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ADEN ROSADI

was a Participant at 1st Biennial Conference on Sharia and Social Studies
“Prophetic Role of Sharia Knowledge in Developing Social Justice”
held by Sharia Faculty of State Islamic University Imam Bonjol Padang, 23th-25th August 2017



Padang, August 25th 2017

Dean of Sharia Faculty


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PROCEEDINGS

1st
BiCoShS

1st Biennial Conference on Sharia and Social Studies

**“Prophetic Role of Sharia Knowledge
in Developing Social Justice”**



“Prophetic Role of Sharia Knowledge in Developing Social Justice”

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Hak Cipta Dilindungi Undang-undang
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viii-174 halaman, 21 x 29 cm
ISBN: 978-979-1389-96-9

Editor

Nurus Shalihin

Lay Out

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KATA PENGANTAR

1st Biennial Conference on Sharia and Social Studies; Konferensi Internasional Keilmuan Syari'ah dan Ilmu Sosial merupakan festival akademik dua tahunan Fakultas Syari'ah Universitas Islam Negeri Imam Bonjol Padang. Kegiatan ini ditujukan untuk menggali dan memahami kekayaan dan kearifan nusantara serta menenunkannya kembali menjadi mozaik keilmuan.

Tema Perdana Konferensi ini adalah Peran Profetik Keilmuan Syari'ah dalam Membangun Keadilan Sosial. Tema ini terinspirasi oleh kenyataan bahwa keilmuan syari'ah sepertinya masih belum kunjung keluar dari kungkungan paradigma teologis-normatif yang cenderung abai terhadap fakta-fakta sosial. Oleh karenanya, Keilmuan Syari'ah Teologis sejatinya membuka ruang dan menerima gejala sosial sebagai sebuah fakta kesyari'ahan yang hidup dalam masyarakat. Interaksi dan dialog keilmuan syari'ah dengan ilmu sosial secara intensif dan berkelanjutan menjadi agenda akademik terpenting dan mendesak dilakukan. Dalam kerangka akademik inilah kehadiran Keilmuan Syari'ah Profetik menjadi keniscayaan untuk membingkai tenunan tatanan sosial yang berkeadilan, berkemanusiaan, dan memiliki etos transendental.

Buku [Prosiding] ini merupakan kumpulan paper yang dipresentasikan oleh para akademisi dan peneliti dari berbagai latar belakang keilmuan dan institusi pada Konferensi Internasional Keilmuan Syari'ah dan Ilmu Sosial yang diselenggarakan Fakultas Syari'ah Universitas Islam Negeri Imam Bonjol Padang, 23 s/d 25 Agustus 2017. Mudah-mudahan pengetahuan yang termaktub dalam prosiding ini dapat memperdalam dan memperluas wawasan keilmuan, sekaligus menjadi etos dalam membangun budaya akademik.

Akhirnya, izinkan kami menghaturkan ucapan terima kasih untuk segala ide, gagasan, konsep, perspektif, partisipasi dan kerja keras akademik semua pihak atas terselenggaranya konferensi pertama tentang Keilmuan Syariah dan Ilmu Sosial di Indonesia; sehingga Keilmuan Syari'ah Profetik dapat dikembangkan, dan misi profetik yang dicita-citakan dapat tersampaikan. Amin.

Padang, 18 Agustus 2017

Penanggung Jawab

nurus shalihin

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Nazhariyyat Al-Tanzhīmi Al-Qadhāi and Its Transformation In Indonesian Regulation

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Abstract – Changes in regulation have a significant impact on the substance, structure and legal culture of Religious Courts, especially after the enactment of Law Number 50 Year 2009. The changes were influenced by some factors and had an impact on the reformulation of *nazhariyyat al-tanzhīmi al-qadhāi* in the Indonesian legal system. In the context of the legal system, the law is required to harmonize both parallel and higher regulation.

