

The Role of Islamic Law in Enriching the Decisions of the Indonesian Constitutional Court

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Abstract: This article discusses the role of Islamic Law in enriching legal considerations of constitutional court decisions. As one of the recognized laws in Indonesia, it turns out that Islamic Law has an essential role in the development of national law, including the Constitutional Court decision. It was proven by the existence of 20 decisions by the Constitutional Court on judicial review of laws with Islamic Law. However, of the 20 decisions, there were only six decisions in which the Constitutional Court used Islamic Law as the basis for its consideration. In this article, we will discuss several things, namely the construction of Islamic Law and the development of positive law in Indonesia. Meanwhile, the penultimate part argues that efforts to legal positivism in Indonesia have been going on for a long time. Before conclusion, the last part believes that in fact, there are nuances of Islamic theory or Islamic Law used by the Constitutional Court judges in several decisions of the Constitutional Court.

Keywords: Islamic law, constitutional court, decision, nuances.

1. INTRODUCTION

Adhere to law, Indonesia adheres to three legal systems at the same time that lives and develops in society, namely the civil law system (Dutch colonial heritage), the adat law system, and the Islamic law system. The three legal systems complement each other independently [1]. Islamic Law affects the style of Indonesian Law due to the majority of the population in Indonesia adheres to the religion of Islam (87.2 % of the total population of around 268 million people) [2] which allows Islamic Law to become an essential and influential part of the legal system in Indonesia. Islamic Law is also a source of national law development [3]. The three legal systems also eclectically colour the laws issued by the State from the level of legislation to the level of technical regulations [4]. The enforcement of Islamic law as a source of national law development was in accordance with Pancasila, especially the first precepts, namely "*God Almighty*" and Article 29 of the 1945 Constitution.

Article 29 of the 1945 Constitution above is the basis of legitimacy for the positivization of laws derived from Islamic law into national law through the legislative process. Islamic law influences Indonesian legislation because many laws have Islamic legal nuances. For example, Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning the Religious Courts, Law Number 23 of 2011 concerning Management of Zakat, Law Number 41 of 2004 concerning Waqf, Law Number 19 of 2008

concerning State Sharia Securities, Law Number 21 of 2008 concerning Sharia Banking, and Law Number 33 of 2014 concerning Guarantee of Halal Products.

In practice, justice seekers not only resolve various legal problems through the judiciary under the Supreme Court, but also through the Constitutional Court by taking judicial review because they think that a provision in the Law is contrary to the 1945 Constitution. Then, based on the recapitulation of judicial review at the Constitutional Court, until the end of 2020, there were at least 20 decisions regarding the judicial review of laws that were of Islamic law. This fact shows that the Court has a role in determining the dynamics of the development of Islamic law in Indonesia. Besides that, it also plays a role in enriching the legal considerations of constitutional judges in deciding cases that have Islamic legal material. Because, when there is such a case, it is obligatory for Constitutional Court Judges to use an Islamic legal approach in resolving the case.

1.2. Research Method and Benefit

This paper is the result of normative legal research. There are two legal approaches used in this research, namely the statutory approach, namely by examining laws with Islamic legal nuances; and the case approach by examining judicial review decisions against laws containing Islamic law. This reserach aims to analyze the constitutional court decisions which contain Islamic law in its legal considerations.

1.3. Paper Structure

This article will discuss how the role of Islamic law ensuring that the legal reasoning of the Constitutional

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Court. This paper construct the argument as follows. In the first section discuss the construction of Islamic law and the development of positive law in Indonesia. Meanwhile, the penultimate part argues that efforts to legal positivism in Indonesia have been going on for a long time. Before conclusion, the last part believes that there are nuances of Islamic theory or Islamic law used by the Constitutional Court judges in several decisions.

2. BACKGROUND

2.1. The Contribution of Islamic Law on the Growth of Indonesian Positive Law

Law Number 1 of 1974 concerning Marriage is one example of the legislation that accommodates religious values. In Article 2 of this law, religion determines the marriage legitimation, so that marriage in Indonesia obey religious marriage. The formulation of that article has some legal consequence that every Indonesian who adhere to Islam, have to follow the Islamic Law first to be able to legitimate their marriage. It was proved that the existence of Islamic Law took some effect on lin life as a nation and state.

