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



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RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE

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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'iyah (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 Judicials as a special court which is in the two environments 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 Seloemardjan 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 Acehese society.

Reconstruction of the value in the province of Aceh should see the values of Acehese, 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. The 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 environment 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 environment 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 supreiore 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

that 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.

2) Development Patterns Conducted by the Administration for Religious Courts

Another obstacle is the structural development patterns jinayat administrative case that there is no rule to date. The Supreme Court decision No. KMA / 032 / SK / IV / 2006 on the Application of Book II Guidelines on Duties and Court Administration which has been revised several times not load patterns jinayat case administration. Anticipating merely imitate the pattern bindalmin criminal cases in the District Court case characteristics jinayat although not exactly the same as a criminal case. Therefore, structural reconstruction continues on the authority of religious courts to direct administration jinayat case in order to achieve the orderly administration as a modern justice. Structural reconstruction of the formation of this administration can not be separated by a 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 on Religious Courts.

c. Reconstruction norms regard to Cultural

Substance and structure alone is not enough for the passage of the legal system. Therefore, Lawrence M Friedman stressed the importance of legal culture (legal culture). Kultur law concerns the legal culture is an attitude of humans (including the legal culture of law enforcement officers) for the law and the legal system.

1) Strengthening the Enforcement of Islamic Law to the people of Aceh with Norma Berkepastian Law

Cultural barriers as a result of the ambiguity of the status of the Sharia Court among others hamper the spirit of the people of Aceh to enforce Islamic Law. The existence of the Sharia Court for Nanggroe Aceh Darussalam in the future as the Islamic court has a very strategic role in efforts to implement Shari'a kaffah. Therefore, efforts are sincere or jihad of all components of society in Nanggroe this, especially the continuous efforts to develop human resources, professionalism, integrity and quality of the devotion of beings Gampong power devices. In addition jihad earnest are also still needed to fight the messages that have been dinukilkan in the Constitution of the Republic of Indonesia Year 1945, Law No. 44 of 1999 on Implementation Features Aceh, Law No. 18 of 2001 on Special autonomy for the Special Province of Aceh as the province of Nanggroe Aceh Darussalam and Law No. 11 Year 2006 concerning Aceh Government became a reality.

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 syakhshiah*, *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 sosioantropologis people of Aceh.

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