



Basic Analysis of the Exercise of Judicial Power (Integration of Islamic Law and Positive Law)

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Abstract

This study aims to see the form of integration of Risalah al-Qadha as Islamic judicial principles and the principle of administering Indonesian Judicial Authority. This study uses a qualitative method with a descriptive approach to the analysis of the documents used in the study, namely Risalah al-Qadha and Law No. 48 of 2009 regarding Judicial Authority. This study argues that Indonesia's modern judiciary has undergone a transformation. One of this is the application of normative Islamic law to positive Islamic law. The judiciary (judiciary) functions to carry out all legal provisions consequently so as to create fair laws. Similarly, the importance of sulthah qadhaiyyah (judicial institution) is a necessity and an absolute condition that must be fulfilled. The contextualization of Islamic judicial principles which is manifested in the principle of administering Indonesian Judicial Authority in the principle of a free and impartial judiciary, the judiciary is democratic and equal in law and transparent.

Keywords: *al-Qadha, Judicial Authority, Principle of Administering Indonesian Judicial Authority.*

Introduction

Islamic law has existed since Islam entered Indonesia.¹ Later, Islamic law has been part of national legal formation until now as well as filling the legal void in positive law. Islamic law acts as a source of value that contributes to the rule of law made with a general nature, regardless of religious differences. The values of Islamic law can also apply to all Indonesian citizens.² Al-Qadha or often referred to as the judiciary is a necessity of community life. A government cannot run without a judiciary. Al-Qadha is necessary in regulating problems related to human behavior. The judiciary itself is a manifestation of social realization. In this connection it is seen that Islamic

¹ Jefik Zulfikar Hafizd, "Sejarah Hukum Islam Di Indonesia: Dari Masa Kerajaan Islam Sampai Indonesia Modern," *Jurnal Tamaddun: Jurnal Sejarah Dan Kebudayaan Islam* 9, no. 1 (2021).

² Hendra Irawan, "Dinamika Internalisasi Hukum Islam Ke Dalam Peraturan Perundang-Undangan Di Indonesia," *Istinbath: Jurnal Hukum* 18, no. 2 (2021): 352–68.



law is not merely a provision imposed from outside society, but is determined by the form of power that exists in society.³ The ruler of the state creates and establishes legal norms with a binding nature for every citizen and whose nature can be imposed by state tools.⁴ In Indonesia, law enforcement is carried out based on the 1945 Constitution and Pancasila⁵ and then derived from laws and regulations such as Law No. 48 of 2009 concerning Judicial Power. Judicial Power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia,⁶ for the implementation of the State Law of the Republic of Indonesia.⁷

The discussion of the integration of Islamic law and positive law has been discussed several times in previous studies. Such as a discussion about the dynamics of the integration of Islamic law into laws and regulations in Indonesia. This study concludes that Islamic law is one part of the development of national law in Indonesia in addition to customary law and Western law.⁸ In addition, there is research that discusses that the Majelis Ulama Indonesia (MUI) has contributed to the development and enactment of Islamic law in Indonesia in the form of fatwas, some of which have been transformed into laws, Government Regulations, Presidential Decrees and other legal products.⁹

This paper aims to analyze how the form of integration between Islamic law and Indonesian positive law in terms of judicial principles contained in the Treatise of Al-

³ Muhammad Mutawali, “Epistemologi Hukum Islam Dan Sistem Peradilan Dalam Islam,” *Schemata* 6, no. 2 (2017): 141–54.

⁴ Endrik Safudin M.H, “Harmonisasi Hukum Dalam Antinomi Hukum,” *Al-Syakhsyiyah Journal of Law & Family Studies* 2, no. 2 (2020): 202–29.

⁵ Nurul Ma’rifah, “Menggali Dan Menemukan Konsep Maqasid Syari’ah Dalam Pohon Ilmu Hukum Indonesia,” *Istinbath: Jurnal Hukum* 16, no. 2 (2019): 248–64, <http://e-journal.metrouniv.ac.id/index.php/istinbath/index>.