Key Words: *Nazhariyyat Al-Tanzhīmi Al-Qadhāi, Transformation, Religious Court, National Legal System*

1. Introduction

Religious Court is a historical proof of Islamic law development in Indonesia. This institution originated from an institution known as *tahkim* formed when Muslim immigrants entered Indonesia. Furthermore, this judicial institution changed to *Ahl Hally wa al-'Aqd*, when Muslim communities appeared. Finally, in line with the development of Muslim politics, this institution became *tawliyah*, as seen in Surambi Court during the Islamic Mataram empire. This was followed by other kingdoms, such as Mataram, Banten, Cirebon, and Aceh.

The scope and period of Islamic judicial institution development can be seen as part of adaptation to previous norms, guided by Hinduism, Buddhism and "indigenous religion". The subsequent development was confronted with "colonial law" institution brought by colonial government which tended to support customs rather than *fikh*. The existence of Islamic judiciary was recognized by the Dutch government. In the beginning, they were not directly involved with the legal affairs of Muslim community. However, due to

political consideration, the Dutch government began to interfere by the inauguration of *Priestraad* based on the Decree of the Dutch King (KB) Number 24 on January 19, 1882. This Religious Court was established in Java and Madura, and it was formed in Kalimantan in 1937. Its coverage includes cases among Muslims based on Islamic law. In Kalimantan, it is limited to *munakahah*, whereas in Java and Madura it covered *munakahah* and *warastash*.

Different from the previous colonies, Japan did not make much intervention to the competence of Religious Court. This situation enables Muslims to restore the Religious Court. In the Dutch colonial period, the effort could not be made due to "independent *ulama*", who mastered Islamic jurisprudence, engaging in rebellion. Recovery is only done by "dependent *ulama*", who have close ties to the colonial Government. During Japanese occupation, the same effort was confronted with nationalist resistance. This is proven from the debate about 7 words in the Jakarta Charter which ended in stating "Ketuhanan Yang Maha Esa" in the preamble of 1945 Constitution of The Republic of Indonesia.

During the New Order period, through the policy of adaptationist modernization, there was recognized the importance of religious and moral values within Pancasila framework. The Religious Court is recognized as a judiciary in Indonesian courts, so Religious Judges have the opportunity to explore the rules of Islamic law developing in society. Law Number 1 year 1974 on Marriage is considered to be an early milestone for the strong legal juridical foundation of Islam, and a sign of the "death" of receipt theory.

Reform movement in 1998 aimed to form a new democratic government of Indonesia, including the field of law. The first step improving system through

regulation change and improvement to the that underlie law enforcement. This completion is made in the form of amendment of 1945 Constitution, which was previously considered sacred (taboo), as *revolutiegrondwet*. In addition, according to the literal meaning, legal reform is defined as the process of legal order change (constitutional reform). The logical consequence of constitutional improvement is the refinement of various laws and regulations under it, including legislation related to religious court in Indonesia.

Based on the above background, Religious Court that is naturally identical with the implementation of Islamic law in Indonesia has changed and will continue to change. Since three decades ago, there have been several changes in the Law of Religious Court, starting from Law Number 7 Year 1989, that becomes Law Number 3 Year 2006, and finally Law Number 50 Year 2009. The changes affect the substance, structure and legal culture of Religious Courts. Therefore, this research is entitled *Nazhariyyat al-Tanzhimi al-Qadhāi* (Theory and System of the Establishment of Religious Judicature Law) and its Transformation in Regulation in Indonesian.

In line with the problem identification, this study aims to analyze: (1) the background of legislation changes on Religious Court from 1989 until 2009; (2) the relationship of Law Number 50 Year 2009 on Religious Court with laws applied in Indonesia, either vertically or horizontally; (3) the amendment of laws on Religious Court that occurred in 2009; and (4) the formulation of *Nazhariyyat al-Tanzhimi al-Qadhā* in Indonesian law;

With the above analysis, this research is expected to provide practical, theoretical, and academic benefits. Practically, this research can provide an understanding of change process and enforcement of law in the form of legislation, especially for general legal practitioners, and for legal practitioners within Religious Court in particular. Theoretically, there can be conducted the development of Islamic Sciences, regarding the theory of Islamic law enforcement and the theory of legal change in Indonesia; and academically, there will be strengthening effort of *Nazhariyyat al-Tanzhimi al-Qadhāi* in the rule of law in Indonesia through various structured studies and research in the body of *shari'ah* science (Body of knowledge) in Indonesia;