The other existence of Islamic Law is the regulation on zakat. The regulation concerning zakat was regulated by the Ministry of Religion Circular Letter Number A/VII/17367 of 1951, wich is passed on the provisions of the Dutch ordinance, that explained if the state only stands as supervision, and will not interfere in the matters of collecting and distributing zakat [1]. In 1991, the government issued The Joint Decree of the Minister of Home Affairs and the Minister of Religion of the Republic of Indonesia Number 29 and 47 of 1991 concerning the Development of Amil Zakat, Infaq, and Sadaqah Bodies [1]. In 1998, the Minister of Home Affairs Instruction Number 7 concerning the Funding of the Amil Zakat and Sadaqah Bodies was issued [1]. This time, the management of zakat is set on the Law Number 23 of 2011, which is the result of an revision of Law Number 38 of 1999 concerning Zakat Management.

Law Number 41 of 2004 concerning Waqf is an application of Islamic Law that contains several new and quite important matters, such as *nazhir*, *maiquf bih* (the propoerty that will be set in waqf), *mauquf 'alaih* (the allocation of waqf property), and the importance of Indonesia Waqf Board. In Article 28 paragraph (2), it is stated that the Indonesian Waqf board can collaborate with the Government Agencies, both in the central or regional level, community organizations, the experts, international bodies, and the other parties if needed.

Apart from marriage, zakat, and waqf, Law Number 13 of 2008 concerning the Administration of Hajj is also one proof of the existence of Indonesian Islamic law. Article 8 paragraph (2) of this law explains the policies and implementation of the hajj pilgrimage are national duties and are the responsibility of the government. The existence of Islamic law is increasingly visible with the announced of Law Number 33 of 2014 concerning the guarantee of halal products to ensure the availability of Halal products for the Indonesian peoples. This law regulates the rights and obligations of Business Actors by providing exceptions for Business Actors who produce products from materials derived from prohibited materials with the obligation to explicitly include non-halal information on the product packaging.

Furthermore, Indonesia also provides a Religious Court under the Supreme Court, which has the competence to accept, decide, and resolve disputes in the field of sharia economics. Therefore, The courts within the Religious Courts not only have the authority to resolve disputes in the area of marriage and inheritance but also to resolve disputes between customers and Islamic financial service institutions, which the Financial Services Authority differentiates into Banking, Capital Market, and Non-Bank Financial Industry. Specifically, in Aceh, the absolute competence of the Religious Courts (known as the Sharia Court) was expanded to judge Islamic criminal cases.

2.2. Positivization of Islamic Law in Indonesia

The plan to positivization of Islamic law into national law has been debated for a long time, even since the debate at the Investigation Committee for the Preparatory Work for Indonesian Independence [5]. Normative acceptance of Islamic Law began with the enactment of the 1945 Constitution. According to Ismail Sunny, the enactment of the 1945 Constitution and Pancasila as the basis of the state even though does not contain seven words from the Jakarta Charter, makes the *receptive theory* (conflict theory) developed by Snouck Hurgronje loses its legal basis and does not apply. On the other hand, Islamic law is increasingly being recognized constitutionally in Article 29 of the 1945 Constitution. At that time, Islamic Law was accepted as a persuasive source [6].

The acceptance of Islamic law is getting more significant after the implementation of regional autonomy, where regions have started competing to

regulate all their regional affairs. Local governments take this opportunity to form Regional Regulations based on regional characteristics [1]. Many areas, especially people, want regional regulations with Islamic nuances based on Sharia principles in accordance with the sociological conditions of their communities. One of the areas that want a Sharia-based regulation is Aceh Province, with a regional rule called *Qanun* [1].

In addition to the *Qanun* in Aceh Province, several State Institutions and other institutions that breathe Islam, for example, the Indonesian Ulema Council, were joined by the establishment of other bodies such as the National Amil Zakat Agency and the Indonesian Waqf Board. The first Indonesian Ulama Council was established by the West Java Ulama Council in 1958. The central Ulama Council was established in 1962, which was then attended by various Ulama Council at the provincial level. In 1975, a new Ulama Council was formed called the Indonesian Ulema Council (MUI) [7]. The Indonesian Ulama Council plays an essential role in ensuring that religious harmony is realized through the fatwas given.

