

# Legal Transplant in the Substance of the Authority of Religious Courts in Indonesia

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## Abstract

This research is a study of the analysis of legal transplant in the substance of the authority of the Religious Courts in Indonesia as normative legal research using several approaches such as the legislative approach, the conceptual approach and the comparative approach. The results of this study find that in the authority of religious courts in Indonesia, there is the application of Islamic Law systems as one part of the legal source in resolving Islamic civil disputes in addition to using other legal norms derived from positive law. Islamic Law System is one of legal system that is not separated from the influence of other legal systems. Mixing between these legal systems occurs through legal transplant, such as the law of Conventional Banking based on Law Number 10 of 1998, which became the basis and reference for the establishment of the Sharia Banking legal system in Indonesia. These legal transplants are only distinguished by the enactment of Sharia Principles in Sharia Banking in particular and the Sharia Economy in general. In the latest development in the civil sector, there are various legal rules that are affected and originating from the Anglo-Saxon legal system which are transplanted into positive law and enforced in Indonesia.

**Keywords:** Legal Transplants, Religious Courts, Legal Substance.

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## 1. Introduction

The existence of the Religious Courts in the legal system in Indonesia is constitutionally regulated based on Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which reads: "Judicial Power is exercised by a Supreme Court and judicial body under it in a general judicial environment, the environment of the religious court, the military court environment, the state administrative court environment, and by a Constitutional Court."<sup>1</sup>

The Religious Court is a place or facility for Muslim people in resolving cases submitted to it. The main duties and functions of the judiciary according to the concept of the Religious Courts basically have similarities with the duties and functions of the judiciary in the General Courts environment, which is only limited to civil cases based on the applicable Civil Procedure Law.

In carrying out its duties and authorities, the judiciary is based on the provisions according to the applicable procedural law, which in the courts in the General Courts are used Civil Procedure Law. Sudikno Mertokusumo formulated that civil procedural law is a legal regulation that regulates how to guarantee compliance with material civil law by the judge.<sup>2</sup> Civil procedure law regulates how and who has the authority to enforce material law in the event of a violation of material law. The law of civil procedure in general is a legal regulation that regulates the process of settling civil cases through a judge (in court).<sup>3</sup>

The concept and development after Indonesian independence, the religious court began to get its arrangement in Law No. 14 of 1970 concerning the Basic Provisions of Judicial Power, which in Article 10 paragraph (1) states "Judicial Power is carried out by Courts in the environment:

- a. General Courts;
- b. Religious Courts;
- c. Military Courts;
- d. State Administrative Courts."

From the sociological aspect, the existence of the Religious Courts is to fulfill the legal needs of the community, as stated in Article 1 Number 1 of Law Number 50 of 2009, that "Religious Courts are a court for Muslim people."<sup>4</sup> In accordance with this provision, sociological -historical aspects Religious Courts are First, to meet the legal needs of Muslim communities in Indonesia; and Second, shows the nature of legal pluralism, which Lawrence M. Friedman explained that legal pluralism means the existence of different legal systems or cultures in a single political community."<sup>5</sup>

<sup>1</sup>The 1945 Constitution of the Republic of Indonesia (Article 24 paragraph (2))

<sup>2</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Liberty, Yogyakarta, 2002, pg. 2

<sup>3</sup> Zainal Asikin, *Hukum Acara Perdata di Indonesia*, Kencana, Jakarta, 2016, pg. 1

<sup>4</sup>The Act Number 50 of 2009 on Second Amendment to the Act Number 7 of 1989 on Religious Court (Article 1 Number 1)

<sup>5</sup> Lihat Undang-Undang Nomor 50 Tahun 2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan

Mochtar Kusumaatmadja also acknowledged the existence of legal pluralism by arguing that developing country communities with a pluralistic system in which customary law systems and institutions apply alongside Western legal systems and institutions and perhaps other foreign legal systems and institutions face a special problem. The problem here is because the law cannot be separated from the system of values embraced by a society. For example, we cannot simply impose a monogamous system on a Muslim community.<sup>1</sup>

