

Citizens' Rights and Discrimination against Minorities in the Religious Judicial System in Indonesia

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Abstract: The principles of Equality and the Protection of Citizens' Rights are the primary foundations of a Democratic Rule of Law. In practice, however, Indonesia's Religious Court system often presents problems of discrimination, particularly against religious minority groups and those outside the normative majority. While the Religious Courts, which are based on Islamic Law, have constitutional legitimacy, their application frequently raises serious issues concerning access to justice, equal rights, and the recognition of citizens' identities. This article aims to analyze the relationship between citizens' rights and discriminatory practices within the Religious Courts in Indonesia from the perspectives of Constitutional Law, Human Rights, and the principle of Religious Moderation. Through a juridical normative approach and critical analysis, this article examines the extent to which the Religious Court system can guarantee the equality of citizens' rights or, conversely, reinforce the social exclusion of minority groups. The analysis reveals that disparities still exist in the fulfillment of constitutional rights, especially the Right to Freedom of Religion, Equality Before the Law, and the protection of vulnerable groups. This condition is exacerbated by majority biased regulations, exclusive legal interpretation practices, and weak oversight mechanisms. This article asserts that to realize a just and inclusive judiciary, regulatory reform, the strengthening of non discriminatory principles, and the application of Religious Moderation values within the national legal system are necessary. Thus, the fulfillment of citizens' rights must not be compromised by institutional discrimination within the Religious Courts.

Keywords: Citizen's Rights, Religious Courts, Equality, Discrimination.

Introduction

The Republic of Indonesia, as a state governed by the rule of law (*rechtsstaat*) based on Pancasila and the 1945 Constitution,¹ fundamentally establishes the principle of *equality before the law* as one of its main pillars.² This constitutional mandate is explicitly enshrined in Article 27(1) of the 1945 Constitution, which states that "All citizens are equal before the law and the government and are obligated to uphold the law and the government without exception." This principle is not merely a legal adage but the very spirit of the guarantee of protection for citizens' rights, regardless

¹ Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: Rajawali Pers, 2017), 56.

² Ismail Suny, *Pembagian Kekuasaan Negara*, (Jakarta: Aksara Baru, 2016), 45.

of their ethnic, racial, religious, or group background. The concept of a modern rule-of-law state necessitates the existence of an impartial, independent, and non-discriminatory judicial system, which serves as the last bastion for those seeking justice in the pursuit of their rights.³

Within the structure of the National Judicial System, Indonesia recognizes legal pluralism, which is accommodated through the diversification of judicial systems. One such judicial system that plays a central role in the social and religious life of the majority of the population is the Religious Courts. Pursuant to Law No. 7 of 1989, as last amended by Law No. 50 of 2009 on the Religious Courts, this institution possesses absolute authority to examine, adjudicate, and resolve cases among Muslims in the areas of marriage,⁴ inheritance,⁵ wills, gifts, waqf, and Islamic economics.⁶ The existence of the Religious Courts is a manifestation of the state's recognition of Islamic law as a "*living law*" within society.

However, this is where a crucial crossroads lies, giving rise to an ongoing academic discourse.⁷ On the one hand, the state is obligated to guarantee the rights of every citizen equally. On the other hand, the Religious Courts operate based on a specific legal source namely, Islamic law, whose interpretation in certain aspects has the potential to create friction with the universal principles of citizens' rights, particularly when it involves minority groups.⁸ In this context, "minorities" are not only understood as non-Muslim minorities who, due to certain circumstances (such as interfaith inheritance disputes or disputes over waqf assets), come into contact with the jurisdiction of the Religious Courts, but also include internal groups within the Muslim community whose fiqh perspectives differ from those of the majority which may be adopted by judges, such as the differences in views between followers of the dominant Islamic mass organizations and groups like the Ahmadiyya or Shia on issues of Islamic civil law.

This issue has become increasingly relevant and urgent to examine in depth; findings from various civil society organizations and academic research over the past decade indicate potential vulnerabilities for minority groups within the Religious Courts system.⁹ This vulnerability does not necessarily stem from the discriminatory intent of judicial officials, but may arise from normative structures, rigid legal interpretations, and the limitations of legal instruments in accommodating the pluralistic reality of Indonesian society. For example, in inheritance disputes where one of the heirs is non-Muslim, Islamic inheritance law is often applied strictly, stipulating that a difference in religion constitutes a barrier to inheriting *mawani' al-irts*.¹⁰ Although there have been jurisprudential breakthroughs through the concept of *wasiat wajibah*,¹¹ its application remains

³ Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2017 Cetakan Kedelapan), 55.

