of Religious Rights and Practices*,[35] the then-Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities Arcot Krishnaswami classified these aspects under two types of religious freedoms: the freedom to comply with what is prescribed or authorized by a religion or belief, and the freedom from performing acts incompatible with prescriptions of a religion or belief.

Table 1: Krishnaswami's classification of the types of religious freedom and the aspects they protect

TYPE OF RELIGIOUS FREEDOM	ASPECTS PROTECTED
Freedom to Comply with Religious Prescriptions	Worship Processions Pilgrimages Equipment and symbols Funeral Rites Observance of religious holidays and days of rest Dietary practices Celebration of marriage and its dissolution by divorce Dissemination of religion or belief Training of religious personnel
Freedom from Performing Acts Incompatible with Religion	Taking of an oath Military service Participation in religious or civic ceremonies Secrecy of the confession Compulsory prevention or treatment of disease

[34] Lindholm and others (n 32), xxxvii–xxxix.

[35] Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices', E/CN.4/Sub.2/Rev.1 (United Nations 1960).

Of the aspects of religious life protected by the right to religious freedom (Table 1), the paper identifies the following aspects to be most useful for the purpose of framing religious rights as environmental rights: (1) worship, processions, and pilgrimages (collectively 'performance of religious rites'); and (2) the acquisition of religious equipment and symbols. I will now proceed with the framing exercise.

2.2. Framework Arguments on the Right to Manifest Religion as an Environmental Right

My general thesis here is that proper environmental protection and management, which includes the prevention of environmental pollution, harm, and damage, is necessary for the manifestation of religion. The failure to prevent environmental pollution, harm, and damage hinders the exercise of the right to manifest religion, and thereby violate the right to religious freedom. This section presents two arguments stemming from this thesis, showing the possibility of framing the right to religious freedom as an environmental right. Note that these arguments are novel[36] and the connections made stem from the putative fact that poor ecological health affects human health and life generally.[37]

The first argument (Argument 1) concerns the ability of people to physically perform religious rituals and obligations broadly defined. This argument hinges on the freedom to perform worship, pilgrimages, and processions, etc., and circumstances brought about by improper environmental management prevent the performance thereof. The second argument (Argument 2) addresses the ancillary requirements for the performance of worship, ie the ability to acquire equipment and symbols found in nature. This argument hinges on the freedom to acquire religious equipment and symbols, especially if this depends on proper environmental management. In these arguments, let X is a law or administrative decision that results in environmental pollution, harm

[36] One may argue that this is not novel because in 1980s United States, Native Americans engaged in religious freedom litigation to protect their indigenous lands, which were vital for religious practice. However, I argue that these are not for environmental protection as such, and although Alexander Gillespie observed that this 'implicitly leads to environmental protection', it is only a secondary benefit as opposed the main objective; and I am attempting to formulate arguments where the primary goal *is* environmental protection: Alexander Gillespie, *International Environmental Law, Policy and Ethics* (OUP 1997) 64–65.

[37] See Megan JM Mitchell, 'Human rights, environmental duties: An ecological interpretation of international law' in Laura Westra, Colin L Soskolne and Donald W Spady (eds), *Human Health and Ecological Integrity: Ethics, law and human rights* (Routledge 2012) 38. Here Mitchell laments the problem of supporting human rights arguments with 'legitimate quantitative data' on the link between deprivations to the human right to life and environmental damage – at least in international human rights instruments – when she says that 'While it is now well accepted that the right to life extends beyond a mere prohibition upon its deprivation, there is nothing in the supporting documents that suggest that such deprivation can be found to have occurred through environmental means. The law itself thus fail to recognize the life-environment link almost entirely' (at 34). I think that where the right to health is concerned, on the other hand, many UNEP documents provide information on environmental health and its impact on human health can support my arguments here, but they do not directly refer to religious activities.

or damage. Religious communities and members as a variable are represented by W. Let us begin by looking at Argument 1:

> Argument 1—Say X_1 = the poor enforcement of a municipal toxic waste disposal law. A chemical plant operating adjacent to a river that runs through the city has been discharging toxic wastes into the river.
>
> (1) X_1 caused environmental pollution that affects human health, and the worst affected will be the people living closest to the site of pollution.
> (2) These include W, who, in accordance to their religious beliefs, have daily religious rituals to perform.
> (3) Poor health means W are either partially or totally unable to perform their daily religious rituals due to illness. But for X_1, W will be able to perform their daily religious ritual as they would have remained in good health.
>
> Conclusion: Therefore, since X_1 prevents W from manifesting their religion or beliefs through the physical performance of religious rituals, X_1 violates their right to the freedom of religion.

