

## HARMONIZATION OF LEGAL PROTECTION IN PUBLIC FUNERAL SERVICES THROUGH LOCAL REGULATIONS

Winda Wijayanti

The Constitutional Court of Indonesia, E-mail: agnes.winda82@gmail.com

---

### ABSTRACT

---

*The funeral services are one of the safeguards for human dignity that was obtained the last time for a human died. Public Burial Places has territory separately based on the religion of people who died, whereas in every countries there are no distinction based on one's religion. The number of Believers at least 3.14 percent of the Indonesian population are protected by the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism Number 43 and 41 Year 2009 concerning Guidelines of Service to the Believers in God Almighty. However, there is no single local regulation that regulates public cemeteries which are in line with it. This paper is a legal research that examines the harmonization between several local regulations in each province where there are the Believers. The paper to analyze based on cases that have occurred related to funeral services for them by the local government. The urgency of harmonization the regulations to provide legal protection them and emphasize that service is not just an appeal but a necessity through the obligatory along with the imposition of sanctions for officials who violate these provisions.*

**Keyword:** *Harmonization, legal protection, public funeral service, Believers, local regulations*

---

### 1. Introduction

The Believer in the One God is everyone who recognizes and believes in the values of the delusion of belief in the One God Almighty (Article 1 number 3 of the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism Number 43 and 41 of 2009 on the Guidelines for Service to The Imaginary of Belief in the Almighty God/ Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009) is estimated at 12 million people by the Ministry of Home Affairs.<sup>1</sup> For example in early December 2014, one of Sapto Darmo Believers in Brebes Regency died, but the village device did not give permission for burial of the remains in the village's tomb causing the body to be abandoned and eventually buried in the home. It is one of the discriminations of a person in relation to the service of a public burial place on the basis of one's belief in the One God.<sup>2</sup> Death for the principle is one of the important events or events experienced by a person, in which there are a sequence of rituals performed by the family that he or she has left behind (Article 1 number 17 Act Number

---

<sup>1</sup> Akhmad, Hartiz Tryan. (2017). Kemendagri: Ada 12 Juta Penganut Penghayat Kepercayaan di Indonesia. Retrieved November 11, 2020, from <https://nasional.okezone.com/read/2017/11/14/337/1813772/kemendagri-ada-12-juta-penganut-penghayat-kepercayaan-di-indonesia>

<sup>2</sup> Sucahyo, Nurhadi. (2018). Penghayat Kepercayaan: Setelah Putusan MK dan Kolom KTP. Retrieved October 29, 2020, from <https://www.voaindonesia.com/amp/penghayat-kepercayaan-setelah-putusan-mk-dan-kolom-ktp/4340417.html>.

23 of 2006 concerning the Population Administration that amended by Act Number 24 of 2013). The event as an example of human rights violation of the belief in the One God Almighty in accordance with conscience as guaranteed by Article 28E paragraph (2) of the Constitution of the Republic of Indonesia in 1945 (the 1945 Constitution).

The sequence of rituals based on the Belief in God Almighty in each community becomes a culture in each community to relieve pain, for example the culture of gathering the funeral system along the river Ganges of Hindu's in India, receiving condolences at home during the mourning period for seven days of the Jews, and management dead bodies is ensuring the dignity and respect of the dead as well as for their living relatives of the Islamic law.<sup>3</sup> For traditional Indigenous peoples in Australia, death often involves a complicated set of rituals. According to Indigenous Australian beliefs, the body must be reunited with the land from which it came from, so burial places are of great importance. Many traditional indigenous communities have their own burial rituals. In some cases the ritual is very different from Western culture, where some indigenous communities of corpses are not buried and left in the bushes. Such differences can conflict with written legislation primarily to accommodate Western burial customs and traditions. The matter was reduced to some degree with the exception of the relevant state and Territory Act permitting the burial outside the cemetery with the approval of the Minister. The provision has been used to accommodate traditional beliefs.<sup>4</sup> Thus, the handling and burial of corpses in most religious groups there are special customs according to their beliefs.