⁴ Bidang perkawinan meliputi izin poligami, cerai talak, cerai gugat, harta bersama, dan lain-lain. Lihat Pasal 49 huruf (a) UU No. 3 Tahun 2006.

⁵ Termasuk penentuan ahli waris, bagian warisan, dan penyelesaian sengketa waris.

⁶ Kewenangan di bidang ekonomi syariah ditambahkan melalui UU No. 3 Tahun 2006, mencakup sengketa bank syariah, asuransi syariah, dan lain-lain

⁷ Tim Lindsey (ed.), *Indonesia: Law and Society*, (Sydney: The Federation Press, 2018), 250.

⁸ Asep Warlan Yusuf, "Harmonisasi Hukum Islam dan Hak Asasi Manusia dalam Sistem Peradilan Indonesia," *Padjadjaran Jurnal Ilmu Hukum*, Vol. 6, No. 1 (2019), 122.

⁹ Komnas Perempuan, *Catatan Tahunan (CATAHU) 2022: Perempuan dalam Himpitan Pandemi dan Tantangan Impunitas*, (Jakarta: Komnas Perempuan, 2023), 89.

¹⁰ Hal ini merujuk pada ketentuan dalam Kompilasi Hukum Islam (KHI) di Indonesia, khususnya Pasal 171 huruf (c) yang menyatakan bahwa salah satu syarat untuk menjadi ahli waris adalah beragama Islam.

¹¹ Wasiat wajibah adalah sebuah terobosan hukum (*ijtihad*) yang mewajibkan pemberian bagian harta warisan kepada ahli waris non-muslim atau anak angkat, yang besarnya tidak melebihi bagian ahli waris sederajat.

inconsistent and often depends on judges' progressive, case-by-case interpretations.¹² This raises a fundamental question: to what extent can the Religious Court system, which is based on a specific religious law, adapt and provide substantive justice for all citizens who interact with it, including those in minority positions?¹³

When viewed from the perspective of Constitutional Law, this issue lies at the heart of the guarantee of citizens' constitutional rights. The 1945 Constitution, following its amendments, has evolved into a comprehensive Charter of Human Rights.¹⁴ Chapter XA on Human Rights, specifically Article 28D, paragraph (1), guarantees that "Every person has the right to recognition, guarantee, protection, and fair legal certainty, as well as equal treatment before the law." Furthermore, Article 28I, paragraph (2), affirms that "Every person has the right to be free from discriminatory treatment on any grounds whatsoever and has the right to protection against such discriminatory treatment."

On this basis, every legal instrument, including procedural and substantive laws applied within the Religious Courts, must not conflict with the fundamental norms enshrined in the Constitution, in accordance with the principle that *a superior law prevails over an inferior one (lex superior derogat legi inferiori)*. The principle of constitutional supremacy requires that all judicial practices be consistent with the values of equality, non-discrimination, and justice.¹⁵ When the application of law in the Religious Courts has the potential to deny citizens' fundamental rights solely because of differences in religious status or belief, a tension arises between the applicable positive law and the legal ideals mandated by the Constitution.¹⁶ According to constitutional law scholar Jimly Asshiddiqie, one of the primary functions of a state governed by the rule of law is to protect human rights, and the courts are at the forefront of fulfilling this function.¹⁷

From the broader spectrum of human rights—whether derived from national law, such as Law No. 39 of 1999 on Human Rights, or from international instruments such as the Universal Declaration of Human Rights (UDHR)¹⁸ and the International Covenant on Civil and Political Rights (ICCPR),¹⁹ the principle of non-discrimination is a non-negotiable norm. The right to a fair trial includes the guarantee of not being treated differently in court based on any status. Several legal studies indicate that although procedural law is formally the same across all judicial systems, the particularistic substantive law in the Religious Courts can lead to *outcomes* that are perceived as

¹² Doni Prasetya, "Konsistensi Penerapan Wasiat Wajibah bagi Ahli Waris Non-Muslim: Studi Putusan Mahkamah Agung Periode 2018-2021," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, Vol. 34, No. 2 (2022), 215.

¹³ Aditya Perdana, *Keadilan untuk Semua: Tantangan Akses Hukum bagi Kelompok Marjinal*, (Yogyakarta: Gadjah Mada University Press, 2020), 44.

¹⁴ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sinar Grafika, 2017), 150.

¹⁵ S. H. C. P. F. van der Brug, *The Rule of Law and the Indonesian Constitution*, (Leiden: Brill, 2019), 88.