After the independence of the Republic of Indonesia, of course it is questioned whether the legal basis until the legal system of Dutch colonial inheritance is still applied in Indonesia. This of course can refer to Article II of the Transitional Rules of the 1945 Constitution which reads "All state bodies and existing regulations are still in force, as long as there has not been an amendment to the 1945 Constitution based on the 1945 Constitution of the Republic of Indonesia, the arrangement in the Transitional Rules is stipulated in Article I which reads "All existing laws and regulations remain valid as long as they have not been held amendment to this Constitution."<sup>2</sup> When amendments to the 1945 Constitution are carried out based on the Constitution of the Republic of Indonesia In 1945, the arrangement in the Transitional Rules was determined in Article I which reads "All existing laws and regulations are still valid as long as they have not been held amendment according to this Constitution."<sup>3</sup>

The legal transplantation of colonial inheritance into the legal system in Indonesia in the Transitional Rules was carried out based on the principle of concordance, as did in code of Civil Law (*Burgerlijk Wetboek / BW*). BW Netherlands is also applied in Indonesia based on the principle of concordance. BW Indonesia was approved by the King on May 16, 1846, which was promulgated through *Staatsblad* Number 23 of 1847 and declared valid on May 1, 1848.<sup>4</sup>

Until now, in the Dutch legal system, the colonial legacy is still largely valid, such as the Civil Code, Criminal Code, Trade Code. According to the author, a number of legal instruments of colonial inheritance are enforced by colonists in their colonies, so the concept of legal transplantation can occur and be realized due to colonialism (imperialism).

If initially the Western Law system, especially the Netherlands, occupies the leading position in the Indonesian legal system, recently, especially after the reformation, the influence of the Anglo-Saxon legal system grew and developed, especially from the United States. One of them was Bankruptcy Law (*Failissement Verordening* (Stb.1905 No. 217 jo. Stb. 1906 No. 348). Ahmad Yani and Gunawan Widjaja,<sup>5</sup> stated that the government's initiative to revise the Bankruptcy Act actually arose due to pressure from the *International Monetary Fund / IMF*, which urges Indonesia to perfect the legal facilities that regulate the problems of obligations by debtors to creditors. The IMF feels that bankruptcy regulations which are the legacy of the Dutch colonial government so far have been inadequate and unable to meet the demands of the times

## 2. Conceptual Framework

### 2.1. Theory of Legal Pluralism

The term Law Pluralism Theory in English is referred to as *Legal Pluralism Theory*, in Dutch is called *Theorie van het Rechtspluralism*, whereas in German it is called *theorie des Rechtspluralismus*.<sup>6</sup>

The definition of legal Pluralism according to John Griffiths, is a condition that occurs in any social area, where all community actions in the region are governed by more than one legal order.<sup>7</sup> While according to Muhammad Bakri, legal pluralism is to apply various (more than one) certain laws to all people of a particular country.<sup>8</sup>

The author himself formulates legal pluralism as the enactment of various legal systems in a country. The reason is, the law in the country concerned consists of various types of systems. The next reason is that legal systems are closely related to the essence of Legal Pluralism. One of the advocates of pluralism, is Werner Meski, who put forward a *legal pluralism approach*, which relies on the linkage between *state (positive law)*, social aspects (*socio-legal approach*), and *natural law (moral / ethical / religion)*.<sup>9</sup>

Legal pluralism in a global perspective which can be put forward by the author as an example is the influence of Human Rights which is then included in Chapter XA of the 1945 Constitution of the Republic of Indonesia. Andi Hamzah,<sup>10</sup> argues that in this modern era, human rights problems have been widespread

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Agama (Pasal 1 Angka 1)

<sup>1</sup> Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*, Alumni, Bandung, 2006, pg. 23