Argument 1 here argues that the state's failure to prevent environmental pollution had in some way cause a violation of the right to religious freedom. Essentially, the environmental pollution resulting from a legal or policy oversight affects human health generally, and consequently prevents the performance of religious rituals that can only be performed when adherents are in good health. The most badly affected is projected to be the elderly, children, and those who are already physically vulnerable. Furthermore, the scope of how religion is manifested include acts of worship (such as prayer and mass), processions, and pilgrimages – all of which are physically demanding. It is thus possible to draw a nexus between an X and the prevention of the performance of religious rituals, and argue that since the performance of a religious ritual is the exercise of the right to manifest religion or beliefs, that right has been violated by the state in this instance. Let us now move on to consider Argument 2:

> Argument 2—Say X_2 = a permit granted by an authority for logging operations without an environmental impact assessment (EIA) being conducted beforehand for whatever reason. The site of logging is a jungle that is both a biodiversity hotspot and has a river running through it.
>
> (1) X_2 caused the destruction of fruit trees, rare rainforest herbs, and animal habitats, etc., and the pollution of the adjacent river.

(2) Say, W typically enter the rainforest weekly to acquire resources at the site of the logging for the preparation and performance of their religious rituals.

(3) Also say, W cannot perform the religious rituals without these resources. But for X_2, W would be able to acquire these resources to perform their religious rituals.

Conclusion: Therefore, since X_2 prevents W from performing their religious rituals, which is a form of manifesting their religion or beliefs through the acquisition of religious equipment and symbols, X_2 violates their right to the freedom of religion.

Argument 2 here argues that the state's failure to conduct an EIA had consequences on the availability of 'equipment and objects' vital for the performance of religious rituals. These may range from clean water, soil, fruit trees, certain types of wood, rare plants and herbs, and so on. These natural resources may be required for a multitude of acts that constitute a religious ritual, procession or pilgrimage such as cleansing (ablution), attire, creation and playing of musical instruments, the presentation of offerings, and feasting. In this case, then, had the state conducted an EIA prior to authorizing the environmentally destructive logging operations, religious communities that depend on the rainforest's biodiversity could have performed their religious rituals unhindered; or even if hindered, mitigation measures could have been taken to ensure that the religious communities modified the performance of their rituals (eg, postponing the ritual, finding alternatives to the equipment and objects, etc.). Additionally, these religious communities would have been consulted as part of the EIA process and their concerns accounted for. Of course, not all jurisdictions incorporate a public participation component in their EIA process, thus the degree to which the voices of potentially affected communities vary from jurisdiction-to-jurisdiction. Hence, it can be argued that the state had deprived affected religious communities from exercising their right to religious freedom by creating conditions in which the acquisition of equipment and objects for religious rituals is partially or entirely impossible. Therefore, the state had in some way violated the right to religious freedom of these communities. Furthermore, the resemblance of Argument 2 with the indigenous rights argument concerning the environment,[38] in which the protection of their cultural rights is inextricably linked to environmental protection,[39] gives the Argument a reference point.

It is reminded here, however, that I am exploring alternatives to conventional environmental rights arguments, and these alternatives do not enjoy the benefit of the more direct

[38] See Rio Declaration on Environment and Development, 14 June 1992, Principle 17, 31 ILM 874 (1992), principle 22; Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), art 10(c).

[39] See Benjamin J Richardson and Donna Craig, 'Indigenous Peoples, Law and the Environment' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart 2006) 195; Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge* (CUP 2014) 31–55.

causation of right to life and right to health arguments (ie, environment–life–right and environment–health–right). Indeed, Argument 1 may be more effectively argued on the basis of the right to health because it (1) directly concerns human health and (2) the line of argument is much shorter (ie, environment–health–right vs. environment–health–religion–right). However, Argument 2 cannot be framed as any right other than that of religious freedom because it directly concerns religious practice as such. But perhaps of greater relevance in this paper is the context: where the arguments are intended to be made. The forum for which these arguments are crafted for regards religion to be an issue of constitutional, political and social importance. Therefore, these arguments are conjured in this paper *arguendo* – they are framed because it is familiar, relatable, relevant, and popular. Of course, these arguments are 'vanilla', and how they are actually argued depends on the litigants themselves, the strategies they adopt, and the facts used as a part of the background for constitutional review.

3. RELIGIOUS FREEDOM BEFORE THE CONSTITUTIONAL COURT OF INDONESIA AND THE ALTERNATIVE APPROACH ARGUMENTS

The right to religious freedom in Indonesia is guaranteed in both the 1945 Constitution and the 1999 Human Rights Law, with overlaps in most of these provisions:

Table 2: The relevant religious freedom provisions in the 1945 Constitution and 1999 Human Rights Law

1945 CONSTITUTION	1999 HUMAN RIGHTS LAW	SUBJECT-MATTER
Article 28E	Article 22(1)	The freedom for every person to choose and practice the religion of their choice, ie the right to religious freedom.
Article 28I(1)	Article 4	The right to religious freedom cannot be limited under any circumstances.
Article 28I(2)	-	The freedom from discrimination on any grounds, including religion.
Article 29(2)	Article 22(2)	The State as a guarantor of the right to religious freedom.