The regional human rights system provides an important layer of protection and is closely related to regional political development and integration. It has the potential to be more attractive to the United Nations system for increased references to jurisprudence and contributions to enriching the law in the field of international human rights. Efforts to encourage regional political integration reinforce human rights as essential at all levels as a marker of the system's ability to provide a stable order based on legal supremacy and the protection of fundamental rights. Regional political support for the human rights system varies greatly, which can affect the effectiveness of the human rights system.<sup>5</sup> For example, Article 27 International Covenant on Civil and Political Rights (ICCPR) says *“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to profess and practise their own religion, or to use their own language”*. Article 9 the European Convention on Human Rights (ECHR) provides that:

*(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law, necessary in a democratic society in the interests of public safety, for*

---

<sup>3</sup> Al-Dawoody, Ahmed & Finegan, Oran. (2020). Covid-19 and Islamic Burial Laws: Safeguarding Dignity of the Dead. Retrieved November 11, 2020, from <https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/>

<sup>4</sup> Human Rights and Equal Opportunity Commission. (1998). *Article 18 Freedom of Religion and Belief* (p. 43-45). Sydney: J.S. McMillan Pty Ltd.

<sup>5</sup> Bantekas, Ilias & Oette, Lutz. (2018). *Regional Human Rights Treaty*. Retrieved November 11, 2020, from <https://www.cambridge.org/core/books/international-human-rights-law-and-practice/regional-human-rights-treaty-systems/A275184F9D08DB30DD6D383DB4104556>.

*the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Given that the country's boundaries are unclear at this time, the existence of written law (*ius scriptum*) i.e. legislation has become one of the basic needs in an effort to uphold justice, peaceful, and legal certainty. This is because the latest inter-human relations have been governed by modern laws, including public burial services by the government. Modern law has the characteristics of written, rational, planned, universal and responsive legal norms in adapting societal development and ensuring legal certainty.<sup>6</sup> The area of human rights guarded by the world is becoming very wide. Human rights that include the freedom of citizens as a free space must be guaranteed by every government to any individual by not intervening in a particular personal space, for example the right to live and feel safe, to be alone, to live in a family, to have a private property, to express an opinion freely, to exercise religion, and to gather peacefully. The freedom of the citizens of that state includes the obligation of the state to lay out its order to ensure minimum respect for the person.<sup>7</sup>

The characteristics of state conception are based on the rule of law, namely the principle of legality of juridical (*supremacy of law*), free, independent judiciary, and recognition and protection of human rights.<sup>8</sup> Guarantees of protection of human rights must be guaranteed in the actualization of the legal state. There are 8 (eight) requirements of the rule of law as stated by Lon Fuller covering there must be rules, must apply forward (prospective) rather than back (retrospective), must be announced, must be intelligible, must not be mutually contradictory, should be possible to follow, must not change constantly, and there must be congruence between the written rules and those applied by law enforcement.<sup>9</sup> In order to realize Indonesia as a country based on the law, the recognition and protection of human rights becomes very important done by the state through recognition in the laws and regulations to provide protection for its citizens through the conformity of the law with the above regulations.

The existence of belief has been around for a long time, including Sunda Wiwitan on baduy ethnicity in Kanekes (Banten), Sunda Wiwitan Madrais in Kuningan, Kejawen in Central Java and East Java, Parmalim in North Sumatra.<sup>10</sup> There are approximately 6 million Believer from 61 organizations or 1 percent or 60 thousand people listed as Believer in the Identity Card. For the city of Madiun there are nine Believer's organizations.<sup>11</sup> The number of Believer is expected to continue to increase by 3.14 percent after they register as Believer in the Identity Card.<sup>12</sup>

The article on legal protection for Believer in the field of Public Funeral Services have been done before, namely Oki Wahyu Budijanto, "Respect for Human Rights for Believer in Bandung," *Journal of Human Rights*, Vol. 7 Number 1 July 2016, p. 43. The author analyzed about Bandung's Local Regulation. Believers have no problem obtaining

---

<sup>6</sup> Astawa, I Gde Pantja & Na'a, Suprin. (2008). *Dinamika dan Ilmu Perundang-undangan di Indonesia* (p. 1). Bandung: PT. Alumnus.

<sup>7</sup> Cassese, Antonio (Translator by A. Rahman Zainuddin). (2005). *Hak Asasi Manusia di dunia Yang Berubah* (p. xxi). Jakarta: Yayasan Obor Indonesia.

<sup>8</sup> Suteki. (2013). *Desain Hukum di Ruang Sosial* (p. 182-183). Yogyakarta: Thafa Media. In Junaidi, Muhammad. (2018). *Hukum Konstitusi Pandangan dan Gagasan Modernisasi Negara Hukum* (p. 208). Depok: Rajawali Pers.

