The 2nd Proceeding
“Indonesia Clean of Corruption in 2020”

"Comparative Law System of Procurement of Goods
and Services around Countries in Asia, Australia and Europe“

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# TABLE OF CONTENTS

Front Page ..............................................................................................................   i  
Information of the International Seminar .................................................................  ii  
Committee Composition..........................................................................................   iii  
Preface ...................................................................................................................... iv  
Greeting From The Dean Faculty of Law ................................................................. vi  

**INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS**  
Prof. Simon Butt .............................................................. 1  

**CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?**  
Prof. Dr. Hikmahanto.,S.H.,LLM ......................................................... 4  

**AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.**  
Rohimi Shapiee.............................................................................................................................................. 7  

**STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020**  
Dr. Jawade Hafidz, S.H., M.H .................................................................................. 11  

**THE NETHERLANDS INGLOBAL CORRUPTION**  
Siti Malikah Marlou Feer, M.A. .................................................................................. 28  

**ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA**  
Laras Susanti.,S.H., LLM.................................................................................................. 33  

**LEGAL STATUS OF AKTOR’S FOR CORRUPTION**  
*(In the Perspective of Islamic Law)*  
Sumarwoto Umar ....................................................................................................... 37  

**THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY**  
Lantik Kusuma Aji ........................................................................................................ 46  

Khalid .......................................................................................................................... 55  

**THE URGENCY OF ANTI-CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA**  
Siska Diana Sari ............................................................................................................. 62  

**THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST**  
Elis Rahmahwati .......................................................................................................... 78  

**DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT**  
Agung Widodo ............................................................................................................. 87  

**DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA**  
*(Studies in Multidisciplinary Perspective)*  
Muhammad Andri ........................................................................................................ 102
<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT</td>
<td>Yati Nurhayati</td>
</tr>
<tr>
<td>OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</td>
<td></td>
</tr>
<tr>
<td>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL</td>
<td>Dr. Sukresno, SH, M.Hum</td>
</tr>
<tr>
<td>THROUGH ENFORCEMENT OF ETHICS</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION POTENCIES IN LAND USE POLICY</td>
<td>Haris Budiman</td>
</tr>
<tr>
<td>(A Case Study in Kuningan Regency)</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION PREVENTION AND CONTROLS</td>
<td>INP Budiartha</td>
</tr>
<tr>
<td>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION</td>
<td>Sri Endah Wahyuningsih</td>
</tr>
<tr>
<td>OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</td>
<td></td>
</tr>
<tr>
<td>JUSTICE AND CHARITY IN JAKARTA'S NORTH COAST RECLAMATION PROCESS</td>
<td>Untoro</td>
</tr>
<tr>
<td>THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</td>
<td></td>
</tr>
<tr>
<td>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</td>
<td>Zulfiani</td>
</tr>
<tr>
<td>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</td>
<td>Anis Mashdurohatun</td>
</tr>
<tr>
<td>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT</td>
<td>Muh. Afif Mahfud</td>
</tr>
<tr>
<td>OF CORRUPTION ERADICATION IN INDONESIA</td>
<td></td>
</tr>
<tr>
<td>DISCOURSE POLITICAL LAW IN INDONESIA</td>
<td>Adrianus M. Nggoro, SH, M.Pd</td>
</tr>
<tr>
<td>ON A COMPLETION OF PLATO PHILOSOPHY</td>
<td></td>
</tr>
<tr>
<td>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</td>
<td>Agus Saiful Abib</td>
</tr>
<tr>
<td>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT</td>
<td>Aris Yulia</td>
</tr>
<tr>
<td>OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED</td>
<td></td>
</tr>
<tr>
<td>ON THE PRINCIPLE OF GOOD GOVERNANCE</td>
<td></td>
</tr>
<tr>
<td>ANALYSIS WIRETAPING AUTHORITY UPPER KPK LAW ENFORCEMENT</td>
<td>Ariyanto, SH, MH</td>
</tr>
<tr>
<td>IN THE PERSPECTIVE OF HUMAN RIGHTS</td>
<td></td>
</tr>
<tr>
<td>SOCIAL WORKING PENALTY AS SOLUTION</td>
<td>Desy Maryani</td>
</tr>
<tr>
<td>IN ERADICATING CORRUPTION IN INDONESIA</td>
<td></td>
</tr>
<tr>
<td>LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDBOVER</td>
<td>Endah Pujiastruti</td>
</tr>
<tr>
<td>TO OTHER COMPANIES IN INDONESIA</td>
<td></td>
</tr>
</tbody>
</table>