2. Literature Review

According to some literature that Religious Court is a legal system, and at the same time is a subsystem of the national legal system. Therefore, the implementation of the legal system in Religious Courts is a complex symptom that requires sophisticated theoretical explanation. On the basis of this consideration, a research on *Nazhariyyat al-tanzhimi al-Qadhāi* (Theory and System of the Establishment of Religious Judicature Law) and its transformation in regulation in Indonesia is still relevant.

Conceptually, the placement of *Nazhariyyat al-tanzhimi al-Qadhāi* (Theory and System of the Establishment of Religious Judicature Law) and its transformation in regulation in Indonesia as an analytical unit requires a theoretical explanation, which is mapped based on theoretical framework sequences of Grand theory, middle range theory, operational theory.

In grand theory, there was used legal system theory from Lawrence M. Friedman. The consideration is that changes in legislation on Religious Courts are conducted within the context of legal reforms, so that law has a tool function for social engineering. As a result, in the broader context law is a subsystem of a wider system. As a system, law covers various elements related to each other in achieving the objectives of legal system. According to Friedman the legal system elements are the legal structure, substance, and culture.

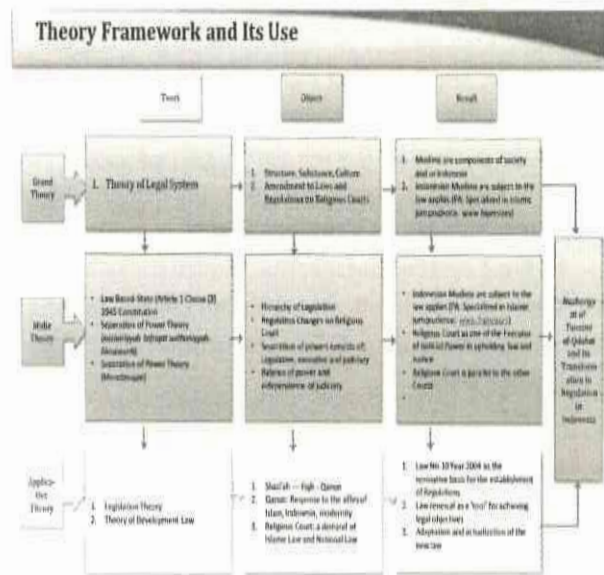
In middle-range theory, there was used the theory of constitutional state and distribution of power. This theory is used considering that Indonesia is not an Islamic state, but a Muslim country. Therefore, the establishment of Islamic legal system can not be separated from the context of the wider national legal system. Another consideration is that 1945 Constitution states that Indonesia is a constitutional state (*staatrechts*), not a power state (*maachtstaats*). The concept of *staatrechts* (Dutch) is corresponding to the concept of the rule of law (English) as proposed by Albert Venn Dicey (1885). This concept includes three important ideas, namely: (1) the supremacy of law, which is different from authoritarian power; (2) everyone is equal before the law; and (3) everyone has the right and independence protected by law and enforced through judiciary. The early version of this concept has developed through the thought of Joseph

Raz, such as independent judiciary, and judicial review of any legislation is essential to ensure legal security. Regarding the last characteristic, the distribution of power based on *Trias Politica* doctrine can not be neglected in the formation of Islamic law in Indonesia which adheres constitutional state principles.

In operational theory, there were used legislation theory and legal development theory in Indonesia. The legislation theory is based on Peter Noll's idea that the development of constitutional state concept will be followed by the development of legislation, so that the latter phenomenon affects the legal theory which previously focused on adjudication as a science of the application of rules that includes yudicial process and legislative process. In this regard, the development does not merely involve judiciary.