<sup>9</sup> Ibid., (p. 208-209).

<sup>10</sup> Yudianita, Feby. (2015). Tinjauan Yuridis Terhadap Aliran Kepercayaan Dihubungkan Dengan Pasal 29 ayat 2 UUD 1945. *JOM Fakultas Hukum*. Vol. 2 Number 2 (p. 3).

<sup>11</sup> Susanto, Bruriy (Ed.). (2020). 60 ribu Warga Jawa Timur Kantongi KTP Penghayat Kepercayaan. Retrieved November 10, 2020, from <https://jatimnet.com/60-ribu-warga-jawa-timur-kantongi-ktp-penghayat-kepercayaan>.

<sup>12</sup> Rakhmatulloh. (2017). Jumlah Penghayat Kepercayaan di Indonesia Capai Ratusan Ribu Orang. Retrieved November 11, 2020, from <https://nasional.sindonews.com/berita/1256823/15/jumlah-penghayat-kepercayaan-di-indonesia-capai-ratusan-ribu-orang>.

population services and civil records, but the general public's rejection of funerals for Believer in public cemeteries still occurs. Article 7 paragraph (1) of Bandung City Regional Regulation Number 19 of 2011 on The Provisions of Public Funeral Services and Burial of Corpses, and the Retribution of Funeral Services and Burial of Corpses reads "*In an effort to improve the effectiveness and efficiency of Public Funeral Place land, the Local Government provides an Integrated Public Funeral Place in accordance with all religious beliefs in accordance with the laws and regulations*". It does not mention religion and/or belief as a limitation or scope of religion. The regional regulation also does not recall the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism 43 and 41/2009. It is highly likely that the civil rights of the Believer will be respected in terms of funerals.

This article to analyze legal issues related to Public Funeral Public for the Believers through four Local Regulations given the existence of Believers in Indonesia is considerable, but the legal protection is inadequate due to disharmony between the Local Regulations and the regulations above namely the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. This is very important and interesting because the freedom to believe beliefs in accordance with his conscience was stipulated in the 1945 Constitution, but some of the regulations under him did not consider the basis of the law to cause disharmony of the legislation. So, the problems in this article. First, what is the legal issue in Public Funeral Services for the Believers through Local Regulations? Secondly, how is the legal protection in Public Funeral Services for the Believers through Local Regulations?

Death is one of the important events in human life, so the state must recognize and protect the human rights as an important thing that must be done by the state given the recognition of the existence of the Belief Deed in the 1945 Constitution and the laws and regulations under it. Believer should be entitled to services to public burial sites by the government or local government, without exception.

Each province in the territory of Indonesia has a belief in accordance with its regional characteristics that each death in the Believer has its own ritual of worship and meaning for the Believer. Human dignity was last obtained through a proper burial place. Therefore, the state is obliged to guarantee the service of the burial place equally regardless of difference (discrimination) on the basis of belief in the One God Almighty. It is also set out in every principle in the Local Regulations in each province, but there is no arrangement to comply with the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009.

## 2. Materials and Methods

This article is a legal research that relate with the latest issue and provides a systematic explanation on the law related to public funeral services for the Believers, analyzes the connection between Joint Regulation of the Minister and Local Regulations for trying to harmonize the future of regulation.<sup>13</sup> The research is analyzing about harmonization of legal protection in public funeral services for the Believers through Local Regulations that effective after Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 in accordance with the mandate of the 1945 Constitution. This research analyzes and compares best practices on legal

---

<sup>13</sup> Tamanaha, Brian Z. (2004). *Rule of Law in the United States*, and Peerenboom & Randall. (2004). *Asian Discourses of Rule of Law* (p. 56-57). London: RoutledgeCurzon. In Harijanti, Susi Dwi. (2011). *Negara Hukum dalam Undang-Undang Dasar 1945, Negara Hukum Yang Berkeadilan: Kumpulan Pemikiran Dalam Rangka Purnabakti Prof. Dr. H. Bagir Manan, S.H., M.C.L.* (p. 88). Bandung: PSKN FH UNPAD.

protection in Public Funeral Services and its legal implementation in some region in Indonesia. The result of this paper is to explain the legal problems in Public Funeral Services for the Believers through Local Regulations and legal protection in Public Funeral Services for the Believers through Local Regulations for giving Public Funeral Services for the Believer without discrimination on the basis of religion or belief to be governed by the law for the future.

