

Authors

¹Muhsin Aseri

²Nuril Huda²

Affiliation

UIN Antasari Banjarmasin

Email

¹Muhsinaseri7@gmail.com

²nurilhuda@uin-antasari.ac.id

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PRINCIPLES OF ISLAMIC PERSONALITY IN THE RELIGIOUS JUSTICE SYSTEM IN INDONESIA

Abstract

The 1945 Constitution, is to put people in the same position before the law including before the judiciary. In The Law of the Republic of Indonesia Number 50 of 2009 concerning the Second Amendment to the Law of the Republic of Indonesia Number 7 of 1989 concerning Religious Justice contained the principle of Islamic personality, people who litigate in religious courts must be Muslims. This study aims to analyze legal conflicts, especially a person's religiousness for litigants in religious courts. This normative research (library research) is sourced from primary, secondary and tertiary legal materials with philosophical, statute, and conceptual approaches and uses qualitative descriptive analysis. This research found that in the religious courts in prosecuting, it seems that they must pay attention to the status of religion, people who are litigants must be Muslims. However, at the level of principles drawn from the laws governing the litigation system in religious courts, it turns out that non-Muslims can also litigate and in adjudicating are based on legal acts or legal events that occur when a person is Muslim, because it is considered fairer, in accordance with the orderly law and human rights.

Keywords: Islam, Principles of Personality, Religious Justice.

Introduction

The Republic of Indonesia is based on Pancasila, whose first precept is "The One True Godhead". The explicit elaboration of the precepts, one of which is the 1945 Constitution Article 29 paragraphs (1) and (2) which reads: "The State is based on the One True Godhead. The state guarantees the freedom of each resident to embrace his own religion and to worship according to his religion and beliefs".

The essence of the first precept of Pancasila when connected with Article 29 paragraphs 1 and 2 of the 1945 Constitution, explicitly the provisions in the article

provide guarantees and freedom for every citizen to carry out God's commands in accordance with the religion adhered to (Dahlan Thaib,1991). As an application, for Muslims it essentially means to carry out the teachings of Islam; and among the teachings of Islam, one of them is Islamic law in the Islamic judiciary and is served by officials who are Muslims.

Article 27 paragraph (1) of the 1945 Constitution reads: "All citizens have concurrent positions in law and government and are obliged to uphold law and government with no exceptions. (Muhammad Amin Suma ,2004). This equality of position before the law is again expressed in Article 28d paragraph (1) of the Amendment to the 1945 Constitution which reads "Everyone has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law (Muhammad Amin Suma ,2004). The sound of this paragraph is the same as the sound of article 3 paragraph 2 of Law Number 39 of 1999 concerning Human Rights. Similarly, Article 5 paragraph (1) reads: "Everyone recognized as a private human being has the right to demand and obtain the same protection in accordance with his human dignity before the law. The principle contained in this article is to put equality for everyone before the law without exception. This will be even clearer if it is connected with Article 5 paragraph (1) of The Law of the Republic of Indonesia Number 48 of 2009: "Courts adjudicate according to law by not discriminating against people".

These articles are associated with Article 1 point 1 of Ri Law Number 50 of 2009 concerning the Second Amendment to RI Law Number 7 of 1989 concerning Religious Justice which reads: "Religious Justice is a judiciary for people who are Muslims". Regarding this person, it is also stated in Article 2: "The Religious Court is one of the executors of judicial power for the justice-seeking people who are Muslims regarding certain civil, civil matters provided for in this law"; with competence as provided in Article 49 paragraph (1): "The Religious Court has the duty and authority to examine, decide and resolve cases in the first instance between persons who are Muslims in the field of (a) Marriage; (b) inheritance, c. will, d. grant, e. waqf, f. zakat; g. infaq; h. shadaqah; and i. shari'a economics"

Furthermore, in several Articles of Law Number 50 of 2009, it is stated that those who can litigate in religious courts are people who are Muslims only; the rest is not his authority. Therefore, the High Islamic Court once refused non-Muslims to litigate in the religious courts at that time as mentioned by Notosusanto about the Court being opinionated if the religious court accepted that the statement of a litigant husband and wife was true, namely that he had actually been from the Islamic religion, then the Islamic religious court from then on was no longer entitled to take care of the husband and wife case, because one of them is not Muslim anymore, while according to Article 134 paragraph (2) of the Indische Saatsregeling and also Article 2 paragraph (1) of the Religious Regulations in Java and Madura, religious courts are only entitled to hear a case if both parties are Muslim. So from

the time of the recipient of the riddah the religious court has no right to determine that the marriage of the apostate woman is broken."

