

THE POSITION AND COMPETENCE OF THE SHARIAH COURT OF NANGGROE ACEH DARUSSALAM IN INDONESIA'S JUSTICE SYSTEM

Sufiarina *

* Lecturer at the Faculty of Law Universitas Tama Jagakarsa, Jakarta.

Article Info

Received : 17 December 2014 | **Received in revised form :** 7 March 2015 | **Accepted :** 19 June 2015

Corresponding author's e-mail : sufiarina_01@yahoo.com

Abstract

Article 27 paragraph (1) of Law No. 48 Year 2009 regarding Judicial Power states that special courts can only be formed in one of the court systems under the Supreme Court, which include general courts, religious courts, military courts and state administration courts. However, article 3A paragraph (2) of Law No. 50 Year 2009 concerning the Second Amendment to the Law on Religious Court places Shariah Court as a special court within the system of religious courts and as a special court within the system of general courts. Such positioning is inconsistent with Article 27 paragraph (1) of the Law on Judicial Power which raises a legal issue and therefore requires juridical solution. The inconsistency is subject to juridical normative study within the scope of a research concerning the level of horizontal synchronization, using descriptive analysis. The method applied for data collection in this research is through literature study supported by field data. The data obtained is analyzed by using juridical qualitative method. This study concludes that, in fact, the Shariah Court is neither a special court, nor does it stand in two systems of courts. Both in terms of general administration as well as case management, the Shariah Court is a Religious Court for the territory of the Province of Nanggroe Aceh Darussalam, the competence of which has been expanded in the context of the implementation of special autonomy, particularly in the field of the implementation of Islamic shari'a.

Keywords: shariah court, special character of the province of Nanggroe Aceh Darussalam, justice system

Abstrak

Pasal 27 ayat (1) Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman menyatakan: "Pengadilan khusus hanya dapat dibentuk dalam salah satu lingkungan peradilan yang berada di bawah Mahkamah Agung." Lingkungan badan peradilan di bawah Mahkamah Agung meliputi peradilan umum, peradilan agama, peradilan militer dan peradilan tata usaha negara. Pasal 3A ayat (2) Undang-Undang No. 50 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Peradilan Agama, menempatkan Mahkamah Syar'iyah sebagai pengadilan khusus dalam lingkungan peradilan agama dan sebagai pengadilan khusus dalam lingkungan peradilan umum. Penempatan Mahkamah Syar'iyah sebagai pengadilan khusus, sekaligus di dua lingkungan peradilan inkonsistensi dengan Pasal 27 ayat (1) Undang-Undang Kekuasaan Kehakiman. Inkonsistensi ini menimbulkan permasalahan hukum yang perlu dicarikan penyelesaiannya secara yuridis. Permasalahan mengenai inkonsistensi aturan hukum tersebut dikaji secara yuridis normatif dalam cakupan penelitian terhadap taraf sinkronisasi horizontal dengan spesifikasi penelitian deskriptif analisis. Teknik pengumpulan data pada kajian ini melalui studi kepustakaan dan didukung data lapangan. Data yang diperoleh kemudiandianalisis secara yuridis kualitatif. Kajian ini menemukan bahwa Mahkamah Syar'iyah sesungguhnya bukanlah dalam kedudukan sebagai pengadilan khusus dan juga tidak berpijak pada dua lingkungan peradilan. Secara administrasi umum maupun pengelolaan perkara Mahkamah Syar'iyah merupakan Pengadilan Agama untuk wilayah Propinsi NAD yang kewenangannya diperluas dalam rangka melaksanakan otonomi khusus bidang pelaksanaan syariat Islam.

Kata Kunci: mahkamah syar'iyah, keistimewaan provinsi NAD, sistem peradilan

I. Introduction

The implementer of judicial power in Indonesia, according to Article 24 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia, is the Supreme Court which supervises four systems of courts, namely the systems of general courts, the religious courts, the military courts and the state administration courts respectively, and by a Constitutional Court. The above mentioned four systems of courts under the Supreme Court have undergone structural development marked by the formation of special courts. Article 27 paragraph (1) of Law No. 48 Year 2009 concerning Judicial Power (Law on Judicial Power) sets forth that special courts may only be formed in one of the systems of courts under the Supreme Court.

