

# Legal Reconstruction of Freedom of Religion and Belief Principle in Ensuring a Just Legal Treatment

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DOI: [10.36348/sijlcj.2023.v06i02.011](https://doi.org/10.36348/sijlcj.2023.v06i02.011)

| Received: 14.01.2023 | Accepted: 20.02.2023 | Published: 23.02.2023

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## Abstract

This study aims to analyze and find weaknesses in regulations and carry out reconstruction of regulations on freedom of religion and belief in ensuring fair legal treatment in empirical-Juridical Research. The results of the research show that the regulations on freedom of religion and belief in guaranteeing fair legal treatment by realizing legal protection for adherents of religions and minority beliefs are not yet fair as there is still discrimination that occurs to minorities, therefore reconstructing Article 1 of Law Number 1/PNPS/1965 concerning the prevention, abuse, and/or blasphemy of religion and Reconstructing the Law of the Republic of Indonesia Number 1 of 2023 (which will take effect after three years from the date of promulgation or three years after January 2, 2023), Concerning the Criminal Code specifically in Chapter VII concerning Crimes Against Religion, Beliefs, and Religious or Belief Life, Article 300 reads: "Any person in public who" is reconstructed becomes "everyone who" commit acts of a hostile nature; express hatred or hostility; or incitement to violence, or discrimination, against religion, other people's beliefs, groups, or groups on the basis of religion or belief in Indonesia, shall be punished with imprisonment for a maximum of 3 (three) years or a maximum fine of category IV.

**Keywords:** Legal Reconstruction, Religion, Legal Treatment, Justice.

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## INTRODUCTION

The right to justice is a human right to ensure respect, protection, and fulfillment of everyone's rights to be equal and dignified before the law. The right to justice has an essential position in efforts to realize other human rights, which have been recognized and guaranteed by various international and national human rights instruments (Widodo, 2018). Respect, protection, and fulfillment of the right to justice are the keys to realizing the Second Precept of Pancasila, namely a Just and Civilized Humanity, and the Fifth Precept, namely Social Justice for All Indonesian People (Widodo, 2019).

In relation to this, the legal norms that provide protection for citizens to adhere to their religion are regulated in the Preamble to the 1945 Constitution, Article 29 of the 1945 Constitution, Article 28E, Article 28I, Article 28J, Article 29, and Article 31, whose existence is intended to ensure and maintain that the diversity of religions and beliefs in Indonesian society can work harmoniously.

Constitutional guarantees through various articles in the 1945 Constitution of the Republic of Indonesia are translated into more detailed legal products (laws and regulations), such as through Law Number 39 of 1999 concerning Human Rights and Law Number 7 of 2012 concerning Conflict Management Social, which also pays attention to the possibility of issues related to religion and belief. Law Number 7 of 2012 views religious issues as a potential conflict, either through inter-religious feuds or between religious communities. Indeed, in practice, living in harmony in diversity is something that is not easy to achieve in Indonesian society, even though Pancasila and the 1945 Constitution of the Republic of Indonesia are in place.

One of the most problematic human rights issues in Indonesia recently is the right to belief, religion, and worship. In the past, this country was often considered a plural and tolerant country, but now this country is colored by tensions between religious or

belief communities, especially regarding pressure and attacks on minority groups of beliefs or religions.

In recent years, the issue of the right to belief, religion, and worship has become increasingly critical with the escalation of violence, which has increased quantitatively and qualitatively, even leading to fatalities. This can be seen in attacks on minority beliefs or religious communities, efforts to limit and prohibit the construction of places of worship, or religious activities of minority groups in various forms ranging from verbal or written threats to casualties.

The problem of increasing intolerance and violence against the rights to belief, religion, and worship has also drawn concern from the international community, both from international human rights organizations and representatives of other countries' governments, bearing in mind that Indonesia's diplomatic pretexts in international forums so far have always boasted about the practice of pluralism and religious tolerance at the domestic level.

The issue of the right to belief, religion, and worship which is marked by the radicalization of religious sentiments and hatred towards religious minorities is undeniably a derivative of the country's ambiguous political policies. Namely when the state, on the one hand, implements various formal policies, including constitutions and laws at the national level that are pro-human rights as a result of the reform movement, but, on the other hand, the central government seems confused when there are derivative policies or local policies that actually contradict with the principles of human rights and freedom of belief, religion, and worship (Akbar, 2020).