If this is the case, if the person being tried by the religious court is a person in accordance with Articles 1, 2, and 49 of Law Number 50 of 2009, then in the religious court there will be distinctions in the placement of this person and it will be contrary to Article 5 of Law Number 48 of 2009 and as the main provisions and HIR and R.Bg as the procedural law.

This issue of people (persons) will be even more interesting if it is related to the issue of legal certainty. At the time let's just say the general judiciary adheres to things that have to be proved is a right or occurrence while in religious courts it adheres to a person or person. As a result of this inconsistency will greatly interfere with the competence of each judiciary and ultimately be very detrimental to the seeker of justice (M Yahya Harahap,2009).

Research Methods

The object of research is the principle of Islamic personality in the religious justice system in Indonesia. Sources of legal materials are primary, secondary and tertiary legal materials. Primary legal materials, namely binding legal materials, consist of laws and regulations or jurisprudence that directly contain the principles of Islamic personality in Indonesia. Secondary legal materials consist of supporting library materials in the form of books and research results. Tertiary legal materials, namely instructions / explanations of primary and secondary legal materials .

Normative type of research with philosophical, statute, and conceptual approaches. Legal materials are analyzed by qualitative juridical analysis methods, namely analysis that relies on legal interpretation, legal reasoning, and legal argumentation in sequence and sequence (Hamidi, 2010).

Hasil dan Pembahasan

Personality Principles in the Judicial System in Indonesia

In Islamic law, what is subject to law is the subject of law or *mukallaf* or a person who is *balig* and *sensible* to do an act or not to do an act as stated in the terms *ahka m al-khamsah* (compulsory, circumcision, mubah, makruh and haram) or *ma hku m fih* which is attached to *maahkum 'alaih*.

The burden of law is called *mahkūm fih*, that is; "the object of law, that is, the deeds of a person mukallaf related to the command of *syar'ī* (Allah and His Messenger), both those that are of the nature of demanding to work on demands, leaving, choosing a job and those that are conditional, cause, obstacle, *azīmah*, *ruskhsah*, and void" (Rachmat Shafi'i,1999).

If there is a dispute between the subjects of law, then what must be proven is a legal act or legal event carried out by the subject of law. And the judge decides the case only in an event that a person argues against his opponent. According to civil law, who can be the subject of law, one of them is a person (*person*). The person is the bearer of rights and obligations and so on (Satjipto Raharjo,1996). If there is a dispute, then what is done is to obtain rights or

defend rights.

In evidentiary law, what is meant by proof is proof that justifies the relationship of law (Umar Mansyur Shah,1991). Or in other terms it is "the attempt of the litigants to convince the judge of the veracity of the events or events proposed by the parties to the dispute with the evidence established by law." ¹⁶⁴ This is in accordance with P origin 163 subsection (1) HIR jo P of 283 R.Bg which reads; "Whoever assumes that he has a right or a circumstance to strengthen his rights or deny the rights of another person, must prove that right or circumstance (Abdul Manan,2000). In P of 186 BW it is also stated: "Every person who postulates that he has a right, or in order to affirm his own right or to dispute the rights of others, pointing to an event, is required to prove the existence of such right or event (R. Subekti and R. Tjitrosudibio,1999). If what is proven is an event or events, it is in line with the formulation of the formula given by Taufiq in order to facilitate the determination of the verdict, namely:

$F \times R = C$

F : *Fact*

R : *Rule*

C : *Conclusion*

X : *Operasional*

The table above gives an idea that the outcome of the decision process will be correct only if the facts, laws, and legal reasoning are correct. If one of them is wrong, then the result must be wrong (Abdul Manan and M. Fauzan,2000). A fact is something that has been worked on, an event that has been carried out, an ongoing event, an event that has existed in space and time, or a physical or mental event that occupies space. It can also be said that a fact is the state of an object, hence it exists, or motion, hence the occurrence of an event. In terms of legal science, the existence or actions of legal subjects that have legal consequences are determined through an evidentiary process (Abdul Manan and M. Fauzan, 2000).