¹⁶ *Ius constitutum* adalah hukum yang berlaku saat ini (hukum positif), sementara *ius constituendum* adalah hukum yang dicita-citakan atau yang seharusnya berlaku di masa depan.

¹⁷ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Sinar Grafika, 2016), 211.

¹⁸ Pasal 7 DUHAM: "Semua orang sama di depan hukum dan berhak atas perlindungan hukum yang sama tanpa diskriminasi."

¹⁹ Pasal 26 ICCPR, yang telah diratifikasi melalui Undang-Undang Nomor 12 Tahun 2005.

substantively unfair by minority groups.²⁰ The challenge lies in balancing the Muslim community's right to practice Sharia through a state-recognized judicial institution with the state's obligation to protect the rights of every individual citizen without exception.²¹

Discussion

History of Religious Courts in Indonesia

The existence of Islamic judicial institutions in the Indonesian archipelago has very deep historical roots, dating back long before the arrival of Western colonial powers in the country. During the era of Islamic kingdoms such as Samudera Pasai, Aceh Darussalam, Demak, Mataram, Banten, Ternate, and Gowa Talo, religious judicial institutions operated effectively in resolving various social disputes based on Sharia law.²² These judicial functions were carried out by religious officials who held both spiritual and legal authority, such as the Penghulu, Qadhi, or Mufti, who were officially appointed by the Sultan or King.²³ Theoretically, the application of Islamic law during this pre-colonial era aligns with the theory of *Receptio in Complexu* proposed by L.W.C. van den Berg, which states that Islamic law automatically applies in its entirety to adherents of Islam.²⁴ The institutionalization of religious courts during the era of the Nusantara kingdoms was not merely a manifestation of the local community's religiosity but also a political instrument of royal power to maintain social order, uphold normative justice, and legitimize the rulers' authority based on the teachings of the Qur'an and the Hadith.²⁵

The dynamics of the religious judiciary underwent a fundamental shift when the Dutch East Indies colonial government began to assert its hegemonic influence and political interference in the Nusantara region. The colonial government gradually formalized and restricted the religious judiciary for political and economic interests, as well as to prevent the consolidation of Islamic law, which had the potential to threaten the colonizers' power.²⁶ In 1882, the colonial government issued *Staatsblad* 1882 No. 152, which officially established the *Priesterraad* in the regions of Java and Madura. Although this *Staatsblad* marked the colonial government's first official recognition of the existence of religious courts, the establishment of the *Priesterraad* was fraught with various legal limitations, such as unclear jurisdictional boundaries, the absence of a budget for the salaries of religious judges, and the lack of internal bailiffs; consequently, every decision required an "executable declaration" (*executabel verklaring*) from the *Landraad* general court to be enforced.²⁷ Furthermore, influenced by the ideas of Snouck Hurgronje and Cornelis van Vollenhoven, which gave rise to the theory of "Receptio", the colonial government asserted that Islamic law only possessed legal force if

²⁰ Budi Santoso, "The Paradox of Legal Pluralism: Minority Rights within the Jurisdiction of Indonesian Religious Courts," *Journal of Southeast Asian Human Rights*, Vol. 5, No. 2 (2021), 195.

²¹ Eka N. A. M. Haris, "Dilema Negara Hukum Pancasila: Antara Partikularisme Agama dan Universalisme HAM," *Jurnal Konstitusi*, Vol. 16, No. 3 (2019), 501.

²² Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, (Berkeley: University of California Press, 1972), 10.

²³ Cik Hasan Bisi, *Peradilan Agama di Indonesia*, (Jakarta: PT RajaGrafindo Persada, 2003), 25.

²⁴ L.W.C. van den Berg, *Beginselen van het Mohammedaansch Recht, Volgens de Masehabs van Eboe Hanifah en sjafi'i*, (Batavia: Ernst & Co, 1878), 4.

²⁵ Abdul Halim, *Peradilan Agama dalam Politik Hukum di Indonesia*, (Jakarta: Kencana, 2005), 42.

²⁶ Ibid, 58.