### 3. Results and Discussion

Harmonization of legal protection in Public Funeral Services for the Believers through Local Regulations is very important to be implemented by the government in order to meet the legal needs of every community in every region of Indonesia without discrimination on the basis of one's belief in the One God Almighty.

#### 3.1 The legal issue in Public Funeral Services for the Believers through Local Regulations

There are several Local Regulations related to Public Funeral Services for example:

- a. Article 7 paragraph (1) of Bandung City Regional Regulation Number 19 of 2011 on The Provisions of Public Funeral Services and Burial of Corpses, and the Retribution of Funeral Services and Burial of Corpses reads *"In an effort to improve the effectiveness and efficiency of Public Funeral Services land, then the Local Government provides integrated Public Funeral Services for all religious people in accordance with the laws and regulations"*. It does not mention religion and/or belief as a limitation or scope of religion. The regional regulation also does not recall the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism Number 43 and 41 of 2009 on the Guidelines for Service to The Delusion of Believer in the One God Almighty. It is highly likely that the civil rights of the Believer will be respected in terms of funerals;<sup>14</sup>
- b. Kebumen District Regulation Number 5 of 2019 on the Management of Public Burial Places. Article 1 number 7 Regional Regulation of Kebumen Regency says about definition about Public Funeral Services is land area provided for funeral purposes for each person without distinguishing religion and class, whose management is carried out by the Local Government or Village Government. In Provision of Burial Place on Article 4 paragraph (1) Local Government of Kebumen 5/2019 that the Local Government is obliged to provide land for the purposes of Public Funeral Services managed by the Local Government, but the rule does not base on Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. The Local Regulation does not govern at all the regulation of Public Funeral Services for Believer by Local Government, but imposes for any heirs or family parties or persons responsible for the deceased in the area through the word "must" to bury the remains in the burial place in accordance with the provisions of the religion or beliefs adopted by the deceased (Article 11 paragraph (1) Local Government of Kebumen 5/2019);
- c. Regulation of the Regent of Penajam Paser Utara Number 60 of 2017 on the Management of Integrated Public Burial Sites in Penajam Paser Utara Regency. In the section considering the numbers 1 to the number 5 there is no Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, but the provision stipulated the Decree of the Minister of Home Affairs

---

<sup>14</sup> Budijanto, Oki Wahyu. (2016). Penghormatan Hak Asasi Manusia Bagi Penghayat Kepercayaan di Kota Bandung. *Jurnal Hak Asasi Manusia*. Vol. 7 Number 1 (p. 43).

Number 26 of 1989 on Government Regulation Number 9 of 1987 on the Provision and Use of Land for Burial Place Purposes whose existence was long before the existence of the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. The burial place according to Article 1 number 9 is the land area provided for the Funeral Place of the corpse/Skeleton of the Corpse for each person without distinguishing religion and class which is the wealth of the Region. Article 1 number 10 Public Funeral Place/Integrated is a land area provided for the burial place of the corpse/skeleton for each person regardless of religion and class which is the wealth of the area and its management is carried out by the Local Government. Article 1 number 11 of the Block of Public Burial Places is the division of parts of the Integrated Public Burial Place based on religion and class. Then, Article 3 that Integrated Public Cemetery Management Arrangements aim to:

- 1) use natural resources in the form of land for grave purposes.
- 2) control the use of land for the purposes of the tomb in accordance with the provisions of spatial, social, cultural and religious aspects.
- 3) make the burial place as a place of burial that is cool, safe, comfortable, orderly, neat and beautiful.

About funeral of the corpse regulated on Article 12 that everyone who dies in the Regional Area buried in the Integrated Public Cemetery is buried in accordance with the provisions of religion and beliefs. Public Funeral Place is designated as many as 6 (six) blocks, including Muslim Public Cemetery Block, Christian Public Cemetery Block, Block of Catholic Public Cemeteries, Protestant Public Cemetery Block, Buddhist Public Cemetery Block, Block of Hindu Public Cemeteries; and Konghuchu Public Cemetery Block (Article 8 paragraph (1)). The provisions of the Blocks of Public Burial Places as referred to are further regulated by the Head of Office according to the percentage of the population based on their religion and beliefs (Article 8 paragraph (2)); and Banyuwangi Regent Regulation Number 42 of 2017 on Change of Regent of Banyuwangi Number 11 of 2014 on The Provision of Public Funeral Places for Housing and Settlements in the Considering number 1 to number 11 section there is no legal basis for the Joint Decree of the Minister. The Local Regulations also do not regulate Public Funeral Services for Believer.