However, the right to religious freedom is qualified despite Article 28I(1) of the 1945 Constitution and Article 4 of the 1999 Human Rights Law providing that the right is non-derogable.[40] Article 28J(2) of the 1945 Constitution limits the exercise of the right by subjecting it to 'the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.' Similarly, Article 73 of the *1999 Human Rights Law* states that 'The rights and freedoms in this Law may only be limited by law, solely to guarantee the recognition and respect for human rights as well the basic freedoms of others, decency, public order, and the national interests.' Therefore, any application alleging the violation of the right of religious freedom must, prima facie, consider whether the right's violation is justified under grounds mentioned in these provisions. Indeed, the majority of religious freedom cases before the Indonesian Constitutional Court (*Mahkamah Konstitusi*, henceforth 'Court' or 'MK'), specifically dealing with the controversial *Law No. 1/PNPS/1965 on the Prevention of Misuse and the Insulting of a Religion* (or the 'Blasphemy Law'), demonstrate the invocation of Article 29J(2) to justify the statute's continued operation in Indonesia.[41]

Nevertheless, even if these provisions are not invoked, the applicants' success and failure depend on other factors. An examination of three prominent religious freedom cases before the MK, – the *Polygamy Case* (2007),[42] *Religious Judicature Law Case* (2008),[43] and *Hajj Administration Law Case* (2010)[44] – affords an observation that arguments on the right to religious freedom received different responses from the Court depending on the subject-matter of the application and expert evidence available. Consequently, they highlight the precautions that the applicants should take as part of their litigation strategy.

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[40] While the right to religious freedom is qualified, the extent to which the qualification is tolerated under international law is limited. Article 28J(2) of the 1945 Constitution and Article 73 of the 1999 Human Rights Law are similarly phrased as the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, where, in its Article 1(3), states that the 'Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'

[41] See eg Decision No 140/PUU-VII/2009 (MK); Decision No 84/PUU-X/2012 (MK), Decision No 56/PUU-XV/2017; Decision No 76/PUU-XVI/2018 (MK). Essentially, the Court has consistently stated that while the right to religious freedom is guaranteed where the *internal* aspects of the freedom is concerned, the right can be limited by law where the *external* aspects of the freedom is concerned ie, where the exercise of the right also concerns other members within the community. Thus, to safeguard the freedom of these other members on grounds laid down in Article 29(2), the Blasphemy Law's operation is justified: Decision No 76/PUU-XVI/2018 at 30–31.

[42] Decision No 12/PUU-V/2007 (MK).

[43] Decision No 19/PUU-VI/2008 (MK).

[44] Decision No 51/PUU-VIII/2010 (MK).

3.1. Applicant Arguments & Judicial Responses in Indonesia's Religious Freedom Jurisprudence

In the *Polygamy Case*, the applicant argued that Indonesia's *Law No. 1/1974 on Marriage* (1974 Marriage Law) violated his right to religious freedom as a Muslim under Article 28E(1) of the 1945 Constitution. He argued, among others, that Article 3(1) of the 1974 Marriage Law was unconstitutional because it cements 'marriage' to be exclusively monogamous.[45] This was, he claimed, contrary to the 'obligation' in Islam for Muslim males to engage in polygamy. Thus, because Article 3(1) prevents the applicant from fulfilling his obligations as a Muslim to engage in polygamy, it violated his right to religious freedom under Article 28E(1), and therefore Article 3(1) is unconstitutional. In this case, the government, represented by the Minister of Religious Affairs, submitted that Article 3(1) was constitutional because 'Islam favoured monogamy over polygamy'.[46] The Minister's argument was further bolstered by the expert opinion of two top Indonesian Islamic scholars (one a former Minister for Religious Affairs, the other the top Islamic woman scholar in the country), who posit that polygamy is not an obligation in Islam, and that in fact and in law, Islam discourages polygamy.[47] The Court decided in favour of the respondents.

In *Religious Judicature Law Case*, the applicant similarly argued that Article 49(1) of *Law No. 7/1989 on Religious Judicature* (1989 Religious Judicature Law) violated his right to religious freedom as a Muslim under Article 28E(1) of the 1945 Constitution and was therefore unconstitutional. However, he also argued that the right to religious freedom of 'the entire Indonesian Muslim community' was concurrently violated.[48] Article 49(1) of the 1989 Religious Judicature Law defines the scope of the jurisdiction of Indonesia's religious courts to cover mostly civil and personal legal matters, ie marriage, divorce, probate, Islamic economic instruments, etc. The applicant requested for the expansion of the scope of religious courts' jurisdiction under Article 49(1) to include Islamic criminal law.[49] The non-inclusion of Islamic criminal law, the applicant claimed, prevents Muslims in Indonesia from abiding Islamic law in its entirety. Thus, this violates the right to religious freedom of all Indonesian Muslims (who make up the majority of the population), and Article 49(1) should be deemed unconstitutional. The Court's response was two-fold. The Court first held that expanding the scope defined in Article 49(1) was beyond its jurisdiction, and that it was a matter for the legislature to decide.[50] However, the Court then opined

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[45] *Polygamy Case* (n 42) at 5–6, 8.

[46] ibid 24–26. Simon Butt, 'Islam and the Indonesian Constitutional Court' (2010) 19 Pacific Rim Law & Policy Journal 279, 293.

[47] *Polygamy Case* (n 42) at 63–69.