²⁷ Supomo, *Sistem Hukum di Indonesia Sebelum Perang Dunia II*, (Jakarta: Pradnya Paramita, 1982), 67.

it had been accepted and assimilated by local customary law.²⁸ The direct implications of applying this theory were reflected in the publication of *Staatsblad* 1937 No. 116, which revoked the authority of the Religious Courts to resolve inheritance cases and transferred that authority to *the Landraad*.²⁹ In the same year, *Staatsblad* 1937 Nos. 638 and 639 were also published, establishing the Religious Council in the South Kalimantan region as a form of partial recognition by the colonial government of Islamic judicial institutions outside Java.³⁰

During the Japanese occupation, the institutional structure of the Religious Courts did not undergo significant structural changes; rather, changes were limited to renaming and administrative adjustments under the supervision of the Japanese military government, such as the renaming of *the Hof voor Islamietische Zaken* to *Kogyo Koin Kai* under the administration of *the Shumubu*.³¹ Following the Proclamation of Indonesian Independence on August 17, 1945, the position of the religious courts began to gain an increasingly solid constitutional and legal foundation within the framework of the Republic of Indonesia as a state governed by the rule of law. The establishment of the Ministry of Religious Affairs through Government Decree No. 1/SD of 1946 marked the starting point for the transfer of administrative and organizational oversight of the religious courts to the authority of the Ministry of Religious Affairs.³² Furthermore, to ensure legal certainty and standardize the judicial structure outside the regions of Java and Madura, the Indonesian Government issued Government Regulation No. 45 of 1957 concerning the Establishment of Religious Courts/Sharia Courts outside Java and Madura.³³ This regulation gradually expanded the institutional reach of the Religious Courts to all corners of the archipelago, although legal dualism and disparities in authority between regions persisted until the enactment of the law on judicial power during the New Order era.

A crucial turning point in the process of fully integrating the Religious Courts into the national judicial system occurred during the New Order era. Through Law No. 14 of 1970 on the Basic Provisions of Judicial Power, the Religious Courts were explicitly recognized as one of the four legitimate judicial branches in Indonesia, standing on equal footing with the General Courts, the Administrative Courts, and the Military Courts. This institutional recognition was further strengthened by the enactment of Law No. 1 of 1974 on Marriage, which provided a uniform substantive legal basis for marriage cases involving Muslim citizens. The culmination of the modernization and legal consolidation of the Religious Courts was marked by the enactment of Law No. 7 of 1989 on Religious Courts.³⁴ This law revolutionarily eliminated the requirement for an “executable declaration” (*executabel verklaring*) from the District Court, thereby granting the Religious Courts full autonomy to enforce their own decisions.³⁵ Presidential Instruction No. 1 of 1991 on

²⁸ Snouck Hurgronje, *De Atjehers*, (Batavia: Landsdrukkerij, 1893), hlm. 12; C. van Vollenhoven, *Het Adatrecht van Nederlandsch-Indië*, (Leiden: E.J. Brill, 1918), 85.

²⁹ *Staatsblad* Tahun 1937 Nomor 116 tentang Pencabutan Kewenangan Waris bagi *Priesterraad*.

³⁰ Ibid, Nomor 638 dan 639 tentang Pembentukan Kerapatan Agama di Kalimantan Selatan.

³¹ Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: PT RajaGrafindo Persada, 2007), 18.

³² Penetapan Pemerintah Nomor 1/SD Tahun 1946 tentang Pengalihan Pembinaan Peradilan Agama ke Kementerian Agama.

³³ Peraturan Pemerintah Nomor 45 Tahun 1957 tentang Pembentukan Pengadilan Agama / Mahkamah Syariah di Luar Jawa dan Madura.

³⁴ Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama (Lembaran Negara Republik Indonesia Tahun 1989 Nomor 49).

³⁵ M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama*, (Jakarta: Sinar Grafika, 2003), 55.

the Compilation of Islamic Law was subsequently issued to supplement the substantive legal aspects applied by judges within the Religious Courts in resolving cases involving marriage, inheritance, wills, gifts, and waqf.³⁶

The 1998 Reform Movement brought radical changes to the independence and structure of the judiciary in Indonesia through the emergence of the “*One Roof* System” concept. The Third Amendment to Article 24 of the 1945 Constitution reaffirmed the principle of judicial independence under the Supreme Court. The concrete implementation of these reform and constitutional mandates was realized through the enactment of Law No. 35 of 1999, which amended Law No. 14 of 1970, as well as Law No. 4 of 2004, which was subsequently updated by Law No. 48 of 2009 on Judicial Power. This policy officially transferred all technical, administrative, financial, and organizational oversight of the Religious Courts from the Ministry of Religious Affairs to the Supreme Court of the Republic of Indonesia, a transition that was fully realized in 2004.³⁷

The next significant development was marked by the enactment of Law No. 3 of 2006 and Law No. 50 of 2009 on Amendments to Law No. 7 of 1989. These regulations significantly expanded the absolute jurisdiction of the Religious Courts, no longer limited to family law or *al-ahwal al-syakhsyyah*, but also encompassing disputes regarding Islamic economics, zakat, infaq, and sadaqah. Specifically for the Province of Aceh, through Law No. 18 of 2001 as amended by Law No. 11 of 2006 and Aceh Qanun No. 10 of 2002, the Religious Courts were transformed into the Sharia Courts (Mahkamah Syar'iyah), which possess additional absolute jurisdiction in the field of jinayah, or Islamic criminal law.³⁸ This entire historical and legal transformation demonstrates that the Religious Courts in Indonesia have evolved from traditional religious institutions into modern, independent state judicial bodies that are fully integrated into the constitutional system of the Republic of Indonesia.