<sup>2</sup> The 1945 Constitution of The Republic of Indonesia (Article II Constitutional Transitions)

<sup>3</sup> The 1945 Constitution of The Republic of Indonesia (Article I Constitutional Transitions)

<sup>4</sup> Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Citra Aditya Bakti, Bandung, 1990

<sup>5</sup> Ahmad Yani dan Gunawan Widjaja, *Seri Hukum Bisnis. Kepailitan*, RajaGrafindo Persada, Jakarta, 2000, pg. 1-2

<sup>6</sup> Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Buku Kesatu, *Op Cit*, pg. 95

<sup>7</sup> Henry Campbell Black, *Op Cit*, p. 1039

<sup>8</sup> Henry Campbell Black, *Op Cit*, p. 1039

<sup>9</sup> Suteki, *Masa Depan Hukum Progresif*, Thafa Media, Yogyakarta, 2015, pg. 135

<sup>10</sup> Andi Hamzah, *Perlindungan Hak-Hak Asasi Manusia Dalam Hukum Acara Pidana. Perbandingan Dengan Beberapa Negara*, Penerbit

discussed in the world community. International law on human rights has even been formed (*International Human Rights Law*).

## 2.2. Legal System Theory.

The term "System" in English is called "*System*" which means: *Orderly combination or arrangement, as of particulars, parts, or elements into a whole.*"<sup>1</sup>. "The system itself is a unit consisting of components or elements that are connected together to facilitate flow information, material or energy to achieve a goal."<sup>2</sup>

The system in a legal perspective is called the *Legal System*. Sudikno Mertokusumo explains, law is a system meaning that law is an order, a whole unit consisting of parts or elements that are closely related to each other.<sup>3</sup>

Experts distinguish legal systems, as stated by Achmad Ali for:

- a. *Civil law*, applies to continental Europe and in the former colonies;
- b. *Common Law*, applies in the United Kingdom, United States, and English Speaking countries (*Commonwealth*);
- c. *Customary Law*, in several African countries, China and India;
- d. *Muslim Law*, in Muslim countries, especially in the Middle East;
- e. *Mixed System*. One of them in Indonesia, where the system applies law, customary law and islamic law<sup>4</sup>

The author argues that the urgency of the legal system is to provide an overview and understanding of the legal systems that apply in Indonesia which consist of: Western Legal Systems, Customary Law Systems, and Islamic Legal Systems, which are still distinguished on the basis of sub-systems, as in Marriage Law in Indonesia, Marriage Law applies based on the West Civil Law System in accordance with the provisions in the Civil Code, and Marriage Law based on Islamic Law and also according to Customary Law.

One expert on system theory, Lawrence Meir Friedman, states that a legal system in its actual operation is a complex organism in which structure, substance and culture interact.<sup>5</sup> Legal structure as an element of the legal system, for example, is an institution or law enforcement official, such as a Judge in the Religious Court, Indonesian National Police Investigator.

Another element of the legal system, according to Friedman, is the legal substance, which is the whole rule of law (including the principles of law and legal norms), both written and unwritten, including court decisions.<sup>6</sup> Regulations such as Law Number 21 of 2008 concerning Islamic Banking, are part of the legal substance.

## 2.3 Theory of Legal Transplant.

The definition of legal transplants according to Frederick Schauer, is "*the process by which laws and legal institutions developed in the country are then adopted by another.*"<sup>7</sup> Based on this formula, legal transplant is not only a mere process of legal adoption, but also the adoption of the accompanying legal institutions.