[48] *Religious Judicature Law Case* (n 43) at 4–5.

[49] While Islamic criminal law is not provided for in the 1989 Religious Judicature Law, it is implemented in the province of Aceh. See generally Kamaruzzaman Bustamam-Ahmad, *Islamic Law in Southeast Asia: A Study of its Application in Kelantan and Aceh* (Asian Muslim Action Network 2009); Hasnil Basri Siregar, 'Islamic Law in a National Legal System: A Study of Implementation of Shari'ah in Aceh, Indonesia' (2008) 3(1) Asian Journal of Comparative Law 1.

[50] *Religious Judicature Law Case* (n 43) at 22–24.

that the application of Islamic law in Indonesia had to account for several things: (1) the foundational principles of Indonesian statehood and the national ideology Pancasila, and (2) the legal pluralism defining the country's legal landscape that does not favour one source of law over another.[51] The Court also reaffirmed the doctrine of constitutional supremacy as operational in Indonesia, with a reminder that 'As Muslims, we consider the Qur'an to be the highest law but ... the national consensus is that the Constitution is the highest law.'[52]

In *Hajj Administration Law Case*, the applicants argued that *Law No. 13/2008 concerning Hajj Administration* (2008 Hajj Law) 'impaired and restricted their constitutional right to perform their religious obligations' under Article 29(2) of the 1945 Constitution, and was therefore unconstitutional.[53] The administration of pilgrimages (ie the hajj) for Indonesian Muslims by the Ministry of Religious Affairs (MORA) is highly controversial. Apart from claims of mismanagement, it is problematized by the requirement for prospective pilgrims to pay an exorbitant 'Hajj administration fee' (BPIH)[54] in their registration to be in a waitlist. The system also faces the challenge of adhering to quotas set by the Saudi Arabian government on the number of Indonesian pilgrims allowed annually, thereby causing a bottleneck on the ever-growing waitlist. The applicants essentially argued that 'the high rate of the BPIH impeded the ability of most Muslims to register for the hajj, and the long waitlist renders it very difficult for Muslims to perform the pilgrimage in a timely manner.'[55] The application was withdrawn by the applicants on the MK's advice that striking down the 2008 Hajj Law means the dissolution of centralized administration of the annual hajj.[56] Furthermore, the pilgrimage quotas set by the Saudi Arabian government was an aspect of the system that is beyond the control of the Indonesian government. Thus, the government cannot accommodate all prospective pilgrims even if it wants to.[57]

3.2. Precautions for Arguing the Alternative Approach

The *Polygamy Case* firstly demonstrates the Court's willingness to entertain religious arguments and listen to expert witnesses where the subject-matter requires it. Arguably, the Court's reliance on expert opinion for insights into Islamic law was done in recognition of its own jurisdictional

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[51] ibid 24.

[52] Mahkamah Konstitusi, *Bench Meeting Report for Case No. 19/PUU-VI/2008, Court's Examination of Amendments Made to Application (II)* (Jakarta, 31 July 2008) 7 (Justice Muhammad Alim's Comment to Applicant), <https://mkri.id/public/content/persidangan/risalah/risalah_sidang_Perkara%2019%20puu%20VI%20-2008,%20%2031%20Juli%202008.pdf> accessed 4 November 2019.

[53] Alfitri, 'Religion and Constitutional Practices in Indonesia: How Far Should the State Intervene in the Administration of Islam?' (2018) 13 Asian Journal of Comparative Law 389, 398.

[54] The BPIH fee per person is 25 million Indonesian Rupiah or about USD1767. In fact, the constitutionality of the state's finances vis-à-vis *hajj* administration was challenged in Case No 51/PUU-XV/2017.

[55] Alfitri (n 53) 397–398.

[56] ibid 397 fn 35. The nationalization of hajj administration sought to allow uniformity and affordability in the costs of pilgrimages. This is seen as a national endeavour (*tugas nasional*) that the state feels obliged to undertake due to the extremely large number of pilgrims from Indonesia annually.

[57] ibid 399.

boundaries, ie that it had no say in what is or is not in compliance with Islamic law. The Court's agreement with the Minister's arguments and the Minister's experts can be seen as the Court deferring to the state vis-à-vis polygamy as opposed to taking a stand on the permissibility of polygamy under Islamic law. Second is the invocation of longstanding overarching policy principles. The MK affirmed the prevailing political and judicial position concerning the place of religion and religious law in the Indonesian constitutional and legal landscape since independence.[58] The courts have always referred to foundational principles of statehood and the Pancasila, public order considerations, and Indonesia's reality as a plural society, to refute arguments that would prioritize the interests of one religion (usually Islam) over others – and this is most apparent in religious freedom cases.[59] This is likely to be status quo for future cases of similar nature. Third, the Court's advice to the applicants of the *Hajj Administration Law Case* to withdraw their application reflects its willingness to recuse itself from deciding a matter well within its jurisdiction because of possible political consequences – which is in this case, the total dissolution of a government agency and disruption to bureaucratic administration. Arguably, this does not deal with the issue of religious freedom as such where the Court is required to balance the right to religious freedom of an individuals or class of individuals against the rights of others per the 1945 Constitution's Article 29(2). Rather, the recusal was a result of balancing the upholding of the right to religious freedom on the one hand against the continued functioning of government.