The 2nd Proceeding
"Indonesia Clean of Corruption in 2020"
<table>
<thead>
<tr>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</td>
<td>Pupu Sriwulan Sumaya ............................................................................</td>
<td>256</td>
</tr>
<tr>
<td>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</td>
<td>Ifrani .....................................................................................................</td>
<td>267</td>
</tr>
<tr>
<td>THE EFFORTS OF ERADICATING CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS’ ASSETS</td>
<td>Yasmirah Mandasari Saragih..................................................................</td>
<td>276</td>
</tr>
<tr>
<td>AFFIRM ROLE OF EXISTENCE RECHTSVERWERKING TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</td>
<td>Rofiq Iaksamani, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus</td>
<td>287</td>
</tr>
<tr>
<td>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</td>
<td>Ida Musofiana..........................................................................................</td>
<td>304</td>
</tr>
<tr>
<td>FREED INDONESIA’S CORRUPTION BETWEEN HOPE AND REALITY</td>
<td>Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH.................................</td>
<td>313</td>
</tr>
<tr>
<td>UTILIZATION OF INDONESIA’S MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TO WARDS THE SHAFT OF THE MARITIME WORLD</td>
<td>Dr. Lathifah Hanani, SH.M.Hum., M.Kn. and Letkol (mar) MS. Noorman, S. Sos., M.Opsla</td>
<td>319</td>
</tr>
<tr>
<td>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</td>
<td>Lilik Warsito............................................................................................</td>
<td>325</td>
</tr>
<tr>
<td>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</td>
<td>Sri Suatmiati ..........................................................................................</td>
<td>334</td>
</tr>
<tr>
<td>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</td>
<td>Siti Zulaekhah........................................................................................</td>
<td>344</td>
</tr>
<tr>
<td>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</td>
<td>Supriyanto, Hartwiningsih, Supanto..................................................................</td>
<td>354</td>
</tr>
<tr>
<td>JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</td>
<td>Siti Rodhiyah Dwi Istinah........................................................................</td>
<td>364</td>
</tr>
<tr>
<td>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</td>
<td>Aryani Witasari..........................................................................................</td>
<td>376</td>
</tr>
<tr>
<td>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</td>
<td>Achmad J Pamungkas (Indonesia), Carlito Da Costa (Timor Leste) ..................</td>
<td>390</td>
</tr>
</tbody>
</table>
STUDYING THE WISDOM OF ZAKAT
Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) ........................................... 398

HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON
DIGNIFIED JUSTICE
Agus Winoto ............................................................................................................................ 410

RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY
IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON
WELFARE
Mohamad Khamim ................................................................................................................... 420

THE TASK RECONSTRUCTION AND BPKP’S AUTHORITY IN THE CASE
OF JUSTICE VAUE BASED CORRUPTION
Sarbudin Panjaitan .................................................................................................................... 429

THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE
AND MUT’AH IN DIVORCE CASE FOR JUSTICE AND WELFARE
Mustar ........................................................................................................................................ 438

JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE
A NOTARY DEED
Subiyanto .................................................................................................................................... 446

REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED
ISLAMIC JUSTICE
Masduqi ....................................................................................................................................... 452

RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION
IMPLEMENTATION OF VALUE-BASED JUSTICE
Kukuh Sudarmanto Alugoro ...................................................................................................... 462

ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW
ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999
JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE
As’adi M. Al-ma’ruf ................................................................................................................... 472

RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT
LAW BASED ON JUSTICE
Christina N M Tobing ............................................................................................................... 479

THE LAW AND THE IMPACT OF MARRIAGE SIRRI
Sahal Afhami ................................................................................................................................ 489

CRIMES AGAINST CHILDREN AS ACTORS
Muhammad Cholil .................................................................................................................... 503

RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW
(KUHAP) ABOUT THE DETENTION
Muhammad Khambali ............................................................................................................... 512
BASED ON JUSTICE
PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)
Esti Ningrum .......................................................................................................................... 520

RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA
Urip Giyono ............................................................................................................................ 531

IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)
Muhammad Yaman ......................................................................................................................... 539

RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE
Hanuring Ayu Ardhani Putri ............................................................................................................. 549

REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR
Ansharullah Ida ............................................................................................................................ 556

RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE
Teguh Anindito ............................................................................................................................. 569

RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito .................................................. 579

IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW
Aji Sudarmaji ............................................................................................................................... 587

FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)
Bachtiar Simatupang .................................................................................................................... 594

RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE
M. Hasyim Muallim ....................................................................................................................... 616

RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW
Salomo Ginting ............................................................................................................................ 625

LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA
Muhas ........................................................................................................................................... 639
IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER’S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)
Ahmad Zaini .................................................................................................................. 648

IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT
Ruslan ................................................................................................................................ 658

RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE
Jufri Ghalib ....................................................................................................................... 667

RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE
Elpina ..................................................................................................................................... 679

RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE
Ramon Nofrial .................................................................................................................... 693

RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY
Hakim Tua Harahap .......................................................................................................... 706

RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE
Ulina Marbun ..................................................................................................................... 726

RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE
Zaenal Arifin ....................................................................................................................... 740

THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE
Abdul Kholiq ...................................................................................................................... 751

THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA
Adi Mansar ....................................................................................................................... 767

MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)
Mariah S.M. Purba .......................................................................................................... 778

POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)
Warman .............................................................................................................................. 790
<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</td>
<td>Sekhroni</td>
<td>798</td>
</tr>
<tr>
<td>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN’S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</td>
<td>Indriyana Dwi Mustikarini</td>
<td>809</td>
</tr>
<tr>
<td>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</td>
<td>Bambang Sulistyowidjanarko</td>
<td>816</td>
</tr>
<tr>
<td>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</td>
<td>Adya Paramita Prabandari</td>
<td>826</td>
</tr>
<tr>
<td>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</td>
<td>Alwan Hadiyanto</td>
<td>839</td>
</tr>
<tr>
<td>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</td>
<td>Sulistyowati</td>
<td>852</td>
</tr>
<tr>
<td>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</td>
<td>Sarjiyati</td>
<td>863</td>
</tr>
<tr>
<td>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</td>
<td>Erna Trimartini</td>
<td>873</td>
</tr>
<tr>
<td>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</td>
<td>Sukmareni</td>
<td>885</td>
</tr>
<tr>
<td>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</td>
<td>Anis Rifai</td>
<td>903</td>
</tr>
<tr>
<td>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</td>
<td>Sri Setiawati</td>
<td>913</td>
</tr>
<tr>
<td>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</td>
<td>Achmad Sulchan</td>
<td>922</td>
</tr>
<tr>
<td>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</td>
<td>Herwin Sulistyowati</td>
<td>932</td>
</tr>
<tr>
<td>STANCE AND AUTHORITY OF PEOPLE’S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</td>
<td>Ahmad Mujib Rohmat</td>
<td>944</td>
</tr>
</tbody>
</table>
TAXES AND ALMS SEEN FROM ISLAMIC LAW
Mohammad Solekhan ................................................................................................................. 954

DIVERSION IN COURT (Case Studies in Karanganyar District Court)
Anita Zulfiani .............................................................................................................................. 964

International Seminar
Photos........................................................................................................................................ 971
A. Background Issues

Article 25 of Law No. 18 of 2001 on Special Autonomy for the Special Province of Aceh as Nanggroe Aceh Darussalam province mandated that the Islamic Law Judicial in Aceh province as part of the national judicial system undertaken by Mahkamah Syar’iyyah (Sharia Courts) free from the influence of any party. For the implementation of these norms, Presidential Decree No. 11 of 2003 specifies Pengadilan Agama (Religious Courts) that had existed in the province of Aceh should be converted into Sharia Court and Pengadilan Tinggi Agama (High Courts of Religious Courts) in Banda Aceh should be converted into Sharia Court of the Province of Nanggroe Aceh Darussalam.

Sharia Court's authority is further stipulated by Aceh Qanun. The provisions of Article 25 of Law No. 18 of 2001 are then confirmed by Article 128 to Article 137 of Law Number 11 Year 2006 concerning the Government of Aceh.

Specificity of Sharia Court in Aceh Province, among others, can be seen from its absolute competencies which is based on Islamic law in the national judicial system. Furthermore, Article 128 paragraph (3) of Law Number 11 Year 2006 concerning Aceh Government and Article 49 of the Qanun Aceh Province Number 10 Year 2002 regarding Islamic Law Judicial, make it clear that the absolute competencies of Sharia Court covers judge actions in ahwal al-syakhsiyah field (family law), mu'amalah (civil law) and jinayah (criminal law), which is based on Islamic law.