Deconstruction of Article 1 of the Religious Courts Act

The primary focus of the issue at hand lies in the seemingly simple yet far-reaching wording of Article 1 of Law No. 7 of 1989 on Religious Courts, which states: “Religious Courts are courts for persons of the Islamic faith.” On the surface, this article appears to be a definitive statement of a technical-legal nature, defining the *legal subjects* under the jurisdiction of this judicial institution. However, a deeper deconstruction of this article—taking into account its historical, sociological, and philosophical contexts—reveals that it is the epicenter of a legal structure that inherently creates the potential for discrimination.

Linguistically, the use of the word “for” implies both a service function and exclusivity. On the one hand, it can be interpreted positively as “intended to serve,” in line with the argument that the Religious Courts are a form of facilitation and fulfillment of the civil rights of Muslims in

³⁶ Instruksi Presiden Nomor 1 Tahun 1991 tentang Penyebarluasan Kompilasi Hukum Islam.

³⁷ Keputusan Presiden Nomor 21 Tahun 2004 tentang Pengalihan Organisasi, Administrasi, dan Finansial di Lingkungan Peradilan Agama ke Mahkamah Agung Republik Indonesia.

³⁸ Undang-Undang Nomor 18 Tahun 2001 tentang Otonomi Khusus Bagi Provinsi Daerah Istimewa Aceh, Undang-Undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh, serta Qanun Aceh Nomor 10 Tahun 2002 tentang Mahkamah Syar'iyah.

accordance with their beliefs.³⁹ This argument is based on a historical and sociological *ratio legis*, namely accommodating the living law within the majority society and continuing the tradition of religious courts that has existed since the pre-independence era.⁴⁰ From this perspective, Article 1 embodies an accommodative legal policy aimed at providing certainty and culturally relevant access to justice.

However, on the other hand, the word “for” inevitably creates a demarcation a “legal fence” that divides citizens into two distinct categories within a specific area of civil law: “those who are Muslim” and “those who are not Muslim.” This is the starting point where accommodation begins to transform into exclusion. By institutionalizing a special judicial system for one religious group, the State consciously creates a *legal enclosure* that subjects its citizens to different treatment and procedures based on their religious identity.⁴¹ The direct implication is the exclusion of non-Muslim citizens from this specially facilitated legal space. They are not excluded from the general judicial system, but they are excluded from a special judicial system that handles cases that are essentially the same as those they face.

This structure gives rise to what is known as *de facto* discrimination or structural discrimination. This type of discrimination does not always stem from malicious intent or explicit prejudice in the text of the law, but rather from the effects arising from the way an existing system or structure operates.⁴² The Religious Courts Act may not explicitly state an intent to discriminate against non-Muslims. However, by providing a religion-based judicial mechanism for only one group, the resulting structure automatically creates *unequal conditions* for other groups. Minority groups must navigate the General Court system, which is based on secular civil law a system that may be just as foreign to their religious doctrines (such as Catholic canon law or traditional Balinese Hindu inheritance law) as Islamic law is.⁴³ In this case, the state does not provide an equal “legal home” for all faiths, but rather builds a grand mansion for one faith and leaves the others to dwell on the porch of the general legal system. This is the essence of the discrimination problem rooted in Article 1 of the Religious Courts Law.

Discrimination in the Religious Courts Act

1. The Perspective of Critical *Legal Studies* (CLS)

Critical Legal Studies (CLS) rejects the positivist view that law is a neutral, objective system of rules separate from politics or power. On the contrary, for CLS thinkers, law is a political arena in and of itself; it is a product of power relations in society and serves to legitimize and reproduce existing power structures.⁴⁴

³⁹ Abdul Manan, *Etika Hakim dalam Penyelenggaraan Peradilan*, (Jakarta: Kencana Prenada Media Group, 2007), 89.

⁴⁰ M.B. Hooker, *Islamic Law in South-East Asia*, (Singapore: Oxford University Press, 1984), 245.