Endeavors for development in the area of judicial power which had started through an integrated structuring of the justice system fostered by the Supreme Court referred to as the one-roof justice system (*sistem peradilan satu atap*)¹ truly deserve appreciation. According to Cate Sumner and Tim Lindsey, Indonesian courts are generally still looked at with a lot of suspicion, as incompetent and inefficient institutions, or even as institutions which systemically have issues of dishonesty and are only seeking interest.² Cate Sumner goes on to say as follows:³

Religious Courts are generally viewed as being non-corrupt and as providing a good service to disputing parties. Religious Courts may be considered as one of Indonesia's most successful judiciary institutions. In certain respects, this could be considered as an irony because these courts have long been ignored by the state and their existence within the national justice system has not been considered as being more important than the general courts. [Unofficial back-translation.]

In the context of the Indonesian nation, with a majority of its population being Muslims, religious courts are the most important institutions in legal disputes for a majority of its citizens.⁴ Within the system of religious courts, there has been a specialization of courts as provided for in law. The special court referred to is the Shariah Court which was formed for the region of Nanggroe Aceh Darussalam.⁵

Article 3A paragraph (2) of Law No. 50 Year 2009 regarding the Second Amendment to Law No. 7 Year 1989 regarding the Religious Court (Law on Religious Courts) provides that The Islamic Shariah Court in the Province of Nanggroe Aceh Darussalam (NAD) is a special court within the system of religious courts, and it is a special court with the system of general courts, to the extent that its competence is related to the competence of general courts. This provision places the shariah court in the position of a special court.

¹ The one-roof justice system referred to here is that the judiciary as the implementer of judicial power is fully fostered by the Supreme Court, both in judicial technical as well as judicial non-technical aspects. Previously, the Supreme Court was fostering courts only in judicial technical aspects, while judicial non-technical aspects were under the guidance of the relevant ministry.

² Cate Sumner and Tim Lindsay, *Reformasi Peradilan Pasca Orde Baru, Pengadilan Agama di Indonesia dan Keadilan Bagi Masyarakat Miskin* [Courting Reform: Indonesia's Islamic Court and Justice for the Poor], (Cooperation between Lowy Institute and Institut Studi Islam Fahmina, Cirebon West Java, 2011), p. 17.

³ *Ibid.*

⁴ Didi Kusnadi, *et. al.*, *Peran Pengadilan Agama Dalam Pengembangan Acces to Justice di Indonesia* [The Role of Religious Court in the Development of Access to Justice in Indonesia], (Jakarta: Directorate General of Religious Court Bodies of the Republic of Indonesia, 2012), p. 92.

⁵ Asril, "Pengadilan-Pengadilan Khusus di Indonesia," www.legalitas.org, accessed on 14 April 2014.

In addition to the Islamic shariah court, other currently existing special courts are as follows: juvenile court, human rights court, anti-corruption court, industrial relations court, commercial court, and fisheries court. These special courts are within the system of general courts, as well as the tax court which is within the system of state administration courts.⁶

Islamic shariah justice in the territory of NAD is implemented by the Shariah Court. Placing the Shariah Court in the position of a special court and within two systems of courts at the same time is inconsistent with the provisions of Article 27 paragraph (1) of the Law regarding Judicial Power. Article 27 paragraph (1) of the Law regarding Judicial Power provides that special courts can only be formed within one of the court systems. At the same time, based on Article 3A paragraph (2) of the Law regarding Religious Court, the Shariah Court in fact stands in two court systems, namely the system of general courts and religious courts.