Another expert is Gunawan Widjaja with his dissertation entitled "Trust Transplant in Code of Civil Law, trade code, and Indonesian Capital Market Law," quoted the Law Transplant expert, Alan Watson with his formulation that legal transplant is "*the moving of a rule or system of law from one country to another, or from one people to another.*"<sup>8</sup>

The definition of legal transplant according to Alan Watson emphasizes the movement of a rule of law or a legal system from one country to another, or from a population to another population. Alan Watson further explained that the law transplanted in a particular country must be different from the law of his home country. It is impossible for a law that has been transplanted and grown in a country that is exactly the same as the law in its home country.<sup>9</sup>

According to the author, the urgency of the legal transplant theory is very relevant and important if studied with the existence of laws and legal systems in Indonesia. As a region that has been colonized by the Dutch for a long time, of course the influence of the Dutch legal system has been felt until today.

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Universitas Trisakti, Jakarta, 2010, pg. 14

<sup>1</sup>Henry Campbell Black, *Op Cit*, p. 1300

<sup>2</sup>"Sistem", dimuat pada : <https://id.wikipedia.org>. Diakses tanggal 26 April 2018

<sup>3</sup>Sudikno Mertokusumo, *Mengenal Hukum. Suatu Pengantar*, *Op Cit*, pg. 122

<sup>4</sup>Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence)*, *Op Cit*, pg. 203

<sup>5</sup>Lawrence M. Friedman, *Op Cit*, pg. 17

<sup>6</sup>Achmad Ali, *Op Cit*, pg. 226

<sup>7</sup>Theofransus Litaay, "*Transplantasi Hukum dan Pluralisme Hukum Dalam Hukum Perusahaan di Indonesia*", dimuat pada : <http://amalatu2005blogspot.com.2005/06/transplantasi-hukum-dan-pluralisme-html>. accessed on 26 april 2018

<sup>8</sup>Gunawan Widjaja, *Transplantasi, Trust dalam KUH Perdata, KUHD dan Undang-Undang Pasar Modal Indonesia*, RajaGrafindo Persada, Jakarta, 2008, pg. 26

<sup>9</sup>Gunawan Widjaja, *Ibid*, pg. 31

The author argues that the legal transplant theory is closely related to the theory of legal pluralism and the theory of legal systems, so that the discussion of legal transplant basically also discusses about legal pluralism and the legal system.

### 3. Research Methodology

This research is a type of normative legal research, namely legal research conducted by researching and using legal materials, namely primary legal materials, secondary legal materials, tertiary legal materials obtained from library research. In this study several approaches are used which include: *Statutory Approach*, *Conceptual Approach*, and *Comparative Approach*.

The significance of the Legislative Approach was also acknowledged by Peter Mahmud Marzuki, who argued that legal research at the dogmatic level of law or research for the purposes of legal practice cannot escape the statutory approach.<sup>1</sup> According to Sudikno Mertokusumo, dogmatic law is a branch of Law that studies positive law (written and unwritten law) and the settlement or resolution of legal problems (jurisprudence). The approach is always associated with the applicable positive law.<sup>2</sup>

The author applies the conceptual approach in this study by presenting a number of concepts and understandings such as the concept and understanding of the authority of the Religious Courts, the concept and understanding of legal systems, and the concepts and understanding of legal transplant.

Next is the comparative Approach. The author uses this approach by comparing laws and regulations with one another, or comparing legal systems that apply in Indonesia such as West Civil Law, Customary Law, and Islamic Law.

### 4. Discussion

The legal content of the Religious Courts regarding its duties and functions also changes from one regulation to another. Law Number 7 of 1989 concerning the Religious Courts, which was ratified and promulgated on December 29, 1989, in Article 49 paragraph (1) states that "the Religious Court has the duty and authority to examine, decide and settle cases in the first level between Muslim in the fields of:

- a. Marriage;
- b. Inheritance, will, and grants based on Islamic law;
- c. Waqf and *shadaqah*."

Duties and authorities of the Religious Courts in the field of marriage are very complex, such as in the case of marriage registration. Law No. 1 of 1974 stipulates in Article 2 paragraph (2) that "Each marriage is recorded according to the applicable laws and regulations."