What do these mean for strategy in litigating the alternative approach? For one, the *Polygamy Case* shows us that a claim by applicants with a religious subject matter must have religious scholars as expert witnesses. This is especially important because, as it will be shown in the next Part, third parties such as NGOs and experts play an important epistemic role in informing and educating judges on the subject matter of the case. Per the *Religious Judicature Law Case*, applicants must also ensure that their arguments do not undermine overarching principles in constitutional law. Additionally, applicants must consider, even before an application is made, whether its demands will lead to similar consequences as the Court feared would happen should it rule in the applicants' favour in the *Hajj Administration Law Case*. Nevertheless, regardless of the arguments made and the religious freedom jurisprudence before the MK, it is equally important for litigation strategy to consider who should argue the alternative approach, and why it is important that the candidate litigant (or litigants) makes the application to the MK. A contextualization of the alternative approach reveals the choice litigants for the alternative approach to be Islamic NGOs.

[58] See generally Dian AH Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia, and Sri Lanka* (CUP 2017).
[59] See (n 41).

4. PURSUING THE ALTERNATIVE APPROACH

Beyond the subject-matter (ie, religion), there are practical reasons for why Islamic NGOs should blaze the trail for the alternative approach in Indonesia. For one, Islamic NGOs have, over the past few years, made applications to the MK for constitutional review of laws on matters pertaining to environmental and natural resources management – with a record of success. A second reason is the epistemic potential of Islamic NGOs in the judicial review landscape before the MK. Not only are NGOs generally recognized to be agenda-setters and vital information providers to the MK in the public interest litigation they initiate, Islamic NGOs are epistemic authorities with regard to the synergy between religion and the environment. This paper argues that these reasons are sufficient in making the case that Islamic NGOs should be the applicants of the alternative approach in Indonesia.

4.1. 'Constitutional Jihad'

Typically, judicial review in Indonesia involving the environment and natural resources are litigated by private citizens or environmental NGOs such as the Indonesian Forum for the Environment (*Wahana Lingkungan Hidup Indonesia* or WALHI) and the Indonesia Centre for Environmental Law (ICEL). However, over the past few years, Islamic NGOs have also been applicants before the MK on matters relating to the subject. Most prominent is Muhammadiyah, one of the oldest and largest mass Islamic organizations in the country. While Muhammadiyah appears before the MK alongside other Islamic NGOs, as an organization, they have 'termed judicial review "a constitutional jihad" and part of their "great legal struggle"'[60] for social justice. This motivation can be observed from the organization's fulfilment of standing requirements for constitutional review.

Standing requirements for constitutional review in Indonesia are relatively loose.[61] Generally, applicants are required to be (1) an Indonesian citizen; (2) an indigenous (*adat*) community recognized by law; (3) a public or private organization recognized by law (eg, NGOs); or (4) a government body.[62] The application, obviously, must involve the violation of a constitutional right.[63] With regard to the constitutional harm or loss resulting from the violation of the right, there are five conditions that must be met: (1) the right is constitutionally guaranteed for the applicant; (2) the right was violated by the operation of the Law requested to be reviewed; (3) the constitutional harm or loss must be specific and actual, or at least, can potentially result in such harm or loss; (4) there is a causal link (*causal verband*) between the constitutional harm allegedly suffered and the operation of the Law requested to be reviewed; and (5) it is possible that the

[60] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge 2018) 206.

[61] The looseness of standing requirements was heavily debated amongst the justices during the Court's early years: ibid 134–139.

[62] Law No 24/2003 on the Constitutional Court ['Constitutional Court Law'], art 51.

[63] ibid Elucidation, art 51(1).

granting of the request for review will result in the prevention or cessation of the constitutional harm or loss.[64] Nevertheless, the MK can decide on a case despite an applicant's lack of standing if it was in the public interest to do so,[65] and NGOs are presumed to have standing due to the public interest nature of their applications.[66]

It follows that mass Islamic organizations such as Muhammadiyah fulfil standing requirements by virtue of being NGOs. In 2012, Muhammadiyah (as first applicant) alongside nine other Islamic NGOs and thirty-two private citizens challenged the constitutionality of provisions in *Law No. 22/2001 on Petroleum and Natural Gas* (Migas Law) that, in their view, undermines the state's control over its natural resources. The description of these Islamic NGOs standing is arguably fascinating – while their motivations are religious in nature, their methods fit within the judicial review framework:[67]

> Applicant I to Applicant X are legal subjects registered in Indonesia that in general have the objective of realizing the establishment of a *masyarakat madani* or a purely Islamic society (*al-mujtama' al-madani*), that is achieved through diverse efforts in construction, development, advocacy, and the forging of community renewal in the areas of education, health services, social services, community empowerment, participation in national politics, among others. Its application to review the provisions a quo of the Migas Law is an organizational mandate [ie,] part of its efforts to realize a *masyarakat madani* or a purely Islamic society by upholding the Constitution.