The core of the problem is to find answers to the subject matter, regarding how the application of Islamic principles, personality should be at the level of Law Number 7 of 1989 concerning Religious Justice. Whether what is desired there is focused on Muslims (*yustisiabel*), or on the substance (deeds or legal events) committed by Muslims. Then sit it in its proper portion with reference to the rule of law that governs the Indonesian judicial system. To see clearly the position of the principle of Islamic personality in the Indonesian judicial system, the measuring instrument is a principle that is generally accepted in the judicial system in Indonesia itself. Actually, there are many principles that can be drawn from the laws governing the judicial system in Indonesia. However, for this the author only takes four principles that are considered principles and have a close relationship with the subject matter to be analyzed. The four principles will be described as follows:

Principles of Personality and Legal Order

If it is matched between the principle of Islamic personality and the order of law, then legal order is intended as a measure of the proximity of the provisions containing the principle of personality with national law reflected in the basic law, with the source being the 1945 Constitution.

In The Law of the Republic of Indonesia Number 50 of 2009 concerning the Second Amendment to the Law of the Republic of Indonesia Number 7 of 1989 concerning Religious Justice which contains elements of understanding the principles of personality, Islam, especially P origin 1 number (1), P origin 2, P origin 3 paragraph (1), and Porigin 49 paragraph (1), namely as follows:

Article I number (1) reads, "a religious court is a judiciary for persons of the Muslim faith"; Porigin 2 reads, "the religious judiciary, is one of the executors of judicial power for the justice-seeking people who are Muslims regarding certain civil cases provided for in this law"; Pof 3 subsection (1) reads, "the judicial power within the religious judiciary is exercised by 1) the Religious Courts; 2) High Religious Court"; and P of 49 reads: "The Court of Agama is in charge and authorized to examine, decide, and settle cases in the first instance between persons of the Muslim faith in the areas of: a. marriage, b. towarisan, c. will, d. grant, e. waqf, f. zakat; g. infaq; h. shadaqah; and i. shari'a economics"

The general explanation of this law states: "The Religious Court is a court of first instance to examine, decide and settle cases between persons of the Muslim faith in the fields of marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah and shari'a economics based on Islamic law."

The content of the articles suggests that a person who can litigate in a religious court must be Muslim; And those articles are also the basis for the existence of Islamic personality. This is matched with other articles as follows:

Article 27 paragraph (1) of the 1945 Constitution reads, "all citizens have concurrent positions in law and government and are obliged to uphold that law and government with no exceptions"; Pasal 28d paragraph (1) of the 1945 Constitution which reads, "everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law" (Muhammad Amin Suma ,2004); Porigin 5 paragraph (1) of Law Number 4 8 of 2009 which reads, "the court adjudicates according to the law by not discriminating - against persons"; P of 16 Law number 50 of 2009 which contains the oaths of judges, substitute clerks, and bailiffs, in the fourth paragraph reads;

I swear that I will always exercise my office honestly, thoroughly and without discriminating against persons and will prevail in carrying out my duties to the best of my ability and as fairly as possible to a Judge, Clerk/ Clerk of Pangganti, Bailiff who does good and honest in upholding law and justice.

These articles are also in accordance with the reading of article 30 of Law Number 48 of 200 9 and P of 16 paragraph (1), P of 37, article 41 of Law Number 50 of 2009, especially the fourth alenia of the oath of office of the judge / Clerk / Substitute Clerk / Bailiff / Substitute Bailiff. Article 58 paragraph (1) of the law also reads, "The court adjudicates according to the law by not discriminating against persons (Muhammad Amin Suma ,2004).

After comparison with P origin 1 number (1), P origin 2, and Porigin 49 paragraph (1) Law Number 50 of 200 9 there will be differences. One provision does not discriminate against people's religious status, while in the other there are differences.