The central political policy regarding the right to have a belief in freedom of religion/belief which is not firm then encourages various political interests to continuously carry out political maneuvers using religious sentiments, especially calls or incitement that can provoke attacks on minority groups of beliefs.

The escalation of violence perpetrated by vigilante groups in the name of religion has created a sense of intolerance among the community. In fact, as previously unforeseen, actors from vigilante groups can transform into perpetrators of terrorism by targeting police officers because they are labeled as infidel and unjust (*thaghut*). Therefore, based on this description, the author is interested in conducting research and examining the problem in a scientific paper titled "*Legal Reconstruction of Freedom of Religion and Belief Principle in Ensuring a Just Legal Treatment*" where the main problem discussed in this article is as follows:

1. What are the weaknesses in the regulation on the Freedom Of Religion And Belief Principle currently?

2. How are the Legal Reconstruction of Freedom of Religion and Belief Principle in Ensuring a Just Legal Treatment?

## METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010):

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

## RESEARCH RESULT AND DISCUSSION

### 1. Weaknesses in the Regulation on the Freedom of Religion and Belief Principle Currently

In practice, there are many regulations at the regional level that contradict the state constitution which guarantees the right to belief, religion, and worship. Violence in the name of religion is now a trend in society. Unfortunately, the government is not sensitive enough to respond to these discriminatory practices on the right to belief, worship, and religion.

Several cases that stand out and will be used as illustrations here are cases of violence that befell the Indonesian Ahmadiyya Congregation (JAI). This religious group has experienced physical and psychological violence in the last ten years. However, it is not only JAI that has experienced this kind of discriminatory pressure. In Kontras' records, there are several religious groups in society who also experience discriminatory practices in carrying out religious rituals (Kompas, 2021).

For example, the Tolottang religious group in South Sulawesi, Parmalim in North Sumatra, Kaharingan in Kalimantan, Wetu Telu in Lombok, to Sunda Wiwitan in Kuningan, West Java, are often the targets of attacks. Accusations of heretical and misleading sects are often used as a basis for limiting beliefs and rituals on the beliefs of individuals and minority groups. In addition, the trend of violence also threatens Christian congregations, especially in the context of building houses of worship (Church) (As'ad, 2009).

Patterns of violence based on discriminatory policies, and misguided and misleading terms so that the construction of places of worship have become a source of inflaming social tensions, especially between individuals and or groups of followers of religions/beliefs/minority beliefs and organizational groups in society that use religion and other means of violence as a method of advocacy work.

This Problem is deeply connected to the sources of social tension based on religious and religious intolerance that is (Naefi, 2021):

- a. The birth and/or persistence of discriminatory political policies by the state which eventually trigger rampant practices of crimes and/or violations of human rights.
- b. The birth of a number of regional regulations that support discriminatory political policies in several regions in Indonesia.
- c. Political statements from government officials that can invite violence.
- d. Massive discriminatory political decisions from religious authorities, one of which are but not limited to the Ministry of Religion.
- e. The issuance of fatwas (a legal ruling on a point of Islamic law given by a qualified Faqih in response to a question posed by a private individual, judge, or government) from religious leaders relating to guarantees of freedom of religion and belief often triggers polemics in society.
- f. There is justification for the development of heretical and misleading ideas which are then used as a basis for developing religious blasphemy in society.

- g. Misguided and misleading reasons were then used to dispute the construction of places of worship in many areas of Indonesia.
- h. The state has also neglected rampant discriminatory practices in the name of defending the purity of dominant religions, especially Islam.
- i. The recent development of public support for anti-pornography, anti-pornography, and morality issues.

Of the six sources of social tension based on freedom of religion and belief, points 1 and 2 directly and indirectly actually have a very political role as sources of social tension based on religious and religious intolerance practices in Indonesia:

- a. SKB of three ministers consisting of the Minister of Religion, Minister of Home Affairs, and the Attorney General regarding the existence of the Ahmadiyya Muslim Community in Indonesia (No. 3 of 2008, Number Kep-033/A/JA/6/2008 and Number 199 of 2008). The SKB of the three ministers was issued on 9 June 2008 and is valid until now. There are seven points in the three-ministerial Joint Decree which essentially give warnings, orders, and threats of sanctions to JAI to stop all activities that are not in accordance with the interpretation of Islamic religious teachings in general. This SKB also orders local governments to provide guidance to JAI throughout Indonesia
- b. Law Number 1/PNPS/1965 whose decision was rejected by the Constitutional Court (20 April 2010) is an old constitutional product that has the potential to be used as justification for criminalizing Indonesian citizens in the context of blasphemy. This law originally came from Presidential Decree No. 1 of 1965 concerning the Prevention of Religious Abuse/Defamation. In 1969 this Presidential Decree was upgraded to become a Law based on Law Number 5 of 1969.
- c. In the Law which contains five articles, there is a criminal threat for anyone who is considered to have committed blasphemy against religion. The state can convict its citizens due to accusations of blasphemy. Even though according to law everyone has the same position before the law and the state does not have a right or even any legal justification to declare a teaching as deviant or not. In this context, the neutrality of the state is highly prioritized.
- d. Law Number 23 of 2006 concerning Population Administration is still being maintained, which in several articles regulates the freedom of religion and belief of Indonesian citizens. Specifically, in Article 8 paragraph (4) it is explained that the

Government of Indonesia only recognizes six official religions namely Islam, Catholicism, Christianity, Hinduism, Buddhism, and Confucianism. Even though so far there have been tens to hundreds of local beliefs and religions that have existed for a long time in the community.

In addition, although in Article 61 paragraph (2) and Article 64 paragraphs (1) and (2) it is explained that information in the column of religion for adherents of beliefs that have not been recognized as a religion may not be filled in but served and recorded as a population data mechanism, but this often disobeyed by officers in the field. Residents who practice minority beliefs still have to choose one of the six majority religions mentioned above.

In addition, what are far more problematic because it is implemented at the local level are various regional regulations that not only violate the principles of human rights, and the 1945 Constitution but also state administration that does not allow for a decentralization of religious arrangements.

In addition, there are a number of controversial regional regulations that are politically discriminatory and controversial on the issue of guaranteeing freedom of religion and belief in Indonesia. In the National commission on women's records, there are at least 189 regional regulations that are discriminatory at both the district and city levels throughout Indonesia. This note is also strengthened by the annual report that is regularly issued by The Wahid Institute (2015), an NGO working on the issue of belief and religious pluralism.

Broadly speaking, the categories of political activity above are often used as political tools and to justify the many practical acts of restricting the right to freedom of religion and belief in Indonesia. Violent groups in the name of religion exist, develop, and feel that they have the legitimacy to discipline the existence of other religious minority groups. It was proven that several attacks then took place against the JAI community and other minority groups in the name of "*against the practice of blasphemy*".

Violent groups or commonly known as vigilante groups are understanding that have developed and/or been developed as the state's "*alternative guard*" in security matters. This vigilante movement is not only formed from the absence of a rule of law that is obeyed by all people in all countries but also strengthens the conditions of negative relations between the state and citizens.

When the gap between the government's institutional capacities in responding to the development of moral values in society occurs in such a

way and is accompanied by rapid changes in socio-political dynamics, vigilante movements that prioritize violence can emerge. In Indonesia, vigilante movements developed in such a way as a reaction to the 'failure of the state' to guarantee the security of economic assets after the fall of the New Order. Therefore, there is an '*initiative*' of the citizens to 'fight against crime' by building their own strength.

Its development is also interesting because these vigilante movements have built patterns and systems well. It even has the ability to network with state actors. Apart from the economic sector, many vigilante movements also adhere to certain religious morality standards (especially Islam as the majority religion in Indonesia). They even often think that the actions they are taking are not criminal acts and threaten the public's sense of security because they feel they have the status of being "*Moral Guardians*" of social faith from damage.

In addition, related to cases of disputes over the construction of houses of worship in several cities in Indonesia; as happened in the GKI Yasmin case, for example, there are serious indications of the implementation of the Joint Minister of Religion/Deputy Head of Region policy No. 8/9 of 2006 concerning Maintenance of Religious Harmony, Empowerment of Religious Harmony Forums and Establishment of Houses of Worship. This regulation is the main reference used by the Regional Government in granting permits to build houses of worship. However, unfortunately, several provisions that are specifically used as benchmarks in granting permits to build houses of worship in Indonesia have been used as material for religious discrimination by some parties. Article 14 concerning the Establishment of Houses of Worship explains several specific requirements:

- a. The establishment of a house of worship must meet the administrative requirements and technical requirements of the building.
- b. In addition to fulfilling the requirements referred to in paragraph (1), the establishment of a house of worship must meet special requirements including:
  1. A list of names and Identity Cards for users of the house of worship for at least 90 (ninety) people which are legalized by local officials according to the level of regional boundaries as referred to in Article 13 paragraph (3)
  2. Local community support of at least 60 (sixty) people approved by the village head
  3. A written recommendation from the head of the district/city department of religion; And
  4. Written recommendation from district/city's FKUB.



