

August 29th 2018

THE 4th INTERNATIONAL AND CALL FOR PAPER

Legal Construction and Development in Comparative Study
The Role of Indigenous and Global Community in Constructing National Law

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

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THE 4th INTERNATIONAL AND CALL FOR PAPERS

"Legal Construction and Development In Comparative Study"
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29-30 August 2018

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

INVITED SPEAKERS :

- 1. Prof. Henning Glaser
Thammasat University, Thailand
- 2. Dr. Hilaire Tegnau, LL.M.
Faculty of Law, Sorbonne University
- 3. Prof. Shimada Yuzuru
Nagoya University, Japan
- 4. Prof. Dr. Topo Santoso, S.H., M.H.
Indonesia University (UI), Indonesia
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Faculty of Law, Sultan Agung Islamic University

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584

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AND CALL FOR PAPER**

“Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)”

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.**

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fifth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, August 31th 2018

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah is an absolute act that we must say after conducting the International Conference and Call for Paper by theme : “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” which was held by Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang, on August 29th 2018.

This conference tried to reviews different theories of legal development focusing on The Role of Indigenous and Global Community in Constructing National Law in order to highlight their similarities and differences. In the field of law, the substance of the discussion does not lie in 'whether the law is traditional because of the heritage of the past or not', but on the meaning of justice contained in the law. Often in discussing legal matters, we are caught up in the understanding of law in a procedural sense, not a law in a substantive sense-that satisfies the sense of justice. So it is not realized, there is a reduction of the meaning of the law substantively (which meets the sense of justice) becomes law procedurally. Especially when human life enters the era of globalization characterized by modern, as well as loaded with contemporary challenges and issues.

Globalization, in general people understand it is a process in the life of mankind to a society that covers the whole globe. This process is possible and facilitated by advances in technology, especially communication and transportation technology. Such understanding is not much different from the understanding of globalization as a process that refers to "a single interdependent world in which capital, technology, people, ideas, and cultural influences flow across borders". With such understanding, we are gradually going to live in a one world where individuals, groups and nations become more interdependent. In the global human society there will be patterns of social relationships that are different from before. And that too is a portrait of social life not found before.

Therefore, to discuss more about legal construction and development, Faculty of Law, Sultan Agung Islamic University was confidence to conduct a conference by the theme “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who had contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, August 31th 2018

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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THE LEGAL POLITICS OF THE RELIGIOUS JURISDICTION IN INDONESIA

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ABSTRACT

Judicial institution has the meaning of a place where someone can apply for an attempt to seek justice or resolve legal disputes according to applicable regulations. One of the judicial institutions in Indonesia is the Religious Court. Juridically, the reason why the Religious Courts are included in the judiciary environment in Indonesia is that the Republic of Indonesia, as a constitutional state based on Pancasila and the 1945 Constitution, aims to create a prosperous, safe, serene and orderly national life order. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: All citizens shall have the same position in law and Government and are obliged to uphold the Law and Government without exception. Meanwhile, Article 29 paragraph (1) and (3) of the 1945 Constitution of the Republic of Indonesia also states (1) the State is based on the One Godhead, (2) The State guarantees the independence of each resident to embrace their respective religions and to worship according to his religion and belief. Especially for the Religious Courts, the implementation of transfer to the Religious Courts to the Supreme Court is carried out based on Presidential Decree No. 21 of 2004 dated 23 March 2004. In paragraph (2) this Presidential Decree stipulates that the organization, administration and finance of the Directorate of Religious Courts Development of the Ministry of Religion, High Religious Courts / Provincial Syari'ah Courts and Religious Courts are under the Supreme Court.

Keywords: Political Law, Role, Religious Court.

A. INTRODUCTION

Judicial institution has the meaning of a place where someone can apply for an attempt to seek justice or resolve legal disputes according to applicable regulations. One of the judicial institutions in Indonesia is the Religious Court.¹

Talking about the history of the Religious Courts in Indonesia, anyone must honestly admit that its existence in this country has taken quite a long time, as long as the existence of Islam itself.² It is said so, because Islam is a religion of law in the true sense of the word.³ Therefore, the growth of Islam is always followed by the growth of Islamic law itself. The position of a judge in Islam is more a completeness than the implementation of Islamic law. Meanwhile, the trial is a collective obligation, that is, something that can exist and must be carried out under any circumstances.⁴ The existence of the Religious Courts Institution has been recognized since Islam entered Indonesia. However, the institution of the Religious Courts was only recognized after the existence of Law Number 14 of 1970 concerning Judicial Power which states that the Religious Court is one of the jurisdictions of the judiciary under the auspices of the Judicial Power. It was only after several years that the Religious Courts had their own laws in 1989.