Legal protection when associated with legal politics as Moh. Mahfud MD thought that the law must provide social justice i.e. the law must be able to provide special protection against the weak in dealing with the powerful, i.e. when dealing with the government and religious leaders as a strong group. Pancasila's legal system installed signs and gave birth to guiding rules in national legal politics. The signs are reinforced by four guiding rules, including the Belief that the law must guarantee religious freedom with tolerance among its people.<sup>15</sup> The protection of the law when it comes to justice as John Rawls that equality can lay out the principles of justice that the law must be a guide in order for a person to take a fair position while paying attention to the interests of his individual, and act proportionately in accordance with his rights and not violate the prevailing law.<sup>16</sup>

Satjipto Rahardjo argues that the law is not an absolute and final institution, because the law lies in the process to continue to be (*law as process, law in making*). When the law is

---

<sup>15</sup> MD., Moh. Mahfud. (2010). Perdebatan Hukum Tatanegara Pasca Amandemen Konstitusi. Jakarta: Rajawali Pers. In Sukirno. (2019). Politik Hukum Pengakuan Hak atas Administrasi Kependudukan Bagi Penganut Penghayat Kepercayaan. *Administrative Law & Governance Journal*. Vol. 2 Issue 2 (p. 279).

<sup>16</sup> Rawls, John. (1973). *A Theory of Justice* (p. 50-57). London: Oxford University. In Suteki & Taufani, Galang. (2018). Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik) (p. 101). Depok: PT. Raja Grafindo.

not able as to achieve guarantees and maintain various human needs, then the arrangement and reordering of the law becomes important.<sup>17</sup>

Harmonization of existing laws and regulations and the position of Local Laws and Regulations vertically and horizontally in an effort to avoid overlapping arrangements as material for the input of the preparation of philosophical and juridical foundations of provincial, district/city regulations to be established.<sup>18</sup> Harmonization as one of the path towards the national legal system as stated in Article 17 of Act 12/2011 is a legal system that applies in Indonesia with all its elements and supports each other in order to anticipate and overcome problems arising in the lives of national, state, and community based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

The law is the observance of hierarchically regulated legal principles. This can be understood from Hans Kelsen's theory of the law. The legal norms of any country are always multilayered and tiered. The norms below are sourced and based on higher norms, higher norms apply sourced and based on even higher norms to the highest norms called Basic Norms. The composition of the hierarchy of legislation becomes one of the important principles in the process and technical preparation of legislation. The types and hierarchy of legislation consist of:

- a. Constitution of the Republic of Indonesia year 1945;
- b. Provisions of the People's Assembly;
- c. Replacement Government Laws/Regulations;
- d. Government Regulations;
- e. Presidential Regulations;
- f. Provincial Regulations; and
- g. District/City Regulations.<sup>19</sup>

Vertical harmonization of various regional regulations that do not weigh the Minister's Joint Decision in its provisions aims not to conflict with the provisions above (vertical) especially not contrary to Article 28E paragraph (2) of the 1945 Constitution as a legal protection for Believer in Public Funeral Services. The harmonization is to consider the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, and to elaborate the provision stipulated to be an obligation for the central government and the local government to be the residence (domicile) of the Believer to provide public burial services for the Believers. It aims to eliminate discrimination on the basis of one's belief in the One God Almighty as mandate of the 1945 Constitution.

The legal issue in Public Funeral Services for the Believers through Local Regulations is the disharmony between the Local Regulations regarding public burial services and the Joint Regulation that the Local Regulations, for example Bandung, Kebumen, Penajam Paser, and Banyuwangi. None of the Local Regulations take into account the legal basis of the Joint Regulation, so implementation for legal protection for Believers will run into problems. Therefore, the local government needs to restructure the Regional Regulations of both provinces and districts/cities that consider the Joint Regulation of the Minister for harmony of legislation through vertical harmonization in accordance with the mandate of Article 28E paragraph (2) of the 1945 Constitution to believe in the Belief in the One God Almighty in accordance with his conscience. For the future, Public Funeral Services should its management be integrated as regulation of The

---

<sup>17</sup> Rahardjo, Satjipto. (2008). *Membedah Hukum Progresif* (p. 265). Jakarta: Buku Kompas. In Badriyah, Siti Malikhatun. (2016). *Sistem Penemuan Hukum Dalam Masyarakat Prismatic* (p. 2-3). Jakarta: Sinar Grafika.