⁶ Ujang Charda, “STATE RESPONSIBILITY IN LEGAL PROTECTION OF LABOR THROUGH CORPORATE APPROACH,” *Jurnal Independent* 11, no. 1 SE- (March 7, 2023): 240–63, <https://doi.org/10.30736/ji.v11i1.192>.

⁷ Undang Undang, “Undang-Undang No 48 Tahun 2009 Tentang Kekuasaan Kehakiman,” 6 Menkumham § (2009).

⁸ Irawan, “Dinamika Internalisasi Hukum Islam Ke Dalam Peraturan Perundang-Undangan Di Indonesia.”

⁹ Mumung Mulyati, “Kontribusi MUI Dalam Pengembangan Dan Penerapan Hukum Islam Di Indonesia,” *Al-Mashlahah Jurnal Hukum Dan Pranata Sosial Islam* 7, no. 1 (2019): 83–100.



Qadha and Law No. 48 of 2009 concerning Judicial Power. The emphasis of this study will be on three discussions, namely how the existence of Risalah Al-Qadha in Islamic courts, how the existence of the principle of judicial power in Law No. 48 of 2009 concerning Judicial Power and finally how the form of integration of judicial principles in Islamic Law and Positive Law in Indonesia.

This paper is important to be studied as a form of contribution in the study of integrated and interconnective studies of science, especially in the theme of integration of Islamic judicial principles and modern justice in Indonesia today in order to achieve the benefit of the nation and state.

Sub Title

Principles of Islamic Justice in Risalah al-Qadha

The treatise of al-Qadha is Umar bin Khattab's instruction to the judges on ethics in the administration of justice. Although this instruction was originally sent to Abu Musa al-Ash'ari, it was used as a source of reference in the field of justice by the Muslims.¹⁰ As in historical records, during the time of the caliph Umar bin Khattab there was an expansion of Islamic territory. This indicates the addition of Islamic territory which requires an increasingly broad role of the governor. During this time, Umar ibn Khattab separated between executive and judicial powers.¹¹ Therefore, with regard to legal matters, Caliph Umar appointed several judges including Abu Darda' in Medina, Shuraih in Basra, Uthman bin Qais bin Abi al-'Ash in Egypt and Abu Musa al-Ash'ariy in Kufa. Umar's decision to send these judges was deliberated in advance with the companions. To Qadhi Shuraih Umar testified like the will of the Prophet SAW to Muadz bin Jabal when sent to Yemen to resolve cases by sourcing and adhering to the Qur'an, Sunnah and ijtihad if not found stated in the Quran and Sunnah. This step was then followed by scholars and judges who came after him until it developed at this time.¹²

¹⁰ A Husni, "Eksistensi Risalah Al-Qadha Umar Bin Khattab Dan Relevansinya Dengan Peradilan Agama Di Indonesia Pada Era Reformasi," *Al-Risalah*, vol. 13, 2013.

¹¹ Wery Gusmansyah, "Trias Politica Dalam Perspektif Fikih Siyasah," *Al Ijarah: Jurnal Pemerintahan Dan Politik Islam* 2, no. 2 (2019).

¹² Mutawali, "Epistemologi Hukum Islam Dan Sistem Peradilan Dalam Islam."



As for the qadhi Abu Musa al-'Asy'ariy, Caliph Umar gave instructions known as Risalah al-Qadha which contained several matters related to judicial ethics as follows¹³:

1. Resolving matters is a fardhu and compulsory thing to do and a sunnah that must be followed
2. It is mandatory to understand a case when it has been filed, because there will be no meaning of justice if it is not carried out.
3. Evidence is upon those who claim, and an oath is upon those who deny.
4. Equally equal litigants in the assembly, in view and in judgment. So that people of rank will not expect misappropriation and weak people do not despair of yearning for justice.
5. It is permissible to establish peace between Muslims, except for peace that justifies something haram and forbids something halal.
6. Whoever claims a right is out of place or there is no evidence, then give him time until he can prove his claim. Then when he has proven then give his right. However, if he is unable to prove it then he has the right to be defeated. For such is more stable for his fortune and more revealing hidden goods. (Give a grace period to provide evidence, if unable to resolve the issue immediately).
7. Do not prevent you from a decision that you have handed down today from being reviewed, so that you may then gain the truth. For truth must come first and cannot be undone by anything. Returning to the truth is better than continuing to dwell on immorality. (Judgments decided yesterday may be reviewed).
8. Muslims are those who are considered fair to some others, except those who have given false information or those who have been sentenced to limits or people of questionable origin because Allah knows the secrets of men and avoids punishment against them, unless there is evidence or oaths.
9. Understand carefully about the matter proposed to you which there is no legal provision in the Qur'an and the Sunnah of the Prophet (peace be upon him). Then compare these matters and look at the things that are similar in law to those that

¹³ Abd Malik, "Prinsip-Prinsip Peradilan Dalam Risalah Al-Qadha Umar Bin Khattab," *Al-Ubudiyah: Jurnal Pendidikan Dan Studi Islam* 2, no. 2 (2021): 45–57, <https://doi.org/10.55623/au.v2i2.42>.



come later. Then hold onto the law that you think God presupposes and get closer to the truth.

10. Avoid anger, shaky thoughts, boredom, hurting litigants, and being tough when facing them. Because deciding things in the right place is a work that is rewarded by Allah SWT and will bring a good name. So whoever purifies the intention to seek the truth even if it is self-defeating, God will provide sufficiency. and whoever behaves has expertise that is not in him then God will surely reveal the secret of ugliness. For Allah will not accept the charity of His servants except charity based on sincerity. Then what is your presumption about the reward from Allah both that which is soon to be given and that which is in the treasury of His mercy.

Principles of Judicial Power Implementation in Indonesia

The principle of the implementation of judicial power in Indonesia is regulated in Law No. 48 of 2009 concerning Judicial Power Chapter II concerning the Principles of the Implementation of Judicial Power Article II to Article XVII.¹⁴ However, the focus of this paper is the principles related to the ethics of judges in trying cases listed in Article III to Article VIII. The details are as follows:

1. Article III
 - a. In carrying out their duties and functions, judges and constitutional judges are obliged to maintain judicial independence.
 - b. Any interference in judicial affairs by other parties outside the judicial power is prohibited, except in matters as referred to in the Constitution of the Republic of Indonesia Year 1945.
 - c. Any person who intentionally violates the provisions referred to in paragraph (2) shall be punished in accordance with the provisions of laws and regulations.
2. Article IV
 - a. The court adjudicates according to the law without discriminating against persons.
 - b. The court assists justice seekers and strives to overcome all obstacles and obstacles to achieve a simple, fast, and low-cost trial.

¹⁴ Undang, Undang-Undang No 48 Tahun 2009 tentang Kekuasaan Kehakiman.



3. Article V

- a. Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society.
- b. Judges and constitutional judges must have integrity and personality that is beyond reproach, fair, professional, and experienced in the field of law.
- c. Judges and constitutional judges must comply with the Code of Ethics and Code of Conduct for Judges.

4. Article VI

- a. No one can be brought before a court, unless the law provides otherwise.
- b. No one shall be convicted unless the court, by lawful means of evidence, finds that a person deemed liable is guilty of the act against which he is charged.

5. Article VII

No person shall be subject to arrest, detention, search, and seizure, especially upon written order of a lawful authority in the case and in the manner provided for by law.

6. Article VIII

- a. Every person suspected, arrested, detained, prosecuted, or brought before a court shall be presumed innocent before a court decision declaring his guilt and has obtained permanent legal force.
- b. In considering the severity of the crime, the judge must also pay attention to the good and evil nature of the accused.