Struggle enforceability instituting Islamic law formally in the province of Aceh in order to have a status in the state administration by law has been successfully agreed with the promulgation of Law No. 18 of 2001 and Law No. 11 Year 2006. Granting authority to implement Islamic law, legally embodies the implementation of Law No. 44 of 1999 on Implementation Features Special Province of Aceh.

Based on the background of historical studies Sharia Court which is now the place to resolve the problem of Muslims, and in view of the Sharia Court is judicative power under
Article 128 paragraph (1) of Law Number 11 Year 2006 concerning Aceh Government included in the environment of religious judicial body under the Supreme Court by Act No. 48 of 2009 on judicial power which stipulates that judicial power is implemented by the four environments of judicial bodies, namely the Public Judicial Body, Religious Judicial Body, Military Judicial Body and State’s Administrative Judicial Body.

Occurred a noticeable difference between the two laws in the judicial seat of Islamic law in Aceh in the order of the national judicial system. Law Number 11 Year 2006 seat Islamic Law Judicial as part of the national judicial system in religious judicial body, whereas Law Number 50 Year 2009 seat Islamic Law Judiciaals as a special court which is in the two environmentals of judicial bodies, religious judicial body and public judicial body in accordance with its judicial authority being absolute competence. Settings on the Islamic Law Judicial are different from one law with other legislation can lead to differences in interpretations. The differences in interpretation or disharmony of the legislation will result in the emergence of problems at the level of implementation.

The problems that have been described above are taken as the reason to do research with the title "Reconstruction of Status and Authority of Sharia Courts in National Judicial System Based on Justice of Islamic Law"

B. Formulation of the Problems

It should be the main problem is the status of the Sharia Courts who has absolute authority areas of family law (ahwal al-syakhsiyah), civil law (muamalah) and criminal law (jinayah) based on Islamic law. Do the right status Sharia Courts are under the public courts in the National Judicial System that based on justice of Islamic law? The main problems can be formulated into three detailed issues as follows: How is the reconstruction of the status and authority of Sharia Court in the national judicial system based on justice of Islamic law?

C. Reconstruction Of Status And Authority Of The Sharia Court In The National Judicial System Based On Justice Of Islamic Law

Reconstruction is the return something to the original place. Reconstruction can be interpreted drafting or re depiction of existing materials and reconstituted it as is or the original incident. Reconstruction means to build or restore something based on the original incident, which was contained in the reconstruction of the primary values that must remain in activity to rebuild things according to its original state.
Based on the results of research on the status and authority of the Syariah Court in the judicial system of national and obstacles either substance, structurally and culturally is the basis for reconstruction. Moreover, it also comes with the results of comparative studies in the Syariah Court in Malaysia and Brunei Darussalam is expected to be born so that reconstruction should take into consideration various aspects kompeherensif enough.

1. Reconstruction of Values

Reconstruction of value should be recognized as an extremely important point, even almost be said to be very decisive way the future of mankind lives. According Selosoemardjan and Soelaiman Soemardi, social changes are all changes in social institutions in a society, which affects the social system, including the values, attitudes and patterns of behavior between groups in society. As we know that happens, several changes in social institutions in Aceh such as Local Regulation into Qanun, the Syariah Court, the Department of Islamic Law and the Wilyatul Hisbah that affect the values, attitudes in Acehnese society.

Reconstruction of the value in the province of Aceh should see the values of Acehnese, Islamic, Indonesian-ness, and universality. Reconstruction still based on Law Number 44 Year 1999 concerning the Implementation Privileged province. During Aceh is known as one of the areas that uphold religion that religious values should be the basis for any policy action. Moreover, the character of the people of Aceh tend to be more gentle and friendly, as where the customs of the people of Aceh, so that the reconstruction process should also be adjusted to the values and norms prevailing in society.

In building Aceh there are certain values that we could not deny its existence which is the basis of all forms of development that are or will be carried out in Aceh, the grounding values of Islamic Law in Aceh earth. Ideally in building Aceh which is based on Islamic Law fulfilled the following stages.

First, encourage the strengthening of Aqidah dimensions, among other things, through education, dissemination to the public, and to make regulations. Second, the legal formalization of Islamic jinayah and improve the quality of education. Third, always guided by the Qur’an and hadith that Islam really would be living law in Aceh.