The substance of Islamic law is also one of the raw materials for the formation of laws and regulations through a positivization mechanism. The Islamic law positivization in the development of national law takes two forms, namely: (a) Islamic law cannot be enforced in the national scope due to the plurality of the Indonesian nation, but it can be a source of value in the national law formulation; or (b) Islamic law can become positive law which applies to all citizens through a legal process of legislation such as the field of private law (*mu'amalah*) [8].

The Islamic law positivization has bright prospects because the reform era has a responsive legal character, which is in contrast to the less developed Western legal system [8]. It was supported by the majority of the population who are Muslim and government politics that support the development of Islamic law so that Islamic law becomes one of the common sources in the formation of national law in addition to customary law and Western law [8]. As for the values, principles, and norms of the Islamic law that have the potential to be used as material for statutory regulations, namely in the fields of criminal law (*jinayah*), family law (*munakahat* and *faraidh*), and economic law (*ahkam iqtishadiyyah*) [8].

When Islamic law is positivated, there will likely be a conflict of norms, especially a conflict between the

norms of the law and the 1945 Constitution. Therefore, it is not surprising that quite many laws containing Islamic Laws are being tested in the Constitutional Court. The construction of authority and the nature of the decision of the Constitutional Court will affect the implications of the decision on judicial review of the validity of articles in laws that have Islamic legal substance. In a period of approximately 17 years since the Constitutional Court was founded, there have been at least 20 decisions to examine laws related to the substance of Islamic law. However, after further investigation, there are only 6 decisions which in their legal considerations cite Islamic legal theories.

- a. Decision Number 12/PUU-V/2007 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. In this case, the applicant argues that the limitation and the existence of polygamy conditions in the Marriage Law are against the Islamic Marriage Law, thereby reducing the Petitioner's right to freedom of worship and is discriminatory against Muslims. The Court contends that Islamic teachings intend to discipline polygamy gradually, which aims, among other things, so that in its implementation there is no abuse of men and to maintain the dignity of women. Therefore, according to Islamic teachings, the state has the authority to determine the conditions that must be met by its citizens who wish to practice polygamy for the sake of the general benefit, especially in achieving the goal of marriage, which is to form a happy and eternal family based on Almighty God. According to the Constitutional Court, polygamy is included in the *mu'amalah* category which is corresponding the *fiqh qaidah* in the field of *mu'amalah* which states, "basically mu'amalah is permitted unless there is a provision which states explicitly prohibiting it".
- b. Decision Number 19/PUU-VI/2008 concerning Judicial Review of Law Number 7 of 1989 concerning the Religious Courts as amended by Law Number 3 of 2006. The applicant argues that the applicant's freedom of religion and worship is limited due to the existence of Article 49 paragraph (1) of Religious Court Law. This provision is considered to limit the scope of validity of Islamic law by excluding criminal (*jinayat*). The provisions of this article also restrict Muslims from enforcing Islamic religious law as a whole (*kaffah*), as instructed by the Holy Qur'an and Hadith as the main source of Islamic

teachings. The Court contends that Indonesia is not a religious state based solely on one particular religion and nor is it a secular state that does not pay attention to religion at all and leaves religious affairs completely to individuals and society. If the problem of the application of Islamic law is related to the source of law, it can be said that Islamic law is indeed the source of national law, but Islamic law is not the only source of national law, where apart from Islamic law, customary law and western law as well as other sources of legal traditions, become a source of national law.