¹ Erfaniah Zuhriah, *Peradilan Agama di Indonesia dalam Rentang Sejarah dan Pasang Surut*, Malang, UIN Malang Press, 2008, p. 6

² Cik Hasan Bisri, *Peradilan Agama di Indonesia*, Jakarta, PT. Raja Grafindo Persada, 2003, p. 113

³ Daud Ali, *Undang-Undang Peradilan Agama*, Panji Masyarakat, (ed.), No. 634 tanggal 1-10 Januari, 1990, Jakarta, p. 71

⁴ Zaini Ahmad Noeh dan Abdul Basit Adnan, *Sejarah Singkat Pengadilan Agama Islam di Indonesia*, Bina Ilmu, Surabaya, 1983, p. 29

In Indonesia, the reform movement began in 1998. Its main objective is to form a new Indonesian democratic government. To realize this goal, reform in the legal field becomes a priority and is carried out in stages according to the order of priority, because it is impossible to do it all simultaneously, considering that reform is not a revolution in essence.⁵In this regard, the Religious Courts as one of the executors of judicial power may be influenced by reforms.⁶

The birth of Law Number 7 of 1989 concerning Religious Courts has now been updated to Law Number 5 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts has brought major changes to the Religious Courts in Indonesia. In general, Law no. 7 of 1989 in conjunction with Law No. 3 of 2006 has brought major changes and rapid progress for the existence of the Religious Courts. With this Law, it is hoped that there will be legal unification within the Religious Courts within the framework of a national legal system and system.⁷

B. Problem Formulation

- 1) What is the juridical basis for the inclusion of the Religious Courts in the Indonesian judiciary?
- 2) What is the role of legal politics in the post-reformation religious courts?

C. DISCUSSION

1. The juridical basis for religious courts is included in the Indonesian judiciary

Juridically, the reason why the Religious Courts are included in the judiciary environment in Indonesia is that the Republic of Indonesia, as a constitutional state based on Pancasila and the 1945 Constitution, aims to create a prosperous, safe, serene, and orderly national life order. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: All citizens shall have the same position in law and Government and are obliged to uphold the Law and Government without exception.

Meanwhile Article 29 paragraph (1) and (3) of the 1945 Constitution of the Republic of Indonesia also states:

- 1) The state is based on the One Godhead;
- 2) The state guarantees the freedom of each resident to embrace his own religion and to worship according to his religion and belief.

So, in order to realize such an order of life and to ensure the equal position of citizens in the law, efforts are needed to uphold justice, truth, order and legal certainty that are able to provide protection for citizens. And one of the efforts to uphold justice, truth, order and legal certainty is through the Religious Courts.

In the 1945 NRI Constitution, the only article that clearly speaks of judicial power is Article 24. From this Article 24, we can conclude that the executor of judicial power is a Supreme Court and other judicial bodies according to the Law. , which means that these other judiciary bodies must be adapted to the legal needs and legal awareness of the community.⁸

The Organic Law which describes Article 24 of the 1945 Constitution of the Republic of Indonesia is Law No. 14 of 1970 in conjunction with Law No. 35 of 1999 concerning Amendments

⁵ Surya Adi, *Apa dan Bagaimana Reformasi*, Jakarta, Pustaka Intan, 2002, p. 18

⁶ Jaenal Aripin, *Reformasi Hukum dan Posisi Peradilan Agama di Indonesia*, UIN Syarif Hidayatullah, Jakarta, Jurnal Hukum, Vol.26 No.1, Januari-April 2009, p. 46

⁷ Sumadi Matrais, *Kemandirian Peradilan Agama Dalam Perspektif Undang-Undang Peradilan Agama*, Jurnal Hukum, Vol.15 No.1, Januari 2008, p. 122

⁸ Busthanul Arifin, *Peradilan Agama di Indonesia*, (ed), Mimbar Hukum, No. 10, 1993., p. 1

to Law No. 14 of 1970 concerning Basic Provisions of Judicial Power, which were later amended by Law No. 4 of 2004, which determines the existence of 4 judicial circles, namely the General Court, the Religious Court, the Military Court, and the State Administrative Court.