⁴¹ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, (Cambridge: Cambridge University Press, 2002), 176. Santos membahas bagaimana hukum modern menciptakan zona-zona eksklusif.

⁴² Iris Marion Young, *Justice and the Politics of Difference*, (Princeton, NJ: Princeton University Press, 1990), 41.

⁴³ R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007), 210.

⁴⁴ Duncan Kennedy, “The Structure of Blackstone's Commentaries,” *Buffalo Law Review* 28 (1979): 205-382. Kennedy mendekonstruksi bagaimana teks hukum yang tampaknya netral menyembunyikan kontradiksi dan pilihan ideologis.

From the CLS perspective, Article 1 of the Religious Courts Act is not merely a technical provision, but a powerful ideological statement. It is a manifestation of the hegemony of the majority group within the legal sphere. By elevating Islamic private law from the communal sphere to the realm of state law, which possesses coercive power, the state not only accommodates but also grants a status of superiority and formal legitimacy to one group's value system over another's.⁴⁵ In this context, Islamic law is no longer merely a moral choice for individual Muslims but becomes the state law applicable to them, complete with an apparatus and infrastructure funded by the taxes of all citizens, including non-Muslims.

Furthermore, CLK will highlight how the law creates a *false consciousness* that the existing structure is "natural" or "inevitable." The narrative that the Religious Courts are a "sociological necessity" or "historical legacy" can obscure the fact that they are the result of political choices that could have been different. It perpetuates the idea that it is natural for the majority to receive special accommodations, while the needs of minorities are deemed sufficiently accommodated within the general system. Thus, Article 1 of the Religious Courts Law, according to CLK, is a perfect example of how the law functions to subtly maintain the status quo of majority dominance—not through brute force, but through the normalization of a structure that is inherently unequal.

2. John Rawls's Theory of Justice

Political philosopher John Rawls offers a robust framework for evaluating the justice of a society's foundational structure through a thought experiment known as *the "original position"* and *the "veil of ignorance."*⁴⁶ Rawls invites us to imagine a group of rational individuals designing the foundational principles of society without knowing their own positions within that society—they do not know their religion, ethnicity, social status, or level of wealth.

Researchers have attempted to apply this thought experiment to the judicial system in Indonesia. If we were behind *the "veil of ignorance"*—unaware of whether we would be born Muslim, Christian, Catholic, Hindu, Buddhist, or a follower of another faith—what principles of a judicial system would we choose to govern family legal matters?

- Scenario A: A system with a special religion-based court for only one religious group (Islam), while others use the general court system;
- Scenario B: A single, secular general judicial system for all citizens, in which religious law applies only in the private sphere without the power of state enforcement;
- Scenario C: A system in which the state provides equal access to religious or customary courts for all significant religious or customary groups.

From *the original position*, a rational individual seeking to minimize the risk of the worst-case scenario would never choose Scenario A. The reason is that if they were born non-Muslim, they would be in a structurally disadvantaged position, where their religious legal needs would not be facilitated by the state on an equal basis. The fairest and most rational choice is between Scenarios B or C, as both scenarios treat all prospective citizens equally, in line with *the Equal Liberty Principle*

⁴⁵ Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971), 12.

⁴⁶ John Rawls, *A Theory of Justice, Revised Edition* (Cambridge, MA: Harvard University Press, 1999), 11.

and *the Difference Principle*, which justify inequality only if it benefits the least advantaged.⁴⁷ The structure created by Article 1 of the Religious Courts Law clearly fails this Rawlsian test of justice because it creates a fundamental inequality without providing compensatory benefits to minority groups; on the contrary, it actually burdens them.

3. A Critical Perspective on the Theory of Legal Pluralism

As previously mentioned, the existence of the Religious Courts is often justified using the Theory of Legal Pluralism. This theory is descriptively very accurate in illustrating that in Indonesia, state law, religious law, and customary law interact with one another.⁴⁸ However, a critical analysis would question the nature of this pluralism. Is it an equal and harmonious pluralism, or an unequal and hierarchical one?

Article 1 of the Religious Courts Law and the system built around it create an asymmetrical legal pluralism. The state does not act as a neutral facilitator for all normative legal systems existing in society. Instead, the state actively intervenes by selecting one non-state legal system (Islamic law) and transforming it into *state-sanctioned religious law*. This process is referred to as the incorporation or domestication of religious law into the state legal system.⁴⁹ Meanwhile, other religious and customary legal systems (church law, Balinese *awig-awig*, etc.) are left in a state of *unofficial legal pluralism*. They may be respected, but they lack dedicated state judicial institutions to enforce them.