Compilation of Islamic Law also regulates it in Article 5, the verses which read as follows:

- (1) To ensure marital order for the Islamic community every marriage must be recorded.
- (2) The registration of the marriage in paragraph (1) shall be carried out by the Marriage Registrar as stipulated in Law Number 22 of 1946 jo. Law Number 32 of 1954."<sup>3</sup>

Regarding the marriage registration, Erfani Aljan Abdullah explained two aspects, as follows:<sup>4</sup>

First, the marriage registration obligation itself is not born as an original law, but has gone through a certain stage, then it is stated as an obligation as well. From this point of view, efforts to keep records as an obligation also. In this regard, efforts to keep records as part of the marriage contract became very weak. Just *Mahar*, which has a clear origin of the Al-Qur'an, in fact it is not included in the elements of legal harmony.

Second, marriage registration is in a position outside the marriage room. Even though he is an order that is 'punished' shows the meaning / law is obligatory, or does not do it is a legal prohibition, but this does not make him relevant in the corridor of a substantially physically married device. Marriage registration is thus a stand-alone legal institution .

Thought and debate about the validity of marriage registration from the perspective of Islamic law. While various laws and regulations stipulate marriage registration as an obligation. Besides being regulated in Law Number 1 of 1973 concerning Marriage (Article 2 paragraph (2)), Government Regulation Number 9 of 1974 concerning Implementation of Law Number 1 of 1973 concerning Marriage (Chapter II) from Article 2 to Article 9, also stipulated in Law Number 22 of 1946 in conjunction with Law Number 32 of 1954 concerning Registration of Marriage, Divorce and Referral.

The search results of the author, it turns out that the Constitutional Court Decision Number 46 / PUU-VII / 2010 on the Case between Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim and Muhammad Iqbal bin Moerdiono, the Petitioners submitted a petition for judicial review on the basis of constitutional rights as citizens which were deemed violated by the provisions of Article 2 paragraph (2) of Law Number 1 of 1974

<sup>1</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2010, pg. 96

<sup>2</sup>Sudikno Mertokusumo, *Teori Hukum, Op Cit*, pg. 39

<sup>3</sup>Lihat Kompilasi Hukum Islam (Pasal 5)

<sup>4</sup>Erfani Aljan Abdullah, *Pembaruan Hukum Perdata Islam. Praktik dan Gagasan*, UII Press, Yogyakarta, 2017, pg. 13

concerning Marriage which has contradicted the provisions of Article 28B paragraph (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution.<sup>1</sup>

Request for judicial review of the provisions of Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage, which regulates Marriage Registration and the provisions of Article 43 paragraph (1) of Law Number 1 of 1974 which reads "Children born outside of marriage only has a civil relationship with his mother and his mother's family. "

The request for a material test was interesting because of the position of Machica bin Mochtar as an artist, while Moerdiono was one of the Ministers in the New Order era. Marriage between Machica and Moerdiono gave birth to a son named Muhammad Iqbal bin Moerdiono. This case occurs because the marriage was not recorded according to the provisions of the legislation, so the status of the child resulting from the marriage was an extramarital child as referred to Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage.

D.Y. Witanto explained that extramarital children are children born outside of legal marriage apart from adultery children and discordant children. extramarital children in this category can be recognized by their biological parents, so there is a possibility of having a civil relationship with their father or biological mother.<sup>2</sup>

Decision of the Constitutional Court Number 46 / PUU-VII / 2010, states that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1 Additional State Gazette of the Republic of Indonesia Number 3019) which states "Children born outside of marriage only have a civil relationship with their mother and their mother's family ", contrary to the 1945 Constitution of the Republic of Indonesia as long as it means eliminating civil relations with men that can be proven based on science and technology and / or other evidence according to the law it turns out that he has a blood relationship as his father.

Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Additional State Gazette of the Republic of Indonesia Number 3019) which states "Children born outside marriage only have a civil relationship with their mother and their mother's family," does not have binding legal force insofar as it is interpreted as eliminating civil relations with men which can be proven based on science and technology and / or other evidence according to the law to have a blood relationship as their father, so the verse must be read, " Children born outside marriage have a civil relationship with their mother and their mother's family and with men as their father which can be proven based on science and technology and / or other evidence according to the law to have blood relations, including civil relations with his father's family."<sup>3</sup>

The author's search results on the provisions of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, apparently has the same legal substance, as stipulated in Article 280 of Civil Code, which reads "With the recognition made of a extramarital child , a civil relationship arises between the child and his/her father or mother."<sup>4</sup>

Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage turns out to have its editorial similarity to the provisions of Article 100 of the Compilation of Islamic Law, which states that "Children born outside of marriage only have blood relations with their mothers and their mother's family." The provisions actually only adopted Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage.

Rosnidar Sembiring,<sup>5</sup> argues that regarding the Constitutional Court Decision Number 46 / PUU-VII / 2012 that, it appears that this ruling is not called abolishing or amending the provisions of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, only changing the meaning of article provisions as long as it meets the requirements (*conditionally unconstitutional*), as long as the paragraph is interpreted as eliminating civil relations with men that can be proven based on science and technology and / or other evidence according to the law to have blood relations including civil relations and his/her father's family.

Law No. 7 of 1989 concerning the Religious Courts, also regulates the substance of law as part of the duties and authorities of the Religious Courts in addition to marriage, is inheritance, testament, and grants, which are based on Islamic law (Article 49 Letter b). The term inheritance comes from the word "inheritance" which comes from the word *warisa-yarisuwarsan or irsan / turas*, which means to inherit. Inheritance is provisions concerning the distribution of inheritance which includes provisions concerning who is entitled and not entitled to receive inheritance and how much each asset is received.<sup>6</sup>

Inheritance Law in Indonesia as well as Marriage Law is pluralist, because it is regulated based on various legal systems, such as inheritance according to Civil Code, inheritance according to customary law, and

<sup>1</sup>the Constitutional Court Decision Number 46 / PUU-VII / 2010 (Request of petitioner)

<sup>2</sup>D.Y. Witanto, *Hukum Keluarga. Hak dan Kedudukan Anak Luar Kawin Pasca Keluarnya Putusan MK Tentang Uji Materiil UU Perkawinan*, Prestasi Pustaka Publisher, Jakarta, 2012, pg. 45

<sup>3</sup>the Constitutional Court Decision Number 46/PUU-VII/2012.

<sup>4</sup>R. Subekti dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, Pradnya Paramita, Jakarta, 2002, pg. 69

<sup>5</sup>Rosnidar Sembiring, *Hukum Keluarga. Harta-Harta Benda Dalam Perkawinan*, RajaGrafindo Persada, Jakarta, 2016, pg. 141-142

<sup>6</sup>Muhammad Sholahuddin, *Op Cit*, pg. 189

inheritance based on the Islamic legal system.

The compilation of Islamic Law determines in Book II Article 171 Letter a, that the Law of Inheritance is a law that regulates the transfer of ownership rights to inheritance (*tirkah*) of the devisor, determining who has the right to become heirs and what their respective parts are.<sup>1</sup>One of the provisions in the Compilation of Islamic Law which has similarities with the provisions of the rights of the extramarital child only to his mother or his mother's family related to Islamic inheritance, is determined in Article 186 Compilation of Islamic law, "Children born outside of marriage only have mutual relations inherit with his mother and family from his mother's side."