The formulation of positioning the Shariah Court as a special court which stands in two systems of courts at the same time creates inconsistency between the Law regarding Judicial Power and the Law regarding Religious Court. The inconsistency of Article 3A paragraph (2) of the Law regarding Religious Court related to Article 27 paragraph (1) of the Law regarding Judicial Power constitutes a legal issue. In this context, it is paramount to look further into the formulation of positioning and determining the competence of the Shariah Court which is designated as a special court and stands in two court systems at the same time. There is an urgent need to come up with a solution with regards to the inconsistency of legal provisions, particularly between the above mentioned provisions of the law regarding judicial power and the law regarding the religious court.

The appropriate formulation of position should correlate to the provisions on the Shariah Court's competence within Indonesia's justice system. The significance of this study lies in overcoming the differences and contradiction between Article 27 paragraph (1) of the Law regarding Judicial Power and Article 3A paragraph (2) of the Law regarding Religious Court. The intent of the provisions of Article 3A paragraph (2) of the Law regarding Religious Court needs to be critiqued in order to ensure that they are in line with the provisions of Article 27 paragraph (1) of the Law regarding Judicial Power in the context of achieving harmonization of legal provisions.

There are several special objectives of this study concerning the position and competence of the Shariah Court within Indonesia's justice system, namely as follows:

1. Determining a more appropriate position for the Shariah Court within Indonesia's justice system.
2. Understanding better whether the competence of the Shariah Court is competence in its capacity as a special court.
3. Seeking and determining the ideal formulation for Article 3A paragraph (2) of the Law on the Religious Court.

The study on this issue takes the normative approach (statute approach),⁷ which constitutes normative legal research.⁸ The object of this research is the legal norms

⁶ See Elucidation on Article 27 paragraph (1) of the Law regarding Judicial Power.

⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2007), p. 92.

⁸ Roni Hanitijo Soemitro, *Metode Penelitian Hukum dan Jurimetri*, (Jakarta: Ghalia Indonesia, 1990), p. 11. See also Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: PT. Rajagrafindo Persada, 2009), p. 14.

set out in written regulation relying on secondary data obtained from literature, and complemented with field data. The approach is more specifically oriented at a study of the level of horizontal synchronization⁹ between Article 27 paragraph (1) of the Law regarding Judicial Power and Article 3A paragraph (2) of the Law on the Religious Court. The comparative study is conducted by comparing the position and competence of the Shariah Court and the Religious Court to the Commercial Court as a special court within the system of general courts. The study also takes into account the historical background of the Shariah Court in Aceh. The study is complemented with an overview of the provisions of legal norms in the system of judicial power and regulations related to the special character of the Aceh government as primary legal sources. Secondary legal sources include the position and competence of the courts and the justice system in Indonesia. Field data have been obtained through interviews with the Head of the Shariah Court, the Supreme Court's Registrar's Office and Secretariat. Literature materials and field data are analyzed with the qualitative juridical method using abstraction which is subsequently spelled out in the form of description. Description is aimed at answering the issue which has been identified.

II. Review of the Law

A. Judicial Power in Indonesia

The constitutional provisions on judicial power are set forth in Chapter IX Article 24, Article 24A, Article 24B, Article 24C and Article 25 of the 1945 Constitution. All of the above mentioned articles form 19 (nineteen) paragraphs. Article 24 paragraph (1) of the 1945 Constitution provides that Judicial Power is an independent power for the administration of justice aimed at enforcing law and justice.¹⁰

Such positioning of judicial power under the Constitution explicitly grants legitimacy to judicial power as an independent state power in Indonesia as a state based on law. For the operational implementation of the administration of the above mentioned judicial power, Law No. 4 Year 2004 regarding Judicial Power was adopted.¹¹ The currently applicable positive law for the operational implementation of judicial power is Law No. 48 Year 2009 regarding Judicial Power. According to Baqir Manan,¹² this Law regarding Judicial Power is an umbrella law for all laws and regulations, bodies, management procedures, administration and procedural rules of courts. Any juridical amendment to judicial power must extend to various laws and regulations under the umbrella law, including various policy related regulations (*beleidsregels*) and court practices as set out in various court decisions.¹³

By virtue of Article 24 paragraph (2) of the 1945 Constitution which states that Judicial Power is exercised by a Supreme Court and the courts under it in the system of general courts, religious courts, military courts, state administration courts and

⁹ Research on the level of synchronization is the activity for studying laws and regulations in a certain area of life. If the research is conducted to study the horizontal level of synchronization, laws of equivalent hierarchy regulating the same area are taken into account. See Soekanto and Mamudji, *op.cit.*, p. 19.