It is this asymmetry that is the source of discrimination. Muslim citizens enjoy the “privilege” of having disputes resolved according to their beliefs through state mechanisms, while other citizens do not. Pluralism, which should be a recognition of diversity, in practice has instead become a tool to reinforce a hierarchy among these various legal systems, with state-sanctioned Islamic law at the top, state civil law in the middle, and minority religious/customary laws at the very bottom in terms of formal recognition by the state.

Discriminatory Impacts in the Context of Violations of Citizens' Rights

The theoretical analysis above becomes concrete when we examine its impact on the constitutional rights of citizens guaranteed by the 1945 Constitution. The discriminatory structure centered on Article 1 of the Religious Courts Law directly or indirectly violates at least three fundamental rights.

- **Violation of the Right to Equality before the Law (Article 27, Paragraph 1):** This right requires that the state provide equal legal processes and substantive protections for all citizens. However, as discussed in the case of interfaith marriages, the state provides a clear pathway for Muslim couples through the KUA and the Religious Courts, but leaves interfaith couples with no viable option. This is the most glaring example of a violation of the principle of equality. Two couples who are citizens with the same intention (to marry)

⁴⁷ *Ibid*, 52-53.

⁴⁸ John Griffiths, "What is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 24, No. 1 (1986): 1-55.

⁴⁹ Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30, No. 3 (2008): 375-411.

are treated differently by state authorities and the law solely because of their religious identities. This unequal treatment is the very definition of discrimination.⁵⁰

- **Violation of the Right to Freedom from Discriminatory Treatment (Article 28I, Paragraph 2):** This article not only prohibits the state from engaging in discriminatory acts but also obligates the state to provide protection against such discriminatory treatment. In cases of interfaith inheritance, despite the breakthrough of *the wasiat wajibah*, the fact that a non-Muslim child must go through a more complicated judicial process and rely on the judge's *discretion* to obtain their rights—while their Muslim sibling receives them automatically—demonstrates the state's failure to provide equal protection against discrimination. The system itself, by *default*, is discriminatory, and the existing solution is merely a Band-Aid, not a structural fix.
- **Violation of the Right to Freedom of Religion and Belief (Article 28E):** This is the most profound and personal violation. When the legal system effectively forces a citizen to undergo a *pro forma* conversion in order for their marriage to be recognized by the state, that system has unduly intervened in the realm of an individual's *forum internum*. The right to hold beliefs in accordance with one's conscience is an absolute right that cannot be diminished under any circumstances.⁵¹ By creating conditions in which a person must sacrifice the authentic expression of their beliefs in order to obtain a civil right (marriage), the state has violated one of the most fundamental human rights. This transforms religion from a matter of sincere belief into a mere administrative requirement, a devaluation of the very essence of religious freedom itself.

Religious Moderation: Normative Response & Structural Limitations

Faced with this problematic legal structure, the state proposes Religious Moderation as a normative “solution.” Religious Moderation is promoted as an ethos, a worldview that must permeate all aspects of national life, including law enforcement. The goal is to ensure that religious practices, including the application of religious law, are in harmony with national commitments, tolerance, and respect for the rights of all citizens.⁵²

In the context of the Religious Courts, Religious Moderation can serve as a driving force for judges to engage in progressive and just legal interpretation. The spirit of moderation encourages judges not to be fixated on a literal, scripturalist reading of fiqh texts, but rather to explore *the maqāshid al-shari'ah*—such as *al-'adl*, *al-maslahah*, and *al-rahmah*. The jurisprudence regarding *the obligatory bequest* is a product of moderate legal thought and *the maqāshid*. A moderate judge will view a non-Muslim child not as an “outsider” whose inheritance rights are barred, but as a fellow human being and close relative whose rights must be protected to preserve family unity and a sense of justice. Within this framework, Religious Moderation functions as an ethical “lubricant” that seeks to soften the rigidity of existing legal structures.

⁵⁰ Abdullahi Ahmed An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), 173.

⁵¹ Lihat kembali Pasal 28I Ayat (1) UUD 1945, yang menempatkan hak beragama dan hak atas kebebasan hati nurani sebagai non-derogable rights.

⁵² Menteri Agama RI, *Peta Jalan Moderasi Beragama 2020-2024* (Jakarta: Kementerian Agama RI, 2020), 25.