<sup>18</sup> Appendix I Act Number 12 of 2011 concerning the Formation of Regulation (Act 12/2011).

<sup>19</sup> Fitryantica, Agnes. (2019). Harmonisasi Peraturan Perundang-undangan Indonesia Melalui Konsep Omnibus Law. *Jurnal Gema Keadilan*. Vol. 6 Edition III (p. 306-307).

Regent of Penajam Paser Utara 60/2017 so that there is no discrimination between citizens who have died based on their religion or beliefs.

### 3.2 Legal protection in Public Funeral Services for the Believers through Local Regulations

Public Funeral Services for Believer should be provided by the government and local government to provide legal protection for the deceased Believers in order to obtain assurance of safety and comfort in believing the Belief in One God Almighty while the Believer are still alive according to their conscience. The protection of the law on human rights is stipulated in Article 28E paragraph (2) of the 1945 Constitution that everyone has the right to believe in belief in accordance with their conscience.

Based on Article 2 paragraph (1) and paragraph (2) in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 41 and 43/2009 that the Local Government provides services to the Believer. The services include:

- a. administration of the Believer's organization;
- b. funeral; and
- c. the place of worship or other designations.

Based on Article 8 paragraph (1) Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 that the deceased Believer are buried in a public cemetery. Then in the Article paragraph (2) that in the case that the Burial of the Believer is rejected in public cemeteries originating from *waqf*, the local government provides public burials. The absence of arrangements for the local government to provide public burial places through the word "mandatory" caused legal problems for the Believer that the remains of Believer who were rejected at public burial sites originating from *waqf* would be displaced as was the case in Kebumen Regency.

Article 3 Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 that in providing services to the Believer, the provincial government is obliged to:

- a. maintain peace and order including facilitating the realization of community harmony;
- b. develop harmony, mutual understanding, mutual respect, and mutual trust between the Believer and the community; and
- c. coordinate the activities of vertical agencies and regional devices in the province in the maintenance of harmony between the Believer and the community.

Article 4 that in providing services to the Believer, the district/city government is obliged to:

- a. maintain peace and order including facilitating the realization of harmony between the Believer and the community;
- b. develop harmony, mutual understanding, mutual respect, and mutual trust between the Believer and the community;
- c. coordinate the activities of vertical agencies and regional devices in districts/cities in service to Believer; and
- d. facilities of the Believer cemetery at public burial sites.

Article 3 and Article 4 in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 requiring the provincial government and the district/city government to facilitate the burial of the Believer in Public Funeral Places, it is certainly contrary to Article 8 paragraph (2) in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 which does not



provide an obligation for the local government to provide a public burial place when the body of the Believer is rejected at a public burial place originating from the *waqf*.

The importance of the arrangement of obligations in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 as a statement of the provision of an obligation has been established and if the obligation is not fulfilled the concerned is penalized (Appendix II Number 268 Act 12/2011) to be in line with the Article 28E paragraph (2) of the 1945 Constitution. Based on 20 articles in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, there is no provision at all regarding the lifting of sanctions for local government obligations related to services. Therefore, the absence of an obligation arrangement for the central and local governments to provide public burial places and sanctions arrangements led to the disharmonize of the above regulations, namely the 1945 Constitution which affects discrimination of citizens based on a person's beliefs against to One God Almighty.