Tolerance is one of the keywords in building civil society in a democratic space. Tolerance can also be used to maintain the dynamics of a plural society, whether plural in terms of ethnicity, race, class, identity, and especially religion. In terms of religious tolerance, a state that promotes democracy and protects the values of pluralism has an obligation to guarantee and protect all Indonesian citizens (both individuals and groups) to express their religious beliefs and values. Freedom of Religion and Belief Guarantees a person to:

- a. Having faith, belief, worship, and freedom to practice religious rituals/beliefs without harassment or discrimination from anyone;
- b. Can change your religion/belief freely;
- c. Initiating and running a religious/faith organization as part of the ritual practice of worship.

However, tolerance of religion and belief also has clear limits when an opinion and expression is moved by means of violence to limit the actual space of individuals and or groups within the country for belief, religion, and worship. Tolerance will not apply to those who use violent means in advocating for an organization in the space for freedom of religion and belief.

## 2. Legal Reconstruction of Freedom of Religion and Belief Principle in Ensuring a Just Legal Treatment

The formation of a new law to replace Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Blasphemy is urgently needed to ensure legal protection for members of minority religions in Indonesia.

Because, as seen in the explanation above, Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Blasphemy is no longer in accordance with the mandate of the constitution that applies in Indonesia. The author's opinion was strengthened by different reasons (concurring opinion) by Constitutional Justice Harjono in the Decision of the Constitutional Court of the Republic of Indonesia Number 140/PUU-VII/2009.

Harjono stated that the amendment to the 1945 Constitution recognizes the existence of a person's constitutional right to freedom of belief, expressing thoughts and attitudes, in accordance with his conscience in accordance with Article 28E paragraph (2) jo. Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

So that if the existence of Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Blasphemy is connected with changes to the 1945 Constitution of the Republic of Indonesia, then there will be two elements, namely protection of religion on the one hand and the right to freedom of belief on the other hand. In the Indonesian legal state,

the relationship between these two elements needs to be combined in a formula that does not negate one element with another (Toebagus, 2022).

Apart from that, Harjono, in the constitutional court decision number 140/PUU-VII/2009 also argued that the literal application of Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Blasphemy alone, both the wording of the article and the explanation and without linking it to the current context can create an imbalance to create a formula that does not negate between the two elements mentioned above.

The formulation of Article 1 of Law Number 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion states that, "*Every person is prohibited from deliberately publicly telling, advocating and seeking public support, to interpret a religion adhered to in Indonesia or carry out religious activities that resemble religious activities from the main points of the religious teachings, interpretations, and activities which deviate from the main religious teachings*".

For example, a person named Badu deliberately based on the arguments either directly or indirectly from the religion he believes understands one of the other religions in Indonesia, the results of which this understanding differs from the main teachings of the other religion.

This literally means that Badu actually fulfills the element of delict every person interpreting a religion adhered to in Indonesia whose interpretation deviates from the main teachings of that religion. Thus, to fully fulfill the elements of the offense, the following elements are needed: in public and telling, suggesting, or seeking support.

The elucidation of Article 1 of Law Number 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion states that the term "*in public*" means what those words usually mean in the Criminal Code.

Thus, what is meant in public means in a place where there is more than one person or there are other people. The problem is whether this article is intended to prohibit someone who, in front of many people who share his faith, either directly or indirectly, the religious arguments he believes in interpreting other religions that are different from the main teachings of the religion interpreted.

In a literal interpretation, the act fulfills the elements of an act prohibited by Article 1 of the "*a quo law*". As a result, religious lectures that are delivered in front of adherents are prohibited from interpreting other religions whose interpretation is different from the main

points of other religious teachings being interpreted. It will be another matter if someone argues that the article does not prohibit such an act, then the formulation on which the opinion is based.

From an editorial aspect, the formulation of Article 1 of Law Number 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion contains ambiguity so it does not meet the requirements that the formulation of a criminal act law must be clear.