2. Reconstruction of Norms

Based on the results of research on the status and authority of the Sharia Court in the national judicial system has led to substantial barriers, structural, and cultural.
Therefore, urgent reconstruction done to realize the status and authority of the Sharia Court in the national judicial system based on justice of Islamic law.

a. Reconstruction of Norms Characteristically Substantial

1) Changing Norms of Article 3A Paragraph (2) of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on Religious Courts

Sharia Court notch in the national judicial system is currently specified in Article 3A of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on the Religious Courts setted Sharia Court falls under two jurisdictions so that any ambiguity or dualism status for Sharia Court.

The setting status of Sharia Court also found in Law Number 11 Year 2006 concerning the Government of Aceh in Article 1 point 15 as follows:
"The Sharia Courts of Aceh and Sharia Courts of district / city is the court as executor of the judicial authorities in environtmen of religious courts that are part of the national judicial system."

Further affirmed in Article 128 paragraph (1):
"Islamic Law Judicials in Aceh is part of the national justice system in the religious courts were carried out by the Sharia Court free from the influence of any party".

The norm regulates the status Sharia Court is under one judicial environment that is the environtmen of religious courts.

Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on the Religious Court does not repeal the provisions of Article 1 point 15 and Article 128 paragraph (1) of Law Number 11 Year 2006 concerning the Government of Aceh so that the norms regulating the status of the Sharia Court is under the religious courts are still valid.

There are two norms that is the norm in Article 3A, paragraph 2 of Law No. 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on the Religious and the norms of Article 1 point 15 and Article 128 paragraph (1) of Law Number 11 2006 on Governing Aceh so that there is a conflict of norms. To resolve the conflict the norm will be analyzed with the principle of legal preference.

One of the principles of legal preference is the principle of lex postereore derogat legi priore, meaning that the rule of law in the new legislation that negates or defeat the legal norms in the old legislation. This principle requires the use of new legal norms on the condition that the new legal norms that are in the legislation that is equal or higher than the legislation of the old and new legal norms that regulate the same material. The new law in the
conflict of norm is Law No. 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts, while the old law is Law Number 11 Year 2006 concerning Aceh Government, so that the applicable is Law No. 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on Religious Courts.

However, prior to Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts enacted, Act No. 48 of 2009 on Judicial Power has set a limit on the special court in Article 1 paragraph 8:

"The special court is the court that has the authority to examine, hear and decide a particular case can only be established in one of the courts under the Supreme Court set out in legislation."

Further reaffirmed in Article 27:

(1) The special court can only be established in one of the courts under the Supreme Court as referred to in Article 25.

(2) The provisions concerning the establishment of special courts referred to in paragraph (1) shall be regulated by law.

The norms provide restrictions that special courts can only be established in one of the courts under the Supreme Court that the judiciary in public courts, religious courts, military courts or State administrative courts.

Norma in Article 3A, paragraph 2 of Law No. 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts determine Courts Islamic Lawh in Aceh is a special court in religious courts and public courts, whereas the norm in Article 1 point 8 and Article 27 paragraph (1) of Law Number 48 Year 2009 regarding judicial Power has set specific limits that the special court can only be established in one of the courts under the Supreme court. Therefore, if two norms were compared, there will be conflicts of norms.

Due to the principle of lex postereore derogat legi priore in this case the new law in the conflict are the norm of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts, while the old law is Act No. 48 of 2009 on Judicial Power. However, Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts were established to implement the provisions of Law No. 48 Year 2009 concerning Judicial Authority so that the law is not a legislation that equal and legislation that higher long in rank than the legislation...
that is new. Therefore, the principle of lex postereore derogat legi priore can not be applied in conflict resolution of this norm.

Other legal preference principle is the principle of lex superiore derogat legi infiriore that legislation negated higher or defeat legislation is lower. Law Number 48 Year 2009 regarding Judicial Power rank, because Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts set up to implement Act No. 48 of 2009 on Judicial Power. Therefore, Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts must not conflict with the Law No. 48 Year 2009 on Judicial Power. If there is a conflict between the two laws, then to resolve the conflict applies the principles of legislation are higher negated or defeat legislation is lower.

The principles were aimed at implementing or running the law and not addressed to the legislators. Legislators must determine with certainty the applicable provisions explicitly set if it wants to change the old provisions. In the event of negligence in the formation of the legislation coming into conflict as the norm in this discussion, then apply the principle of legal preferences higher law that negates a lesser law.