- c. Decision Number 143/PUU-VII/2009 concerning Judicial Review of Law Number 19 of 2008 concerning State Sharia Securities. The applicant argues that the use of State Property as an underlying asset in State Sharia Securities publication by selling, ensuring or lease them, which is approved by The Minister of Finance after get the approval of the Indonesian House of Representative for and on behalf of the Government, has pledged the state assets as an underlying asset in State Sharia Securities publication bt the government. The Courts has some opinions that there is no *casual verband* between the argued loss and the article petitioned for review, because the article is only in the form of regulating the use of State Property in the context of issuing State Sharia Securities which is an open legal policy, with managing state finances to increase the carrying capacity of the State Budget by using sharia-based financial instruments, which the legislators deemed as having a great opportunity that has not been optimally utilized to finance national development as a purpose.
- d. Decision Number 38/PUU-IX/2011 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. The applicant argues that the reason “between the husband and wife continuously dispute and quarrels” as one of the reasons in divorce, does not guarantee protection, legal certainty and justice for the wife. The applicant said that most wives were sacrificed in domestic disputes and quarrels, even when the husband was the person who caused the dispute and quarrel, for example the husband had an affair with another woman, and then leave the joint residence. Regarding The Pleader’s argument, The Court said that the explanation of Article 39 paragraph (2) letter f of Law Number 1 of 1974 along with the phrase, “*Between the husband and wife continuously dispute and quarrels [...]*” actually provides a solution when a marriage is no longer in line with the purpose of marriage as stated in Article 1 of the Marriage Law and does not provide legal certainty and justice as referred to in Article 28D paragraph (1) of the 1945 Constitution.
- e. Decision Number 30-74/PUU-XII/2014 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. In their application, the applicant argues that Article 7 paragraph (1) and (2) of the Marriage Law create legal uncertainty regarding the age limit of marriage in Indonesia, particularly regarding the legal age limit for marriage for women, especially in protecting the children’s right. The applicant asked the Constitutional Court to make a decision invalidating the article being tested. Later, the Court argued that the minimum age for marriage was a legislative right (*opened legal policy*), where the Court further stated that if the Court was asked to set a minimum age, this would only limit any attempts to change policies by the state in the future.
- f. Decision Number 68/PUU-XII/2014 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. The applicant argues that article 2 paragraph (1) does not fulfill the right to get an equality before the law because in its implementation, so many interpretation rises up and create some different treatment between one citizen and another. Furthermore the article, causes uncertainty in different religion or belief marriage, at the level of legislation and implementation, and it could be found in various judges’ decrees regarding whether or not different religion or belief marriage can be carried out. In their petition, The petitioner asked the Constitutional Court to conditionally decides by interpreting the article being tested. Then, the Court said that is case to perform their rights and freedoms, including the rights to do the marriage and form a family, every single citizen has to comply with the e restrictions stipulated by law vide Article 28J paragraph (2) of the 1945 Constitution. The state has role in providing guidelines to ensure legal certainty of life together in the bonds of marriage.

2.3. The Nuances of Islamic Law In The Constitutional Court's Legal Considerations

As explained earlier, when a judicial review case nuanced Islamic law, the Constitutional Court Judges will also use the Islamic law approach. In decision Number 12/PUU-V/2007, for example, the Constitutional Court (later: the court) adopted an Islamic approach to its legal considerations. The Constitutional Court shall state:

The doctrine of Islam is aimed at gradually implying polygamy, which is intended, among other things, not to harass men and to preserve the dignity of women. [...]. [9]

In addition, to strengthen consideration above, Constitutional Court quotes several verses of the Holy Qur'an such as Verse 1 An-Nisa, Verse 3 An-Nisa, Verse 129 An-Nisa, and Verse 21 Ar-Ruum, and also based on the opinions of Muslim scholars such as Quraish Shihab and Huzaemah T. Yanggo who were presented before the Court and cited various principles of fiqh in his consideration. However, the Court ruled that the application was rejected. Even so, this is an interesting fact, because the Court uses a lot of Islamic legal approaches to assess the constitutionality of the articles being tested.

Then there is Decision Number 19/PUU-VI/2008, in which the applicant argues to extend the authority of religious courts, including Islamic criminal law (*jinayat*). In this case, the Court has firmly held that the role of the Court is only as a negative legislator and does not have the power to add or extend the content of the rules (*positive legislators*). In addition, the Court also explained the relationship between state and religion in Indonesia, that Indonesia is not a religious country, but also not a secular country. So, the Court also agreed that Islamic Sharia is a material source of law and legal development, among other legal sources. The Constitutional Court states that:

Indonesia is a country that believes in the One True God that protects every adherent of religion from worship according to its religion. With regard to Pancasila philosophy, national law must ensure the ideological unity and territorial integrity of the country, as well as develop a good tolerance and civilized interfaith religion. National law can therefore serve

as a factor of integration that becomes a cement and a comparative instrument. [10]

Furthermore, in Decision Number 38/PUU-IX/2011, the applicant argued that the requested norm, as one of the reasons for divorce, did not regulate who caused the dispute so that it violated the guarantee of protection, legal certainty and justice for the wife. The Court then argued in its consideration that Indonesia's marriage paradigm is not only aimed at meeting the needs of life, but also at fulfilling the teachings of the One True God that exists in every religion. In the meantime, the Court has used the approach to religious law to reach a conclusion. This shows how the Court uses an Islamic perspective to explain divorce rates, for example, the purpose of marriage is to create a family of *sakinah, mawaddah, and warrahmah*. However, unlike Decision Number 12/PUU-V/2007, the Court does not directly cite Islamic legal sources such as the Holy Qur'an, Hadith, or the opinion of Muslim scholars in its decision.

In Decision Number 86/PUU-X/2012, the Constitutional Court emphasized that zakat as part of *religion in externum* forum i.e. manifested or outward-facing shows religion or beliefs that carry religion or practice religion in everyday life using physical media, either in the form of speech, behavior, or other actions, or interaction, so that they have social relationships [11]. In addition, the Court argues that zakat coincides with the goals and foundations of the country, namely promoting the common good and realizing social justice for all Indonesians, so that in this case, The country has a role in realizing the implementation of effective and efficient zakat management and management trust in accordance with the Islamic doctrine, to reach those who are rightful [11].

In Decision Number 30-74/PUU-XII/2014, the Constitutional Court in its consideration uses many perspectives of Islamic law, although it also cites sources from Hindu religious law. This is seen from how the Court cites Islamic sharia sources such as the Qur'an, Hadith, and the opinions of Muslim scholars. Regarding the minimum marriage age limit, the Court confirmed this issue as an *open legal policy* by citing the opinion of Mr. Quraish Shihab, who stated that Islam does not regulate a certain age to marry because it adapts to the development of society and its needs [12]. That is why the Court also uses considerations of various aspects, such as social, economic, and health when making its decision. So, it can be said that the

decision makes religious law as a perspective in emphasizing the issue of marriage age limit and at the same time affirms the position of the state as *ulil amri* which has the power to determine policy based on the development and needs of the community.

Later in Decision Number 68/PUU-XII/2014. The Constitutional Court confirms Indonesia as a country based on believing in the One True God. The Court argues that marriage is an activity closely related to religion. Moreover, the Court explicitly mentions the position of religion as the basis for individual societies in their relationship with the One True God, including in this case how religion determines the validity of a marriage [13]. This decision can be said that it has confirmed the position of religion in the national legal system, in particular with regard to marriage.

Based on the above discussion, it can also be seen that of the six constitutional court decisions which have Islamic legal nuances, more are dominated by judicial review decisions on marriage law (four decisions).

3. CONCLUSION

Based on the above discussion, it can be seen that the Islamic Law as part of the law which lived in Indonesian society since hundreds of years ago turned out to have influenced the pattern of law in Indonesia because the majority of the population in Indonesia adheres to the Islamic religion which allows Islamic Law to become an essential and influential part of the Indonesian legal system. Besides, Islamic law has also brought Islamic nuances to the Constitutional Court decisions regarding the judicial review of statutes that contain Islamic values. In that sense, the Constitutional Court Judges in considering their decisions are not only based on western legal theory, but also use an Islamic legal approach such as by quoting the Holy Qur'an, Hadith, and the opinions of Muslim scholars.

4. SUGGESTION

Based on the recapitulation of judicial review at the Constitutional Court, until the end of 2020, there were at least 20 decisions regarding the judicial review of

laws that were of Islamic law. This fact shows that the Court has a role in determining the dynamics of the development of Islamic law in Indonesia. In the future, both the government, the House of Representatives, and the Supreme Court can consider selecting candidates for constitutional judges who have more profound knowledge of Islam. This can be taken from practitioners and academics who are concerned in the field of Islamic law, as well as from religious court judges.

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