From the opinion above, it can be concluded that Law Number 1/PNPS/1965 concerning the Prevention of Religion Abuse and/or Blasphemy contains an element of ambiguity in its formulation, both from the point of view of legal protection for Religion and Beliefs, especially for minorities as well as from the point of view of drafting laws which contain a crime, where the formulation of a law that contains a crime must be clear so that it is necessary to amend Law Number 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion to provide legal protection to adherents of religions and beliefs, especially minorities.

In addition, referring to Article 4 of Law Number 39 of 1999 concerning Human Rights which contains "*The right to life, the right not to be tortured, the right to personal freedom, mind, and conscience, the right to religion, the right not to be enslaved, the right to be recognized as persons who are equal before the law, and the right not to be prosecuted on the basis of retroactively applicable laws are human rights that cannot be reduced under any circumstances and by anyone*".

Article 22 paragraph 1 of Law Number 39 of 1999 concerning Human Rights states "Every person is free to embrace their own religion and to worship according to their religion and beliefs, as well as Article 22 paragraph 2 of Law Number 39 of 1999 which reads: The state guarantees the freedom of everyone to embrace their respective religions and to worship according to their religion and belief strengthens the argument that Law Number 1/PNPS/1965 concerning Prevention of Abuse and /or Blasphemy of Religion turns out to be contrary to the right to freedom of religion which is one of the Non-Derogable Rights or rights that cannot be postponed.

From the explanation of the expert and the legal basis referring to the constitutional mandate to achieve comprehensive protection for adherents of Religion and Minority Beliefs, it is necessary to amend Law Number 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion materially, especially in granting certainty for minority religions and beliefs to gain freedom in exercising their beliefs in order to provide certainty of legal protection and prevent arbitrary interpretation by the authorities and

because of the existence of a criminal element in the law which can threaten adherents of minority religions and beliefs.

The changes are in the form of a reconstruction of Article 1 of Law Number 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Blasphemy, in the form of:

- a. Everyone is prohibited from knowingly publicly telling, advocating, and seeking public support, to interpret a religion adhered to in Indonesia or carry out religious activities that resemble religious activities from the main teachings of that religion.
- b. Everyone is prohibited from intentionally obstructing, disbanding, or committing acts of violence against anyone who tells, recommends, or seeks support either to carry out an interpretation of a religion that is adhered to in Indonesia or to carry out religious activities that resemble religious activities from the main points of the main teachings of the religion that are not carried out in public places or in the environment of their respective adherents.

## CONCLUSION

Based on the results of the research, the following conclusions can be drawn:

1. Weaknesses in regulations on freedom of religion and belief in guaranteeing legal treatment at this time, namely Law Number 1/PNPS/1965 concerning Prevention of Religious Abuse and/or Blasphemy in which there are words that acknowledge the existence of six major religions which can cause discrimination against religious minorities if misinterpretation occurs. Thus, a solution is needed so that adherents of religions and beliefs, especially minorities, receive strict legal protection against the mindset of people who think that minority religions are heretical religions, the state also takes part in discrimination that occurs through several written laws made by the government which seems ambiguous and indirectly does not provide legal protection for minority religions trying to develop in Indonesia.
2. Reconstruction of regulations on freedom of religion and belief in guaranteeing fair legal treatment by realizing legal protection for adherents of religions and minority beliefs can be done by reconstructing Article 1 of Law Number 1/PNPS/1965 concerning Prevention of Misuse and/or Blasphemy of Religion related to acts of obstructing obstruct, disperse or commit acts of violence against anyone who tells, recommends or seeks support either to carry out an interpretation of a religion that is adhered to in Indonesia or to carry out

religious activities that resemble religious activities from the main teachings of that religion which are not carried out in a public place or in the environment of their respective adherents and Law of the Republic of Indonesia Number 1 of 2023 (which will take effect after three years from the date of promulgation or three years after January 2, 2023), Concerning the Criminal Code specifically in Chapter VII concerning Crimes Against Religion, Beliefs, and Religious Life or Beliefs, Article 300 reads: "Any person in public who" is reconstructed becomes "everyone who": (1) Commit acts that are hostile in nature; (2) Express hatred or hostility or; (3) Inciting to commit violence, or discriminating against religion, other people's beliefs, class, or groups on the basis of religion or beliefs in Indonesia, shall be punished with imprisonment for a maximum of 3 (three) years or a maximum fine of category IV.

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