Discrimination is affirmed in Article 26 of the International Covenant on Civil and Political Rights (Covenant on Human Rights): "*All people are equal before the law and are entitled to equal legal protection, without any discrimination. On this basis, the law prohibits all discrimination and guarantees everyone equal and effective protection against discrimination on any basis such as tribalism, color, gender, language, religion, political views and others, national or social origin, wealth, birth, or other status.*". Discrimination under Article 1 number 3 Act Number 39 of 1999 concerning Human Rights (Act 39/1999) that any restrictions, harassment, or exclusion directly or indirectly is based on human discrimination on the basis of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, resulting in the reduction, deviation or elimination of recognition, exercise or use of human rights and basic freedoms in the lives of both individuals and collectives in the fields of politics, economics, law, social, culture, and other aspects of life. Based on Constitutional Court Decision Number 070/PUU-II/2004 dated April 12, 2005, the Court states that new discrimination can be said to exist if there are different treatment without reasonable ground reason to make that difference. Precisely if the actual different things are treated uniformly it will lead to injustice. Then, Constitutional Court Decision Number 27/PUU-V/2007, dated February 22, 2008, the Court stated that discrimination is treating differently against the same thing. On the contrary, it is not discrimination to treat differently.<sup>20</sup>

Legal protection in Public Funeral Services for the Believers is manifested in strict rules through the inclusion of the word "mandatory" in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 in order to bind central and local governments to provide legal protection for Believers. Therefore, it is necessary to change the Joint Regulation of the Minister immediately which is followed by changes to various Local Regulations related to public burial services for The Person of Faith without any discrimination on the basis of one's belief in the One God Almighty.

---

<sup>20</sup> Constitutional Court Decision Number 97/PUU-XIV/2016 concerning Judicial Review of Act Number 23 of 2006 concerning Population Administration as amended by Act Number 24 of 2013 concerning Amendment to Act Number 23 of 006 concerning Residency Administration to the Constitution of the Republic of Indonesia Year 1945 (p. 146).

#### 4. Conclusion

The legal issue in Public Funeral Services for the Believers through Local Regulations is the disharmony between the Local Regulations regarding public burial services and the Joint Regulation that the Local Regulations, for example Bandung, Kebumen, Penajam Paser, and Banyuwangi. None of the Local Regulations take into account the legal basis of the Joint Regulation, so implementation for legal protection for Believers will run into problems. Therefore, the local government needs to restructure the Regional Regulations of both provinces and districts/cities that consider the Joint Regulation of the Minister for harmony of legislation through vertical harmonization in accordance with the mandate of Article 28E paragraph (2) of the 1945 Constitution to believe in the Belief in the One God Almighty in accordance with his conscience.

Legal protection in Public Funeral Services for the Believers is manifested in strict rules through the inclusion of the word "mandatory" in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 in order to bind central and local governments to provide legal protection for Believers. Therefore, it is necessary to change the Joint Regulation of the Minister immediately which is followed by changes to various Local Regulations related to public burial services for The Person of Faith without any discrimination on the basis of one's belief in the One God Almighty.

#### References

##### Regulations:

Appendix I Act Number 12 of 2011 concerning the Formation of Regulation (Act 12/2011).

Constitutional Court Decision Number 97/PUU-XIV/2016 concerning Judicial Review of Act Number 23 of 2006 concerning Population Administration as amended by Act Number 24 of 2013 concerning Amendment to Act Number 23 of 006 concerning Residency Administration to the Constitution of the Republic of Indonesia Year 1945.

##### Books:

Astawa, I Gde Pantja & Na'a, Suprin. (2008). *Dinamika dan Ilmu Perundang-undangan di Indonesia*. Bandung: PT. Alumni.

Human Rights and Equal Opportunity Commission. (1998). *Article 18 Freedom of Religion and Belief*. Sydney: J.S. McMillan Pty Ltd.

Cassese, Antonio (Translator by A. Rahman Zainuddin). (2005). *Hak Asasi Manusia di dunia Yang Berubah*. Jakarta: Yayasan Obor Indonesia.

Suteki. (2013). *Desain Hukum di Ruang Sosial*. Yogyakarta: Thafa Media. In Junaidi, Muhammad. (2018). *Hukum Konstitusi Pandangan dan Gagasan Modernisasi Negara Hukum*. Depok: Rajawali Pers.

Tamanaha, Brian Z. (2004). *Rule of Law in the United States*, and Peerenboom & Randall. (2004). *Asian Discourses of Rule of Law*. London: RoutledgeCurzon. In Harijanti, Susi Dwi. (2011). *Negara Hukum dalam Undang-Undang Dasar 1945, Negara Hukum Yang Berkeadilan: Kumpulan Pemikiran Dalam Rangka Purnabakti Prof. Dr. H. Bagir Manan, S.H., M.CL*. Bandung: PSKN FH UNPAD.