There are several types of settlement in respect of the principle of preference laws, namely the denial (disavowal), reinterpretation, cancellation (invalidation), and recovery (remedy). Type of completion that can be used in respect of conflict of norms between Norma Article 3A, paragraph 2 of Law No. 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 on the Religious and Article 1 point 8 and Article 27 paragraph (1) of Law Number 48 Year 2009 on Judicial Power is cancellation (invalidation). There are two kinds of cancellation, namely in the abstract formal and practical. Cancellation of a formal abstract conducted by specially authorized institution that is the Constitutional Court. Cancellation practices, which do not apply these norms in practice.

This principle gave birth to the theory and research, called the level of synchronization of legislation which are vertical, and is also known level of synchronization or suitability equivalent legislation governing the same field or level of synchronization of legislation that are horizontal.

The results showed that Article 3A paragraph (2) of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts not only conflict norms or insinkronisasi norm horizontally with Article 1 point 15 and Article 128 paragraph (1) Law Number 11 Year 2006 concerning the Government of Aceh,
but also occur vertically insinkronisasi norm with Article 1 paragraph 8 and Article 27 paragraph (1) of Law Number 48 Year 2009 on Judicial Power. Therefore, it is urgent to do the reconstruction of the status of the Sharia Court in the national judicial system which was originally located under the two courts that religious courts and public courts, comes under the jurisdictions that religious courts.

2) **Set the Sharia Court's authority in the regime Judicial Power Act**

Sharia authority of the Court is to hear and decide the cases for Acehnese are Muslims in the area of al-ahwal al-sakhshiyah, mu'amalah, and jinayah. The authority is regulated in Law Number 11 Year 2006 concerning the Government of Aceh in Article 128:

1) Courts Islamic Shari'a in Aceh is part of the national justice system in the religious courts were carried out by the Sharia Court free from the influence of any party.

2) The Supreme Sharia Court is for everyone who is Muslim and is in Aceh.

3) The Supreme Sharia authorized to investigate, prosecute, adjudicate, and a settlement to the case covering the fields ahwal al-syakhsiyah (family law), muamalah (civil law), and jinayah (criminal law), which is based on Islamic Lawh.

4) Further provisions on the field ahwal al-syakhsiyah (family law), muamalah (civil law), and jinayah (criminal law) as referred to in paragraph (3) shall be regulated by Aceh Qanun.

Sharia Court's authority as mentioned in Article 128 of Law Number 11 Year 2006 concerning Aceh Government, also regulated in Aceh Qanun No. 10 of 2002, namely in the area of al-ahwal al-sakhshiyah, mu'amalat, and jinayat, Sharia Court's authority is very broad. Nevertheless, the Court's authority to examine Sharia and hear the case ahwalus syakhsiah, muamalah, and jinayat is still regulated in Law Number 11 Year 2006 concerning Aceh Government and bylaws. As one of the institutions of judicial power, setting Sharia Court's authority should be regulated in the Act are included in the regime laws governing judicial power.

b. **Reconstruction Norms Regard to Structural**

1) **Development of Technical Staff Performed by the Religious Courts**

Applicability of norms Article 3A paragraph (2) of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts will cause difficulties for religious courts in fostering technical personnel with regard to the field of jinayat or Islamic criminal law. The norms have restricted religious courts for guidance and raises a dilemma and the problems are quite complex. Therefore, it is necessary
The legal norms that berkepastian judiciaries to provide guidance to the Sharia Court is religious courts so that the status of religious courts in the national judicial system based on Islamic law of justice can be realized.
Substantial reconstruction of the content of the norms of Article 3A paragraph (2) of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts so berkepastian law will provide corroboration for the enforcement of Islamic Law for the people of Aceh. Implementation of Shari'a kaffah either in public or private life is God's command so it is a sacred duty that should be pursued and championed as the consummation of faith and submission to God's law.