2.The Political Law of the Role of the Post-Reform Religious Courts

Development of the Religious Courts Post Reformation Order should be noted as a change with the birth of Law No. 35 of 1999 as amendments to 2 articles of Law no. 14 of 1970 concerning Basic Provisions of Judicial Power.⁹The presence of Law no. 35 of 1999 amending Articles (11) and (22) of Law no. 14 of 1970 Article 11 paragraph (1) prior to the revision reads "Bodies that carry out judiciary in Article 10 paragraph (1), the agencies in question are the General Courts, Religious Courts, Military Courts and State Administrative Courts, Organizers, Administrative and Finance exist and are under the authority of the respective departments concerned ". Subsequently there is an amendment to Article 11 paragraph (1) which reads "Judicial bodies as referred to in Article 10 paragraph (1), are under the authority of the Supreme Court, organizationally, administratively and financially.

From the article material, it can be concluded that Law no. 14 of 1970 determined that; First: religious judiciary bodies are under the authority of the Supreme Court in organizational, administrative and financial terms. This means that the power of the Ministry of Religion over the Religious Courts in these fields which has been running since the proclamation will be transferred to the Supreme Court. Second: The transfer of these agencies from the General Courts, Military Courts and State Administrative Courts to the Supreme Court and the provisions of the transfer of each judicial environment are further regulated in Law in accordance with the specificities of the respective jurisdictions and implemented gradually not later than not later than five (5) years after the issuance of the law. Whereas for the religious court the time is not determined. Third:

In response to the provisions of this Law, through a meeting of the Minister of Religion with Islamic scholars and leaders on December 28, 1999, three (3) opinions were born: First: That the power of the Ministry of Religion over religious courts is transferred to the Supreme Court within five years of the enactment of the Law No. 35 of 1999. The determination of the limit is based on the unfavorable socio-political problem. Second: The court of power of the Ministry of Religion over the Religious Court to the Supreme Court is adjusted to the provisions of Law no. 35 of 1999. Third: To improve Indonesian law, it must be carried out thoroughly and without patchwork, because it will create new problems.

Now Law no. 35 of 1999 has been amended by Law no. 4 of 2004 concerning the power of the Justice. After the enactment of this Law, several changes occurred, among others: in Article 10 paragraph (1) it is stated that the Judicial Power is exercised by a Supreme Court and the judiciary under it, and by a Constitutional Court. Meanwhile, paragraph (2) states that the judiciary under the Supreme Court includes judicial bodies within the General Courts, Religious Courts, State Administrative Courts and Military Courts.

Furthermore, specifically for the Religious Courts, the implementation of transfers to the Religious Courts to the Supreme Court is carried out based on Presidential Decree No. 21 of 2004 dated 23 March 2004. In paragraph (2) this Presidential Decree stipulates that the organization, administration and finance of the Directorate of Religious Courts Development of the Ministry of Religion, High Religious Courts / Provincial Syari'ah Courts and Religious Courts are under the Supreme Court.¹⁰

⁹ Abdullah Tri Wahyudi, *Peradilan Agama Di Indonesia*, Yogyakarta, Pustaka Pelajar, 2004., p. 8.

¹⁰ Abdul Manan, *Penerapan dan Pelaksanaan Pola Pembinaan dan pengendalian Administrasi Kepanitraan*, Diterbitkan Oleh Direktorat Jendral Badan Peradilan Agama Mahkamah Agung RI, 2007, Cet-3, Cet-3, p. 3.

D. CONCLUSION

1. Juridically, the reason why the Religious Courts are included in the judiciary environment in Indonesia is that the Republic of Indonesia, as a constitutional state based on Pancasila and the 1945 Constitution, aims to create a prosperous, safe, serene and orderly national life order. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: All citizens shall have the same position in law and Government and are obliged to uphold the Law and Government without exception. Meanwhile, Article 29 paragraph (1) and (3) of the 1945 Constitution of the Republic of Indonesia also states (1) the State is based on the One Godhead, (2) The State guarantees the independence of each resident to embrace their respective religions and to worship according to his religion and belief;
2. Especially for the Religious Courts, the implementation of transfers to the Religious Courts to the Supreme Court is carried out based on Presidential Decree No. 21 of 2004 dated 23 March 2004. In paragraph (2) this Presidential Decree stipulates that the organization, administration and finance of the Directorate of Religious Courts Development of the Ministry of Religion, High Religious Courts / Provincial Syaria'h Courts and Religious Courts are under the Supreme Court. Through a meeting forum of the Minister of Religion with Islamic scholars and leaders on December 28, 1999, three (3) opinions were born: First: That the power of the Ministry of Religion over the religious court was transferred to the Supreme Court within five years of the enactment of Law no. 35 of 1999. The determination of the limit is based on the unfavorable socio-political problem. Second: The court of power of the Ministry of Religion over the Religious Court to the Supreme Court is adjusted to the provisions of Law no. 35 of 1999. Third: To improve Indonesian law, it must be carried out thoroughly and not patchy, because it will create new problems.

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