Integration of Islamic Judicial Principles in Indonesia's Modern Judiciary

Law enforcement is no longer interpreted as a tool in building society but as a means in order to create a peaceful and prosperous life.¹⁵ Without a judiciary (judiciary) that functions to carry out all legal provisions consequently, it is impossible to create a fair law. Therefore, in the Islamic state system, the presence of the importance of *sulthah qadhaiyyah* (judicial institution) is a necessity and an absolute condition that must be fulfilled. The *Sulthah qadhaiyyah* (judiciary) has been present since the

¹⁵ Kriswanto, "Harmonisasi Hukum Di Indonesia Dalam Perspektif Teori Hukum Pembangunan," *Istinbath: Jurnal Hukum* 19, no. 1 (October 7, 2022): 37–57, <https://doi.org/10.23969/litigasi.v22i2.4211>.



beginning of the presence of the state in the treasures of Islamic history although it is present and functioning still in its very simple form.¹⁶

This is also the case in the judiciary in Indonesia. Law Number 48 of 2009 concerning Judicial Power is the foundation of the state judicial system and regulates the judiciary and courts.¹⁷ This law provides for independent powers exercised by a Supreme Court and subordinate judicial bodies. The judiciary in question is not only the general judicial environment, but also includes the religious court environment, the military court environment, the state administrative court environment, and the Constitutional Court. Therefore, a judge is obliged to abide by the principle of creating an authoritative and clean judicial system in order to uphold law and justice.¹⁸

Indonesia is a state of law (*rechtstaat*) and not a state of power (*machstaats*). As a state of law, every administration of the state and its government must be based on laws and regulations. Indonesia is also not a country that adheres to a theocracy based on the administration of its state on religion where it is understood that the state and religion are understood as two things that cannot be separated. It is carried out based on the words of God. In addition, Indonesia is also not a country that adheres to a secular state that disparities religion from state and separates religion from state. However, Indonesia packs synergistically rather than dichotomously. Religion and state are understood to need each other reciprocally.¹⁹

Referring to the Treatise al-Qadha Umar bin Khattab, the following is a summary of the principles of Islamic justice:

¹⁶ Sri Yunarti Asmarianti, “Analisis Sulthah Qadhaiyyah Terhadap Putusan Mahkamah Konstitusi No. 36/PUU-XV/2017 Terkait Kedudukan Komisi Pemberantasan Korupsi,” *JISRAH: Jurnal Integrasi Ilmu Syariah* 3, no. 1 (2022): 27–35, <https://ojs.iainbatusangkar.ac.id/ojs/index.php/jisrah/article/view/5785%0Ahttps://ojs.iainbatusangkar.ac.id/ojs/index.php/jisrah/article/download/5785/2423>.

¹⁷ Moh Muhibbin and Anang Sulistyono, “Konstruksi Peradilan Inklusif Di Tengah Pluralisme Dalam Perspektif Islam,” vol. 6, 2022.

¹⁸ Darmini Darmini, “PELAKSANAAN DIVERSI PADA SISTEM PERADILAN ANAK,” *QAWWAM* 13, no. 1 SE-Articles (December 21, 2019): 43–63, <https://doi.org/10.20414/qawwam.v13i1.1436>.

¹⁹ Husni and Hasanudin, “Pelaksanaan Taqin Al Ahkam Di Negara Kesatuan Republik Indonesia,” *SYARIAH: Jurnal of Islamic Law* 3, no. 1 (2021): 125–43.



- a. Judiciary is an obligation from Allah and the Sunnah of the Messenger of Allah that must be followed, therefore the relevant parties are asked to be very careful in revealing cases, understand correctly the problems or problems raised.
- b. The position of man must be equal in the eyes of the law and must be fair to others.
- c. Peace in a case is permissible, unless it makes the haram lawful and vice versa.
- d. The judgment decided yesterday, may be reviewed.
- e. Give a grace period to provide evidence, if unable then resolve the problem immediately.
- f. Stay away from disruptiveness, cheating, let alone hurting people's hearts.