However, this is where the fundamental limitation of Religious Moderation lies. It is a “software” solution offered to fix a “hardware” problem. Religious Moderation is about ethos, legal culture, and perspective. Meanwhile, the issue of discrimination analyzed here is rooted in the positive legal structure itself—specifically in the text of Article 1 of the Religious Courts Law and the Marriage Law. An ethos, however noble, cannot override or supersede a law that is in force.⁵³

This is evident in cases involving interfaith marriages. Although the spirit of Religious Moderation promotes tolerance and anti-discrimination, judges in the General Courts and the Supreme Court remain bound by a formal interpretation of the Marriage Law, culminating in the issuance of SEMA No. 2 of 2023, which prohibits the registration of interfaith marriages. This shows that when the “software” of moderation clashes with the “hardware” of rigid law, it is the hardware that prevails. Religious Moderation can inspire judges to act fairly in inheritance cases where there is room for *ijtihad*, but it is powerless when the law effectively closes the door to legal solutions, as in the case of marriage.

Therefore, Religious Moderation, while important and necessary as a social and legal-cultural movement, will never be sufficient to resolve this issue of structural discrimination. It is an inevitable step, but not a sufficient one. Without being accompanied by bold legislative reforms—such as revising the Marriage Law to explicitly regulate interfaith marriage procedures, or even rethinking a more symmetrical model of legal pluralism—Religious Moderation will merely serve as a soothing narrative that masks the gaping wounds of discrimination caused by a lopsided legal structure.

Conclusion

Based on the analysis presented, it can be concluded that the existence of Article 1 of Law No. 7 of 1989, as last amended by Law No. 50 of 2009 on Religious Courts, inherently creates a fundamental constitutional legal problem. The provision defining the jurisdiction of the Religious Courts exclusively for citizens who are Muslim—known as the principle of Islamic personal status—*de facto* and *de jure* gives rise to a dualism in the civil legal system that has direct implications for the constitutional rights of citizens. This issue is not merely a technical procedural matter but touches on the very essence of the principles of the rule of law, equality, and non-discrimination guaranteed by the 1945 Constitution.

Specifically, this restriction of jurisdiction based on religious identity directly conflicts with Article 27(1) of the 1945 Constitution, which guarantees equal standing for every citizen before the law and the government. When a Muslim citizen is mandatorily subject to the jurisdiction of the Religious Courts in certain matters—such as marriage, divorce, inheritance, wills, gifts, waqf, etc.—while non-Muslim citizens are subject to the General Courts for similar matters, the state has consciously created a legal segmentation. Although this distinction is based on the historical and sociological realities of the Indonesian nation, it cannot negate its potential to give rise to *unequal legal treatment* and, ultimately, create legal uncertainty. The right to obtain justice and fair legal certainty regardless of ethnic, religious, racial, or intergroup background is a cornerstone of the modern rule of law.

⁵³ H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 91. Hart membedakan antara "aturan primer" (hukum substantif) dan "aturan sekunder" (aturan tentang bagaimana hukum dibuat dan diubah), di mana etos tidak termasuk dalam keduanya.

On the other hand, this debate also reflects the perennial tension within the Indonesian legal system between the ideal of legal unification and the reality of legal pluralism. The Religious Courts are a manifestation of the state's recognition of Islamic law as one of the "living laws" within society. However, this recognition must be situated within the broader constitutional framework that positions the state as a neutral entity that protects all its citizens equally. The current wording of Article 1 of the Religious Courts Law tends to prioritize the principle of Islamic identity over the principle of universal equality, thereby creating an anomaly within the national legal system.

Therefore, a recontextualization and critical reflection on the position of the Religious Courts are necessary. Legal reform does not necessarily mean the abolition of this institution, but rather the alignment of its paradigm with constitutional principles. Several strategic steps that can be considered include the following. First, conducting a *judicial review* of Article 1 of the Religious Courts Act to change the nature of its jurisdiction from mandatory to an optional legal avenue for litigants, whether Muslim or non-Muslim. Second, if *judicial review* is deemed difficult to implement in the near future, then to eliminate elements of discrimination within the Religious Courts, a step that can be taken is to add the word "Islam" after "Religious Courts," so that it becomes "Islamic Religious Courts," thereby eliminating the exclusivity of the Religious Courts. This is because when we speak of religion, the context is broad—it encompasses not only Islam but all religions recognized in Indonesia.

Ultimately, the future of a just Indonesian judicial system depends on its ability to manage legal pluralism without sacrificing the fundamental rights of citizens. Harmonizing the Religious Courts Act with the Constitution is an absolute necessity—not to weaken the existence of religious law, but to ensure that its presence strengthens, rather than delegitimizes, the foundation of the Pancasila-based rule of law, which is inclusive and just for all the people of Indonesia.

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