The other duties and authorities of Religious Courts are in the field of wills and grants carried out in accordance with Islamic law. The testament originates from word *Wasiyah* means message. Testament is a statement or word of someone to another person that he/she gives his/her wealth to someone else; waive that person's debt or provide the benefits of something he/she owns after he/she dies.<sup>2</sup>

Inheritance is closely related to a testament, which is also regulated in various legal systems, both according to the West Civil law system, the Customary law system and the Islamic Law system. Article 875 of Civil Code formulates that "The so-called testament is a deed that contains a person's statement about what he/she wants will happen after he/she dies, and which by him/her can be revoked."<sup>3</sup>

In the Book II of Compilation of Islamic Law, formulated in Article 171 Letter f, that "Testament is the giving of an object from the devisor to another person or institution that will take effect after the devisor dies." According to Article 195 verses Compilation of Islamic Law, states that:

- (1) A testament is carried out verbally in the presence of two witnesses, or written in the presence of two witnesses, in front of a Notary.
- (2) A testament is only permitted as many as one third of the inheritance unless all heirs agree.
- (3) Testaments to heirs apply if agreed to by all heirs.
- (4) Statement of agreement in paragraphs (2) and (3) of this article is made verbally in the presence of two witnesses or written in front of two witnesses and the Notary. "

Regarding inheritance objects and testament is very interesting because the object from a conventional inheritance or testament, such as movable or immovable objects in Article 2000 of Compilation of Islamic Law, stated that "A testament is in the form of immovable property, if for some reason because the legitimate experience of depreciation or damage that occurs before the devisor dies, the recipient of the testament will only receive the remaining assets. "Very interesting because according to the author, there are several provisions in the field of Intellectual Property Rights which also regulates the transition rights or ways to obtain rights.

Discussion about the substance of the authority of the Religious Courts according to Article 49 of Law Number 7 of 1989 concerning the Religious Courts, whose scope is only limited to: fields: marriage, inheritance, testament, and grant based on Islamic Law, *waqf* and *shadaqah*, in its development based on Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts, which was ratified and promulgated on March 20, 2006, saw the expansion of its trial.

Article 49 of Law Number 3 of 2006 states "The Religious Court has the duty and authority to examine, adjudicate and settle cases in the first level between Muslim people in the fields of:

- a. Marriage;
- b. Inheritance;
- c. Testament;
- d. Grant;
- e. *Waqf*;
- f. *Zakat*;
- g. *Shadaqah*; or
- h. Islamic Economics."

The addition of some of these fields only covers the fields: *zakat*, *infaq*, and *sharia economics*. *Zakat* itself is the basic word *zaka* which means blessing, growing, clean, good and growing.<sup>4</sup> According to the Explanation of Article 49 of Law Number 3 of 2006 Letter f, that what is meant by "*zakat*" is a property that must be set aside by a Muslim or legal entity owned by a Muslim in accordance with sharia provisions to be given to those entitled to receive it.

The existence of *zakat* as well as *waqf*, has been regulated in legislation, namely Law Number 23 of 2011 concerning Management of *Zakat*, which formulates in Article 1 Number 2, that "*Zakat* is a property that must be issued by a Muslim or business entity to be granted to those who have the right to receive it in accordance

<sup>1</sup>The compilation of Islamic Law (Book II Article 171 Letter a)

<sup>2</sup>Muhammad Sholahuddin, *Op Cit*, pg. 189-190

<sup>3</sup>R. Subekti dan R. Tjitrosudibio, *Op Cit*, pg. 232

<sup>4</sup>Muhammad Sholahuddin, *Op Cit*, pg. 192

with Islamic law.”<sup>1</sup>

The concept of *zakat* in the Islamic Law system is interesting, because *zakat* has similarities with the concept of tax, so that Muslims, besides being taxed, are also burdened with the obligation to pay *zakat*. Such a double burden only applies to Muslims, and the presence of Law Number 23 of 2011 is only a substitute for Law Number 38 of 1999 concerning Management of *Zakat*.