Referring to the current modern judicial context, the above principles can be found again. The following is the integration between Islamic judicial principles and modern Indonesian judicial principles today:

1) Free and Impartial Judiciary (Independent)

A free and impartial judiciary is a constitutional guarantee. This is a provision of the constitution that not only prohibits any interference with instructions, but also recommendations from the executive and legislature to the judiciary in carrying out its judicial duties. Judges should have such skillful and mental abilities as to be able to perform their duties with full intellectual freedom and moral integrity. The judicial power is independent as a separate power institution with a one-stop judicial system (one roof system) under the Supreme Court.²⁰ The goal is to create a competent, impartial fair trial.²¹ This principle has existed since the time of the Prophet (peace be upon him).

2) The Judiciary is Democratic

Freedom according to the Islamic view is the exercise of a person to every personal right (material side) and intellectual rights (non-material side) that do not contradict the law of shari'a and its teachings and do not interfere with the public interest, and do not contradict social ethics. Therefore, freedom is a very

²⁰ Abd Malik, "Prinsip-Prinsip Peradilan Dalam Risalah Al-Qadha Umar Bin Khattab."

²¹ Wakid Evendi, "Prinsip Pengadilan Yang Adil Berdasarkan Yurisprudensi Islam Dan Hukum Internasional," *Jurnal Kajian Hukum Islam* 8, no. 1 (2021): 51–69, <https://doi.org/10.52166/jkhi.v8i1.26>.



important and fundamental thing in a person's life.²² Similarly, the examination of trials and the announcement of case decisions in court in public by the court is a way of communication between the court and the community, because the principle of democracy has been placed in the course of justice. So that in this way the community can also supervise the administration of the court. In the principle of Islamic courts, it is also prescribed that in the event of a case, then a person who sues can give evidence and a person charged with a case can give an oath. This shows that the judiciary provides opportunities and rights to the community within a certain period of time to participate in the trial in accordance with the trial procedure.

3) Equality in Law and Transparency

There is transparency and open social control over every process of making and enforcing the law, so that the weaknesses and shortcomings contained in official institutional mechanisms can be complemented by the direct role of the community (direct participation) in order to ensure justice and truth. Most people assume that the principles of independence, fraternity, and equality were unknown before the French revolution at the end of the 18th century. The Principle of Equality Before The Law²³ has actually been stated both in the Qur'an, hadith, and the sayings of khulafaurrosyidin since the 7th century AD. In prosecuting, the Prophet (peace be upon him) always behaved equally between disputants. So did the khulafaurrosyidin. As Amir al-Mu'minin Umar ibn al-Khatthab (r.a) testified in his Risalah al-Qadha: "*Be equal among men before you in statements and decisions. So that the noble do not hope for the victory of the case in your perversion, and the weak do not despair of your justice.*"²⁴

Conclusion

²² Abdul Halim and Dikko Ammar, "Analisis Perbandingan Azas-Azas Sistem Peradilan Islam Dan Indonesia," *Kalam Keadilan : Jurnal Hukum* 9, no. 2 (2021): 132–46.

²³ Muhibbin and Sulistyono, "Konstruksi Peradilan Inklusif Di Tengah Pluralisme Dalam Perspektif Islam."

²⁴ Husni, "Eksistensi Risalah Al-Qadha Umar Bin Khattab Dan Relevansinya Dengan Peradilan Agama Di Indonesia Pada Era Reformasi."



From the analysis above, it can be concluded that Indonesia is a state of law that shows synergy in realizing harmony in religious and state affairs. Indonesia is not a theocracy based only on God's revelation but it is not a secular state that separates religion and state. Symbiotically, there has been a form of integration and interconnection in the application of Indonesian law, especially in the administration of justice. This can be seen in the principle of the administration of justice. In this regard, there is no separation between the principle of Islamic justice known in Risalah al-Qadha and the principle of the exercise of judicial power in Indonesia contained in Law No. 48 of 2009 concerning Judicial Power. At least, based on these two sources of judicial principles, there are three important points that must be obeyed by judges in deciding cases, namely independent, democratic and equal in law and transparent. This must be implemented to realize the implementation of law in Indonesia that is independent, clean and authoritative.

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