Lower provisions should be subject to higher provisions. A lower regulation if it conflicts with a higher regulation then the lower regulation cannot be applied and can be declared invalid.

Regarding this legal order, P of 4 paragraph (1) of the People's Consultative Assembly Decree No. III of 2000 states, "in accordance with the order of these regulations per-law, any lower rules shall not conflict with the higher rule of law". The order of the legislation is as follows, (1) the 1945 Constitution; (2) Provisions of the People's Consultative Assembly of the Republic of Indonesia; (3) the Act; (4) Government Regulation in Lieu of Law (Perpu); (5) Government Regulations; (6) Presidential Decrees; and (7) Local Regulations.

About this rule of law, before it is regulated by Tap. MPR Number III of 2000, regulated by Tap. MPRS Number XX / MPRS / 1966. Thus, the establishment and formulation of the Law must not conflict either with the 1945 Constitution or with the Provisions of the MPR. Likewise, Government Regulations cannot conflict with the Law, because Government Regulations are issued based on Laws (Leden Marpaung, 1999).

The hierarchy of legislation according to MPR Decree Number XXI MPRS/1966 is: (1) the 1945 Constitution; (2) MPR provisions; (3) the Act; (4) Government Regulation in Lieu of Law (Peperpu); (5) Government Regulations; (6) Presidential Decrees; and (7) Other implementing regulations. The provisions of the lower law will be removed by the higher law. The legal method mentions "lex superior derogat legi inferior" (Higher legal provisions remove lower laws) The problem of equality before the law, is also regulated in Law Number 39 of 1999 concerning Human Rights, so that for this issue also applies the method "lex posterior derogat legi priori" (the law that came first was abolished by the most recent law).

Abd al-Wahhāb Khalāf mentions: "... As for if one of the postulates is stronger than the other, then what is followed is the law desired by the stronger postulate, and must not turn to the other desired by the other that the other proposition wants..." (Abd al -Wahhāb Khalāf ,1994) In other methods it is called:

فإذا حكم القاضي بحكم يخاف النص القرآن والسنة الصحيحة والاجماع فان هذا الحكم يستحق النقض

(If a *qādhī* breaks the law in contravention of the Koran or a valid sunnah or ijmak, then such a judgment should be overturned).

Principles of Personality and Justice

As it is understood that the function of law is to protect human interests, with the aim of creating order and balance. When human importance is not protected due to the absence of certainty, order of law or the presence of discrimination, due to misapplication. If this condition occurs, then the law does not work and the goal is difficult to achieve. There will be irregularities, discrimination, and a sense of justice can be sacrificed. As one of the human rights is to get equal standing before the law and the judiciary. Regarding arrangements on human rights, in particular to obtain justice. In the amendment to the 1945 Constitution Pof 28d paragraph (1) it is stated that "Everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law ((Muhammad Amin Suma ,2004). Placing in the same position before the law forms part of human rights. If there is an effort to distinguish people before the law, it means that it is a discriminatory attitude that is prohibited based on Porigin 1 number 3 of Law Number 39 of 1999. One form of equating people before the law is

to pay equal respect without questioning one's beliefs or religion. The Word of Allah swt. in Surah al-Mā'idah verse 42 reads:

فإن جاءوك فاحكم بينهم أو اعرض عنهم فإن يضروك شيئاً وان حكمت فاحكم بينهم بالقسط ان الله يحب
المقسطين

(... If they [the Jews] come to you [to ask for a verdict], then destroy [the matter] among them, or turn away from them; if you turn away from them, then they will not give you the slightest *mudharat*. And if you decide their cause, then decide [the matter] among them justly. Indeed, God loves just people.)

The application of the principle of Islamic personality is translated into the substance of things that Muslims do. When matched with a sense of justice, equality before the law is incarnated in the form of equal respect for people before the law. Equality comes from justice, because doing the same to two things is in the sense of fairness. On the contrary, distinguishing the two same things means *zalim* (Gharisah,1990). In Islam, the principle of personality is not solely related to judiciary as the *judiciary* for the *dzimmī* prevails the judicial legality of deeds. Since what is tried is the act of a legal subject or legal event, which is fixed and permanent in nature, then the trial of this legal act or legal event will be more standard and measurable.