Rawls, John. (1973). *A Theory of Justice*. London: Oxford University. In Suteki & Taufani, Galang. (2018). *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)*. Depok: PT. Raja Grafindo.

MD., Moh. Mahfud. (2010). *Perdebatan Hukum Tatanegara Pasca Amandemen Konstitusi*. Jakarta: Rajawali Pers. In Sukirno. (2019). *Politik Hukum Pengakuan Hak atas*

Administrasi Kependudukan Bagi Penganut Penghayat Kepercayaan.  
*Administrative Law & Governance Journal*. Vol. 2 Issue 2.

Rahardjo, Satjipto. (2008). *Membedah Hukum Progresif*. Jakarta: Buku Kompas. In  
Badriyah, Siti Malikhatun. (2016). *Sistem Penemuan Hukum Dalam Masyarakat  
Prismatik*. Jakarta: Sinar Grafika.

#### **Journal Articles:**

Yudianita, Feby. (2015). Tinjauan Yuridis Terhadap Aliran Kepercayaan Dihubungkan  
Dengan Pasal 29 ayat 2 UUD 1945. *JOM Fakultas Hukum*. Vol. 2 Number 2.

Budijanto, Oki Wahyu. (2016). Penghormatan Hak Asasi Manusia Bagi Penghayat  
Kepercayaan di Kota Bandung. *Jurnal Hak Asasi Manusia*. Vol. 7 Number 1.

Fitryantica, Agnes. (2019). Harmonisasi Peraturan Perundang-undangan Indonesia  
Melalui Konsep Omnibus Law. *Jurnal Gema Keadilan*. Vol. 6 Edition III.

#### **Website Material:**

Akhmad, Hartiz Tryan. (2017). *Kemendagri: Ada 12 Juta Penganut Penghayat  
Kepercayaan di Indonesia*. Retrieved November 11, 2020, from  
[https://nasional.okezone.com/read/2017/11/14/337/1813772/kemendagri-ada-12-  
juta-penganut-penghayat-kepercayaan-di-indonesia](https://nasional.okezone.com/read/2017/11/14/337/1813772/kemendagri-ada-12-juta-penganut-penghayat-kepercayaan-di-indonesia)

Sucahyo, Nurhadi. (2018). *Penghayat Kepercayaan: Setelah Putusan MK dan Kolom KTP*.  
Retrieved October 29, 2020, from [https://www.voaindonesia.com/amp/penghayat-  
kepercayaan-setelah-putusan-mk-dan-kolom-ktp/4340417.html](https://www.voaindonesia.com/amp/penghayat-kepercayaan-setelah-putusan-mk-dan-kolom-ktp/4340417.html).

Al-Dawoody, Ahmed & Finegan, Oran. (2020). *Covid-19 and Islamic Burial Laws:  
Safeguarding Dignity of the Dead*. Retrieved November 11, 2020, from  
<https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/>

Bantekas, Ilias & Oette, Lutz. (2018). *Regional Human Rights Treaty*. Retrieved November  
11, 2020. from [https://www.cambridge.org/core/books/international-human-rights-  
law-and-practice/regional-human-rights-treaty-  
systems/A275184F9D08DB30DD6D383DB4104556](https://www.cambridge.org/core/books/international-human-rights-law-and-practice/regional-human-rights-treaty-systems/A275184F9D08DB30DD6D383DB4104556).

Susanto, Bruriy (Ed.). (2020). *60 ribu Warga Jawa Timur Kantongi KTP Penghayat  
Kepercayaan*. Retrieved November 10, 2020, from [https://jatimnet.com/60-ribu-warga-  
jawa-timur-kantongi-ktp-penghayat-kepercayaan](https://jatimnet.com/60-ribu-warga-jawa-timur-kantongi-ktp-penghayat-kepercayaan).

Rakhmatulloh. (2017). *Jumlah Penghayat Kepercayaan di Indonesia Capai Ratusan Ribu  
Orang*. Retrieved November 11, 2020, from  
[https://nasional.sindonews.com/berita/1256823/15/jumlah-penghayat-kepercayaan-  
di-indonesia-capai-ratusan-ribu-orang](https://nasional.sindonews.com/berita/1256823/15/jumlah-penghayat-kepercayaan-di-indonesia-capai-ratusan-ribu-orang).