This is also related to the function of law, which is limited to the placement of law not only as a tool of social control, but also as a tool of social engineering. In this relation, legal politics in Indonesia shows the same tendency, as seen in the emergence of "law and development" theory by Muchtar Kusumaatmadja (1976) or "Progressive Law" by Satjipto Rahardjo (1981).

Based on the theoretical framework revealed, here is a conceptual scheme to be framework of thinking in this research.



3. Approach

This research used philosophical, juridical and sociological approach in addition to the approach of

regulation applies in Indonesia, especially after the enactment of Law No.10 year 2004 on the Establishment of Regulation in Indonesia. Thus, the position of this research lies in the study of doctrinal law with normative juridical method.

4. Findings

Based on the description and analysis in the previous chapters, there are some research findings, as follows:

First, the change of regulation on Religious Courts from 1989 until 2009 was motivated by several factors, they are: (1) philosophical factor, meaning that Unitary State of the Republic of Indonesia is a constitutional state based on Pancasila and the Indonesian Constitution Year 1945, which aims to bring about orderly, clean, prosperous and equitable life of state, nation and society. Under that framework, based on the mandate of Article 24 clause (10) and clause (2) of 1945 Constitution of the Republic of Indonesia that the establishment of an independent judiciary is conducting justice to enforce law and justice. The judicial authority is implemented by a Supreme Court and a subordinate judicial body within general court, religious court, Court Martial, Civil Court of Justice and Constitutional Court. (2). juridical factor, meaning that religious court as regulated in Law Number 7 Year 1989 on Religious Court amended by Law Number 3 Year 2006, is no longer compatible with the development of law and the legal needs of society and the constitutional life according to 1945 Constitution of the Republic of Indonesia.

Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 Year 1989 on Religious Court is approved by the President and enacted by the Minister of Law and Human Right on October 29, 2009, with the State Gazette of the Republic of Indonesia Year 2009 Number 159 and Additional State Gazette of the Republic of Indonesia Number 5078. In Law Number 50 Year 2009 regarding the Second Amendment of Law Number 7 Year 1989 on Religious Court, there are 24 item changes. (3) sociological factor, meaning that Realizing a clean and authoritative judiciary requires direct involvement of society (Muslims) as the seeker of justice and Transparent and accountable supervision of the judiciary in performing judicial, administrative, financial and judicial duties. In addition, social changes

in the macro society may also affect legal product in the form of regulation. (4) Political factor, meaning that the presence of regulation with its instrumental change that include substance, institution and culture is a 'political product' by the authorities, both executive and legislative institutions.

In addition, the change in regulation on Religious Courts in 2009 was caused by changes in the national political climate through reformation that has taken place since 1998. One of the reform agenda is law reform through the amendment of law and regulation on Judicial power which has direct implications for all judicial bodies, including Religious Court through a 'one roof system' under the Supreme Court.

Second, Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 Year 1989 has significant relationship with the prevailing regulation in Indonesia, vertically or horizontally. It vertically corresponds to: (1) Article 1 Clause (3) of 1945 Constitution of the Republic of Indonesia that Indonesia is a law based-State. (2). The first principle of Pancasila "Belief in the one supreme God ". (3). Law Number 48 Year 2009 About Judicial Power. (4). Law Number 3 Year 2009 on the Supreme Court. (5). Law Number 22 Year 2004 on the Judicial Commission. Moreover, it is horizontally related to: (1) Law Number 1 Year 1974 on Marriage. (2). Law Number 38 Year 1999, and Law Number 23 Year 2011 on Management of Zakat. (3) Law Number 41 Year 2008 on Endowment. (4). Law Number 21 Year 2008 on Sharia Banking.

Third, the implementation of *nazhariyyat al-tanzhimi al-qadhāi* in the rule of law in Indonesia, related to regulation on Religious Court, is directed to the following three aspects: (1). Substantial aspects. It deals with the power of court, both absolute power (absolute competentie), and relative power (relative competentie). (2). Institutional aspect. It is constantly related to the composition of Religious Court, both within Religious Court internally, and within Judicial Power externally. (3). Legal culture aspect in Religious Court. It deals with the legal consciousness of society (Muslims) in utilizing the services of Religious Court to solve cases.