2) Maintain Historical Facts and Sosioantropologis Communities in Aceh

Historically, the people of Aceh has made Islam as guidance in their lives and livelihoods. Appreciation and experience of life by implementing the teachings of Islam for generations has spawned cultural traditions and Islamic Aceh. Culture and traditions and customs that were born from the clergy ijtihad has been developed and preserved by the people of Islam to Aceh's identity through a long process of history. Therefore, it is understandable that the people of Aceh have demanded implementation of Islamic law since the early days of independence, as well as the struggle of Islamic leaders nationally imprinted with the birth of the Jakarta Charter, dated June 22, 1945, which was continued by the consensus formulation of the Opening Act basic (Constitution) 1945. the struggle reappears in national scale debate vying basis for the State during the Constituent Assembly from 1956 to 1959, and the last days of the reform when the Third Amendment discussions held in 2001 when the People's Consultative Assembly (MPR) to deliberate on the amendment of Article 29 of the 1945 Constitution which ended up with the status quo.

Noting the historical facts and sosioantropologis the people of Aceh, is supposed historical facts and returns the sosioantropologis maintained by the Court as a judicial Sharia Islam is in religious courts. Religion is a judicial institution sosioal Islamic law. Its existence had existed long before the Republic of Indonesia's independence. Although in a very simple form and naming different, but its presence is still needed by the Muslim community in Indonesia. This is because the religious courts not only be a last resort in resolving a dispute that occurred in the Muslim community, but also as a guard the existence and continuity of the implementation of Islamic law in Indonesia.

F. Conclusions

1. The establishment of a special court has been mandated in Article 27 of Law No. 48 of 2009 on Judicial Authority that "the special court can only be established in one of courts under the Supreme Court as referred to in Article 25". However, the norm in Article 3A paragraph (2) of Law Number 50 Year 2009 regarding the Second
Amendment to Law Number 7 of 1989 concerning the Religious Courts stipulates that the status Sharia Court is a special court in religious courts throughout the judicial authorities regarding the authority of religion and a special court within the public courts throughout the judicial authorities regarding the authority of the public so that any ambiguity or dualism Sharia Court status in the national judicial system at this time. Sharia Court's authority to examine and adjudicate cases ahwalus syakhsiah, muamalah, nor jinayat still regulated in Law Number 11 Year 2006 concerning Aceh Government and Qanun, as well as settings not found in the regime laws governing judicial power.

2. As a result of ambiguity or dualism status Syariah Court in the national judicial system raises substantial barriers, structural, and cultural as follows:
   a. Substantially, these norms conflict with the norms of Article 1 point 8 and Article 27 of Law Number 48 Year 2009 concerning Judicial Authority and insinkronisasi norm occurs both vertically and horizontally, giving rise to legal uncertainty.
   b. Structurally, complicate the Religious Courts to provide guidance regarding the technical personnel with the authority to investigate and adjudicate cases jinayat, while the Public courts not to provide guidance to the Sharia Court for in Act No. 2 of 1986 on the Public courts as amended by Law Law No. 8 of 2004 and the second amendment by Act No. 49 of 2009 no norm which authorizes the Public courts to undertake such development, so there is no development patterns administrative cases in the Court jinayat Sharia.
   c. Culturally, the spirit (ghirah) Muslim community in Aceh to enforce Islamic Law in Aceh is not supported by the norms regulating the status of the Court berkepastian Sharia that it ignores the laws and norms of historical value (a historical) and sosioantropologis.

3. Reconstruction of the status and authority of the Sharia Court in the national judicial system based on Justice of Islamic law needs to be done as follows:
   a. Substantial reconstruction. First, change the norm of Article 3A paragraph (2) of Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts so that the contents of these norms regulate that status of Sharia Court is a special court in religious courts. Thus there will be synchronization vertically with the norms of Article 1 point 8 and
Article 27 of Law Number 48 Year 2009 concerning Judicial Authority and synchronization horizontally with Article 1 point 15 and Article 128 paragraph (1) of Law Number 11 Year 2006 on Governing of Aceh so that raises legal certainty. Second, the Sharia Court's authority is not simply regulated in Law Number 11 Year 2006 concerning Aceh Government and Qanun, but also regulated in the Law belonging to the genus laws governing judicial power.

b. Structural reconstruction. The substantial reconstruction will allow for the Religious Courts are structurally in fostering technical personnel with regard to the authority to investigate and adjudicate the case may soon be realized jinayat and administrative development patterns in the Sharia Court to jinayat case.

c. Cultural reconstruction. The spirit (ghirah) of Muslim community in Aceh to enforce Islamic Law in Aceh will be more alive because it supported the norms regulating the status of the Sharia Courts have certainty of law and greatly appreciate the historical value and sosioantropolgis people of Aceh.
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