In Islamic law, this discourse on the term per-artificial subject of law can be described as Sudargo G's opinion, that the notion of Islamic law includes both from the subjective legal aspect and from the objective legal aspect. Subjective law is a law attached to a legal subject (person or legal entity) either related to the legal status or legal actions he performs. Objective law is a law that is attached to the object of law both related to the status of the legal object and the legal relationship between the object of law and a certain legal subject, as well as regarding the relationship between one legal subject and another legal subject in the form of rights and obligations (Sudargo Guatama, 1990).

Unlike the principle of Islamic personality, it is determined by people. The view of people (persons) is often subjective, quick to please and quick to hate. Similarly, a person's status will change depending on the situation and conditions and luck. A person's status is very prone to change, adjudicating something capricious will be difficult to implement justice. Especially if the principle of Islamic per-sonality is exemplified in one's religious attitude. Diversity is easy to change, depending on interests and desires.

The Principle of Personality and Equality before the Law

Legal principles that violate the principle of *equality before the law* are still common. Whereas the 1945 Constitution Article 27 paragraph (1), P origin 28d paragraph (1), P origin 5 and 30 alenia fourth Law Number 48 Year 200 9, and P origin 58 paragraph (1) and P origin 16 alenia fourth Law Nomor 50 Year 2009, became the basis of the prohibition to discriminate against people. Islam does not discriminate against a person because of his status, ancestry, nation, race, etc. Therefore, a *qādhī* is obliged to generalize his views on litigants without regard to the various differences, including his religious aspects. In surah al-Ahqaf verse 19 reads:

ولكل درجات مما عملوا وليوفيهم اعمالهم وهم لا يظلمون

(For each of them to do according to what they have done and for God to provide for them [retribution] of their works, while they are not harmed.) Islam puts the parties before the judiciary in the same position and its application is mandatory, as are equality in matters of sitting, views, talks, and so on.

Principles of Personality and Human Rights

Equality before the law is part of human rights. This has been mentioned in P origin 28d paragraph (1) of the 1945 Constitution, article 5 paragraph (1) of Law Number 4 of 2004, and P of 58 paragraph (1) of Law Number 7 of 1989.

The position of this person or persons in relation to human rights has also been regulated in more detail in Law Number 39 of 1999 concerning Human Rights. Among them article 4 which reads, "The right to life, the right not to be tortured, the right to personal freedom, thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced in any case and by anyone (Nurhayati, Yati, 2013).

Article 5 paragraph (1) also reads, "every person is recognized as a personal human being who has the right to demand and obtain equal treatment and protection in accordance with the dignity of his humanity before the law. Whenever there is an attempt to distinguish people in front of a court, the act can be considered a violation of human rights. This can be seen in the explanation of Article 104 of Law Number 39 of 1999 in which it is stated that as one of the violations is systematic discrimination.

According to the Act, discrimination is any restriction, harassment, or exclusion that is directly or indirectly based on human differences on the basis of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, or political belief, which results in reduction, food, or elimination of the recognition, exercise or use of human rights and basic freedoms in life both individually and collectively in the political, economic, legal, social, cultural, and various other sectors of life. In P3 subsection (2) of the Act it also reads, "every person shall be entitled to recognition, assurance, legal certainty and equal treatment before the law". Thus, denial of equal treatment before the law is a form of discrimination, and is a recycling of the products of the colonizers

Conclusion

From the description above, it can be concluded that in The Law of the Republic of Indonesia Number 50 of 2009 concerning the second amendment to Law Number 7 of 1989 concerning Religious Justice contained the principle of Islamic personality, where the religious court in adjudicating seems to have to pay attention to the religious status of the justice seeker, that people who litigate in religious courts must be Muslim. However, at the level of principles drawn from the laws governing the Indonesian judicial system, it turns out that non-Muslims can also litigate in religious courts and courts that adjudicate based on legal acts or legal events that

occur when a person is Muslim, because it is considered more in accordance with legal order, human rights, fairer, and non-discriminatory.

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