The research findings show that the changes in the regulation of Religious Court have increased its status, competence extension (absolute), and the addition of legal institutions within Religious Court.

First, the changes of regulation on Religious Court have implications to the change of status and position of Religious Court, especially in that is related to the addition of absolute competence in handling shari'ah economic cases. Therefore, in terms of absolute competence, it is no longer a 'Family Court', but is transformed into a 'General Court'. In addition, although the execution of shari'ah economic cases is still below 3%, in handling other legal cases, such as appeal and cassation, it does not have institutional tools such as Civil Court of Shari'ah Commerce.

Second, the cases handled by Religious Court are the most 'sensitive' cases in the world. In solving legal cases, it deals not only with positive law, but also with the psychological law. Therefore, the law enforcers within Religious Courts, especially judges, must have competence in legal psychology (cases related to family conflicts).

Third, the changes of regulation on Religious Court in 2009 may provide an open opportunity for Religious Court to be able to resolve 'criminal cases', especially domestic violence in the family context. Therefore, domestic violence may one day become part of the absolute competence of Religious Court.

Fourth, substantially and institutionally, the changes of regulation on Religious Court lead to the modernization of judiciary. Religious court seems to be modern because it is corresponding to the easy, fast, simple, and low cost current judicial principles. However, culturally (socio-cultural) it is still traditional. This can be proved by the number of cases entered and solved in Religious Court, and little understanding of regulation changes on Religious Courts.

In legal system perspective, the changes in legal instruments have implications to the change in other legal components, namely legal institution and culture in Religious Court.

5. Conclusion

Based on the above framework of thinking, it can be concluded that:

1. The change of *nazhariyyat al-tanzhimi al-qadhāi* is triggered by philosophical, juridical, sociological and political factors; the law amendment on Religious Court in 2009 was driven by the change

of national political climate through the running reform since 1998.

2. The implementation of *nazhariyyat al-tanzhīmi al-qadhāi* in Law Number 50 Year 2009 on Religious Court is directed to the substance, structure and culture of Religious Judicature law;
3. Law Number 50 Year 2009 on Religious Courts is harmonious and compatible with vertical law and horizontal law.

6. Recommendation

Based on the research findings, implications and conclusions of this study, here are some suggestions related to the development of theory for further research on this topic, as well as practical knowledge on the change of regulation on Religious Court, namely:

First, the changes of regulation on Religious Court need attention from government, private institution, and society (Muslims). It becomes an integral part of the national legal system and an implementation of legal thought development in family law of Islam (*al-ahwal al-syakhshiyah*) and its transformation in Indonesian regulation. Therefore, one of the strategic steps is law socialization (counseling). Socialization is very important because it deals with knowledge, understanding, legal awareness of community.

Second, the stakeholders involved in the process of decision-making on the drafting and ratification of regulation regarding Religious Court needs to make a follow-up of re-drafting of regulation in accordance with the applicable legal norms, such as the provision of domestic violence law and Islamic legal norms such as Islamic civil procedural law that can apply in Religious Courts.

Third, al-Ahwal al-Syakhshiyah (AS) Study Program in Syari'ah and Law Faculty, Islamic Law Study Program at Postgraduate School, research centers, and the experts of Islamic civil administration should develop scientific and in-depth studies on contemporary family law issues and objects related to Religious Court in Indonesia in particular, and family law in international level.

Fourth, the theory of religious court legal system in Indonesia will change following the substance of law followed by structure and culture and vice versa.

Fifth, *Nazhariyyat al-Tanzhīmi al-Qadhāi* should be involved in a sub-discipline of syari'ah to be the main study of Religious Courts in Syari'ah and Law faculty.

Sixth, Strengthening *Nazhariyyat al-Tanzhīmi al-Qadhāi* in Indonesia is carried out through the establishment of Civil Courts of Shari'ah Commerce.

These are some contributions that the authors presented in this research. They are expected to be beneficial for the development of Islamic jurisprudence in university, and legal practitioners within the Religious Courts and Muslims in Indonesia as whole.

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