The following year, Muhammadiyah challenged the constitutionality of provisions in *Law No. 7/2004 on Water Resources* for facilitating the privatization of Indonesia's water resources.[68] The Court declared the said law unconstitutional, and the law's predecessor, *Law No. 11 of 1974 on Water Resources Development*, was brought back into force. In both these cases, Muhammadiyah, among others, argued on the basis of Article 33 of the Constitution that entrenched state management over Indonesia's natural resources ie, water, air, and minerals. In 2017, Muhammadiyah went ahead with another 'constitutional jihad' before the MK, this time to challenge the constitutionality of provisions in *Law No. 32/2002 on Broadcasting* and *Law No. 40/1999 on the Press* for facilitating and advertising tobacco products, which were detrimental to both the environment and human health (*Tobacco Products Advertising Case*).[69] In this case, Muhammadiyah were co-applicants with its subordinate organizations, who were concurrently

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[64] These five conditions are the MK's interpretation of the requirement in Article 51(1) of the Constitutional Court Law. Cases refer to Decision No 6/PUU-III/2005 as the origin case articulating these conditions, with consequent MK cases affirming them.

[65] Hendrianto (n 60) 140; Decision No 69/PUU-II/2004 (MK) at 66–67.

[66] Decision No 27/PUU-VII/2009 (MK) at 59.

[67] Decision No 36/PUU-X/2012 (MK) [*Migas Law Case*] at 11 [translated from Bahasa Indonesia].

[68] Decision No 85/PUU-XI/2013 (MK) [*Water Resources Law Case*].

[69] Decision No 81/PUU-XV/2017 (MK).

engaging in anti-smoking advocacy. They were not, however, successful in this instance. The Court's grounds for rejecting the application were, among others, that (1) a thorough reading of the provisions being challenged imply that the promotion and advertisement of tobacco products were in fact already regulated,[70] and (2) declaring these provisions unconstitutional will remove any mechanism already regulating the promotion and advertisement of tobacco products, thus making the applicant's appearance before the Court a counter-productive exercise.[71]

This phenomenon of Muhammadiyah and other Islamic NGOs pursuing constitutional review concerning environmental and natural resource management issues allows for the following observations. First, tying back to the alternative approach and its manifestation in the Middle East, it is argued that the alternative approach is also experienced in Indonesia, albeit differently. In the cases of Egypt and Pakistan, arguments can directly refer to Islamic principles or the religion more generally, which are entrenched (either expressly or implicitly) by their constitutions. In Indonesia, however, while the Constitution does not entrench Islam or Islamic principles such that these can invoked before the MK, the motivation for judicial review can be religious. This affords the conclusion that in Indonesia, judicial review is a mechanism by which religious ideals concerning the environment can be manifested.

Second, the fact that Muhammadiyah has had 'battle experience' before the MK to advance its social justice objectives makes it a potential applicant for the alternative approach formulated in this paper. Indeed, the alternative approach fits well within the strategy of using judicial review as a mechanism to manifest and realize religious ideals because its grounds are purely constitutional ie, the right to religious freedom. Additionally, Muhammadiyah is in good standing to submit briefs on Islamic environmental law and its praxis in Indonesia, and how local communities already recognize an integral link between religious life and proper environmental management. Hence, I argue that Muhammadiyah is the most suited to make the alternative approach arguments, followed by other Islamic NGOs that have appeared before the MK (regardless of whether they succeeded in past applications or not).

4.2. Islamic NGOs and Epistemology in Constitutional Review

Arguably, the MK has been seen as a credible and independent government body that was the anti-thesis to the largely corrupt legislature by acting in accordance to the will of the Indonesian people.[72] A recent study shows that the MK 'has frequently come across as both more populist and more concerned with public opinion' and shows that there is 'statistical significance' and 'sizeable effects' to how 'signals of public opinion' decide the outcomes of the Court's cases.[73] These

[70] ibid 65.
[71] ibid 66.
[72] Dominic Nardi, 'Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court' (2018) 40 Contemporary Southeast Asia 247, 248–251.
[73] Dominic Nardi, 'Indonesia's Constitutional Court and public opinion' (*New Mandala*, 22 February 2018) <https://www.newmandala.org/indonesias-constitutional-court-public-opinion/> accessed 29 May 2019.

'signals', typically in the form of brief submitted by NGOs, play an important epistemic role in shaping the Court's reasoning and decisions:[74]

> [T]hey provide the justices with information about the facts and legal issues in a case. This is crucial because judges only have access to limited sources of information. Unlike the legislative and executive branches, which have expert staff to conduct research on policy issues, the justices lack the capacity to conduct their own in-depth research into the facts or the policy implications of a case. Instead, they learn about the facts and relevant law through any briefs submitted, as well as oral argument and hearings. This makes the justices very dependent upon the quality of the information contained in the briefs.