Article 49 of Law Number 3 of 2006 specifies a new field, namely the Islamic economy, and is formulated in Letter i, that what is meant by “sharia economy” is an action or business activity carried out according to sharia principles, including:

- a. Sharia Bank;
- b. Sharia microfinance institutions;
- c. Sharia Insurance;
- d. Sharia Reinsurance;
- e. Sharia Mutual funds;
- f. Sharia bonds and sharia medium-term securities;
- g. Sharia Securites;
- h. Sharia finance;
- i. Sharia Pawnshop;
- j. Pension fund for sharia financial institutuins;and
- k. Sharia business.

The legal substance of the authority of the Religious Courts will arrive at an important and crucial part, namely the procedural law. Law Number 7 of 1989 concerning Religious Courts, stipulates the Procedural Law in Chapter IV of Article 54 up to Article 64 of Law Number 3 of 2006 which has not changed the articles governing procedural law in Law Number 7 In 1989, but there were changes in Law Number 50 of 2009 namely by adding several new Articles.

Article 54 of Law Number 7 of 1989, which means also, Law Number 50 of 2009 states that “Procedural Laws in Courts within the Religious Courts are Civil Procedure Laws that apply to Courts within the General Courts, except those which have been regulated specifically in this Act.”This provision is not given an explanation, but shows the procedural law that applies to the Religious Courts is the procedural law that applies to the General Courts.

Civil procedure law is a legal regulation that regulates how to guarantee compliance with material civil law with the involvement of judges. In other words, civil procedural law is a legal regulation that determines how to guarantee the implementation of material civil law. <sup>2</sup>Abdul Manan formulated that civil procedural law is a law that regulates the procedure for filing a lawsuit against the court, how the defendant defended himself from the plaintiff’s claim, how the judges acted and how the judge decided the case and executed the decision.<sup>3</sup>

The author disagrees with Abdul Manan’s formulation, because the fundamental difference is the existence of contentious claims and voluntary claims. The contentious lawsuit is true according to Abdul Manan, but does not include voluntary claims. M. Yahya Harahap explained that contentious claims are different or opposite to voluntary claims that are one-sided (ex-parte).<sup>4</sup>There are only one voluntary lawsuit, so there are no disputes or conflicts that occur, for example in the form of a judge to require a divorced husband to finance the lives and education of his children.

Having case in court, of course, using the applicable legal procedure, because the Religious Courts also apply a procedural legal system in the General Courts environment, which means implementing provisions in the HIR / RBg and some other legal sources of civil procedure. Based on the provisions of Article 54 of Act Number 7 of 1989, according to H.A. Mukti Arto, there are 2 (two) procedural laws in the court of Religion, namely:

1. Law of civil procedure that applies to the Court in the General Court environment as *lex generalis*; and
2. Special procedural law stipulated in Law Number 7 of 1989, which specifically applies to courts in the Religious Courts environment as *lex specialis*.<sup>5</sup>

Completion of cases in the court, in this case in the Religious Courts in the procedure, uses more provisions in the HIR / RBg and other rules.

## 5. Conclusion

Based on the discussion that has been discussed previously, conclusions can be drawn in this study, as follows:

1. Religious Courts as one of the judiciary states have their constitutional rights and foundation in Indonesia

<sup>1</sup>Law Number 23 of 2011 concerning Management of *Zakat* (Article 1 Number 2)

<sup>2</sup>Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia, Op Cit*, pg. 2

<sup>3</sup>Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Kencana, Jakarta, 2005, pg. 2

<sup>4</sup>M. Yahya Harahap, *Op Cit*, pg. 46

<sup>5</sup>H.A. Mukti Arto, *Pembaruan Hukum Islam melalui Putusan Hakim, Op Cit*, pg. 116

which birth has long been known, long before the Dutch East Indies period. The duties and authority of the Religious Courts are increasingly extended to the field of sharia economics

2. Religious Courts in practice in Indonesia is a segmentation of the Islamic legal system, but in some cases there has been adoption and mixed legal system with the West Civil law system as well as the Anglo-Saxon legal system through legal transplant. For example, the procedural law of the Religious Courts still uses procedural law that applies to civil cases, namely HIR / RBg.

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