However, NGOs' epistemic role in MK cases goes beyond briefs. The fact that they are better resourced to initiate and carry through the judicial review process (as compared to the ordinary Indonesian) allow NGOs to set the Court's agenda for each case and establish themselves as a source of factual and technical information for the judges:[75]

> NGOs [in Indonesia] can effectively expand the range of constitutional issues that the Court addresses by submitting petitions dealing with new or unique legal claims. In doing so, they help set the Court's agenda for each term ... NGOs can inform judges about rights violations, as well as sound the alarm about any government attempts to evade the Court's previous decisions ... Moreover, NGOs are more likely to have the resources to challenge laws in court. Litigation is prohibitively expensive for the average Indonesian citizen, but NGOs can pool the resources of their members and donors. In addition, NGOs possess technical expertise and organizational capabilities that can help them obtain evidence and provide expert witnesses.

While judges' association with or support for the NGOs' causes is a determinant of their acceptance of NGO views as reliable,[76] it must be recognized that the Court's jurisprudence on socioeconomic and human rights matters are attributable to Indonesian NGOs and their role as applicants and sources of information.[77] Islamic NGOs are no different.

Indeed, Islamic NGOs like Muhammadiyah are highly suitable applicants for the alternative approach – which recognizes an intrinsic link between religious life and environmental protection – because of their well-recognized contribution to environmental protection in Indonesia; which can be described as establishing a system of private environmental governance

[74] Nardi (n 72) 264.
[75] ibid 257.
[76] ibid 265.
[77] ibid 262.

led by religious communities.[78] There is an abundance of literature on how religion, especially Islam, is actively used by Islamic NGOs in Indonesia to advocate for the environment.[79] Beyond traditional advocacy, this faith-based approach to environmental conservation does not only provide epistemic guidance (ie, knowledge dissemination to the masses through religious rulings and proselytization), but the instruments used for epistemic guidance are implemented in local communities.[80]

This is done at the national level and flows down to localities. At the helm is the Council of Indonesian Religious Scholars (Majelis Ulama Indonesia or MUI), a collective of the different Islamic organizations, scholars, and preachers across the country. It was established by the then President Suharto for these disparate entities to collaborate and coordinate efforts in addressing Islamic affairs at a national scale.[81] One of MUI's central roles is the issuance of 'collective fatwas'.[82] Interestingly, six of these collective fatwas directly address environmental issues.[83] MUI's Board for the Sacralization of the Environment and Natural Resources (*Lembaga Pemuliaan Lingkungan Hidup dan Sumber Daya Alam*),[84] with the aid of international environmental NGOs such as Conservation International, also facilitate the implementation (or 'sosialisasi') of these environmental fatwas through proselytization (*da'wah*) and the construction of environmental infrastructure (such as clean water and sanitation facilities) in local

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[78] See generally Shazny Ramlan, 'Religious Law for the Environment: Comparative Islamic Environmental Law in Singapore, Malaysia, and Indonesia', Centre for Asian Legal Studies Working Paper 19/03 (SSRN) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3405923> accessed 14 July 2019.

[79] See eg, Anna M Gade, 'Islamic Law and the Environment in Indonesia: Fatwa and Da'wa' (2015) 19(2) Worldviews: Global Religions, Culture and Ecology 161; Anna M Gade, 'Tradition and Sentiment in Indonesian Environmental Islam' (2012) 16(3) Worldviews: Global Religions, Culture and Ecology 263; Fachruddin M Mangunjaya and Jeanne E McKay, 'Reviving an Islamic Approach for Environmental Conservation in Indonesia' (2012) 16(3) Worldviews: Global Religions, Culture and Ecology 286;

[80] Jeanne E McKay and others, 'Practise What You Preach: A Faith-Based Approach to Conservation in Indonesia' (2014) 48(1) Oryx 23.

[81] Majelis Ulama Indonesia, 'Sejarah MUI' (Majelis Ulama Indonesia) <https://mui.or.id/sejarah-mui/> accessed 15 November 2018.

[82] See Nico JG Kaptein, 'The Voice of the 'Ulamâ': Fatwas and Religious Authority in Indonesia' (2004) 125 Archives De Sciences Sociales Des Religions 115, 120; Jan Michiel Otto, 'Sharia and National Law in Indonesia' in Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 447; Mu'nim Sirry, 'Fatwas and their Controversy: The case of the Council of Indonesian Ulama (MUI)' (2013) 44 Journal of Southeast Asian Studies 100, 101–102.

[83] These are: Fatwa No 128/MUI-KS/XII/2006 on Forest Fires and Smog (Kalimantan); Fatwa No 22 of 2011 on Environmentally-Friendly Mining Practices; Fatwa No 4 of 2014 on Wildlife Conservation for the Preservation of Ecosystem Balance; Fatwa No 41 of 2014 on Waste Management for the Prevention of Environmental Degradation; Fatwa No 001/MUNAS-IX/MUI/2015 on the Utilization of Zakat Wealth, Infaq, Sadaqah, and Waqf for the Construction of Clean Water and Sanitation Facilities for Communities; and Fatwa No 30 of 2016 regarding the Law on the Burning of Forests and Land, and the Control Thereof.

[84] Lembaga Pemuliaan Lingkungan Hidup dan Sumber Daya Alam, 'Home' (MUI LPLH & SDA) <https://mui-lplhsda.org/> accessed 31 October 2019.

communities.[85] The capacity-building of MUI volunteers (who are members of their constituent organizations such as Muhammadiyah) either as proselytizers or project officers are guided by MUI-published guidebooks detailing how its environmental fatwas are to be implemented.[86]

Additionally, MUI publishes books that compile sermons disseminating the Islamic environmental ethic for mosques around the country. These books, collectively featuring over sixty-seven sermons, cover religious topics revolving around environmental and natural resources management, sanitation and environmental health, wildlife conservation, as well as the peatland conservation and restoration.[87] In sum, Islamic NGOs in Indonesia are in the best position to be the MK's agenda-setters and source of information should the alternative approach be applied before the Court. This, in addition to Islamic NGOs record of litigation before the Court on matters related to the environment and natural resources, strengthens their candidacy for bringing the alternative approach arguments into the Indonesian environmental jurisprudence.

5. MOVING FORWARD

This paper began with a hypothesis that the alternative approach to environmental judicial review – that is, the use of constitutional arguments on religion for pro-environmental outcomes – can be applied in Indonesia. It was recognized from the beginning that the alternative approach in Indonesia would be different from its practice in the Middle East because the 1945 Constitution neither entrenches a religion nor express favouritism towards a religion or several religions. The paper then proceeded to explore how the alternative approach can be applied through constitutional arguments on the right to religious freedom before the MK. Insights on the MK jurisprudence on religious freedom reveal strategies for arguing the alternative approach before the MK – that is, the consideration of the experts to invite, the overarching principles that arguments must not be seen to undermine, as well as ensuring that the outcome of the case have as little political (not policy) consequences as possible.

Thereafter, the paper accounted for the factors that may shape the MK's decision, focusing on the role of NGOs. In this case we identified, first, the epistemic role of NGOs in being agenda-setters and vital information providers to MK judges which then inform their reasoning and decisions; second, the role of Islamic NGOs in shaping the environmental discourse in Indonesia is such that the public recognizes the correlation between religious life and environmental protection; and third, Islamic NGOs have a record of litigating before the MK in recent years in pursuit of social justice objectives on issues concerning environmental and human health, and

[85] See eg Hayu Prabowo, 'Pembangkit Listrik Dari Sampah' (MUI LPLH & SDA) <https://mui-lplhsda.org/pembangkit-listrik-dari-sampah/> accessed 31 October 2019; Hayu Prabowo, 'Menjadikan Masjid Mandiri Energi Dengan Listrik Tenaga Surya' (MUI LPLH & SDA) <https://mui-lplhsda.org/menjadikan-masjid-mandiri-energi-dengan-listrik-tenaga-surya/> accessed 31 October 2019.

[86] Ramlan (n 78) 16.

[87] ibid 22–23.

natural resource management. These lead to the proposal that the alternative approach be brought before the MK by Islamic NGOs, supported by their own experts and the Islamic environmental resources readily accessible.

Nevertheless, a careful examination of the environmental/natural resources applications before the MK reveals that the slate of applicants is not always filled by Islamic NGOs. In the *Water Resources Law Case*, a Jakarta-based environmental advocacy group Vanaprastha was Applicant III.[88] In the *Water Resources Law Case* and the *Migas Law Case*, the Parking Attendants, Street Vendors, Businesspersons, and Workers Union (SOJUPEK) were also a co-applicants.[89] In the *Tobacco Products Advertising Case*, the Social Empowerment Foundation of Indonesia (*Yayasan Lembaga Pemberdayaan Sosial Indonesia*), a social welfare NGO, was a co-applicant. Thus, at least Muhammadiyah have included non-religious NGOs to be co-applicants in areas of shared concern; and where the alternative approach is concerned, co-application and collaboration with notable environmental NGOs such as WALHI and ICEL is definitely apt.

In conclusion, this paper is my proposal for the alternative approach where arguments of religion are used to advance environmental objectives to enter Indonesian environmental jurisprudence. Its consideration of existing law and cases in Indonesia, as well as the practice of constitutional review before the MK, are attempts at ensuring that the proposal will, at the end of the day, be as practicable as possible for Indonesian lawyers. Admittedly, it is incomplete as a project because there may be other important considerations left out which can impact the implementation of the paper's proposal. There may be socio-political factors that a foreigner like me may have overlooked in the pursuit of objectivity, or misunderstandings, or misinterpretations of text, practice, and context. Despite these shortcomings, it is hoped that the paper can function as a steppingstone to better enforcement of environmental law in Indonesia, and the recognition of the importance of religion in environmental legal discourse.

[88] *Water Resources Law Case* (n 68) at 1.

[89] *Migas Law Case* (n 67) at 3. Notice, however, that SOKUPEK is Applicant X and is regarded by the Court as an Islamic NGO when it is not. Perhaps, the Court assumed that SOJUPEK shared similar concerns and ideals as the other nine NGOs – and thus was one of them by association. Regardless, SOJUPEK is an active litigant in many other constitutional review cases that do not involve Islamic NGOs.