¹⁰ Indonesia (1), Undang-Undang Dasar 1945 (1945 Constitution), art. 24 paragraph (1).

¹¹ Law No. 4 Year 2004 regarding Judicial Power was revoked and declared as no longer applicable by virtue of Article 62 of Law No. 48 Year 2009 concerning Judicial Power.

¹² Baqir Manan (1), *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Indonesia dalam Undang-Undang No. 4 Year 2004* (Jakarta: Mahkamah Agung RI, 2005), p. v.

¹³ *Ibid.*

by a Constitutional Court.¹⁴ In Baqir Manan's view, the following laws are under the umbrella of the Law on Judicial Power:

1. Law No. 14 Year 1985 amended by Law No. 3 Year 2009 regarding the Supreme Court;
2. Law No. 2 Year 1986 amended by Law No. 49 Year 2009 regarding General Court;
3. Law No. 3 Year 2006 amended by Law No. 50 Year 2009 regarding Military Court;
4. Law No. 5 Year 2006 amended by Law No. 51 Year 2009 regarding State Administration Court;
5. Law No. 31 Year 1997 regarding Military Court.

The development and reform of the judicial system are undertaken as links in the chain of law development. The reason for linking the justice system to law development is due to the fact that the judiciary is an important legal institution.¹⁵ Law reform through the justice system has been implemented by virtue of Law No. 48 Year 2009 regarding Judicial Power. As an organic law, it is a law for the implementation of Article 24 paragraph (2) of the 1945 Constitution, serving at the same time as the basis and general framework which lays the principles, the basis and guidelines for all systems of courts in Indonesia. This law serves as an umbrella law for all regulations in the area of judicial power, bodies, procedures, administration and procedural rules as stated by Baqir Manan.

It is also explicitly provided that only state judiciary bodies established by law have the authority and function to administer justice. It is not allowed for other bodies to exercise such authority and function, as it does not meet the formal and official requirements, and it is also contradictory to the principle of *under the authority of law*.¹⁶ The Indonesian justice system places the Supreme Court as the *supreme court* which supervises 4 (four) systems of courts. The judiciary bodies under the Supreme Court's supervisions are as follows: the system of general courts, the system of religious courts, the system of military courts, and the system of state administration courts. There are no other court systems other than the above mentioned four court systems.

General courts are the implementers of judicial power for the justice seekers in general.¹⁷ Religious courts are the implementers of judicial power in specific cases for justice seekers who follow the religion of Islam.¹⁸ Military courts are implementers of judicial power within *Tentara Nasional Indonesia* (Indonesian National Armed Forces) for enforcing law and justice with due observance of the interests of administering state defense and security.¹⁹ Courts within the military court system handle criminal cases perpetrated by persons who are classified as soldiers of the Indonesian National

¹⁴ Indonesia (1), *loc.cit.*

¹⁵ Ahmad Mujahidin (1), *Peradilan Satu Atap di Indonesia* (Bandung: Refika Aditama, 2007), p. 3.

¹⁶ Dadan Mutaqin, "Penyelesaian Sengketa Perbankan Syariah di Luar Lembaga Peradilan," *Varia Peradilan* No. 26 (2008): 57.

¹⁷ Indonesia (2), *Undang-Undang tentang Perubahan Kedua atas Undang-Undang No. 2 Tahun 1986* (Law regarding the Second Amendment of Law No. 2 Year 1986 regarding General Court), UU No. 49 Tahun 2009, LN No. 158 Tahun 2009 (Law Number 49 Year 2009, SG No. 158 Year 2009), art. 2.

¹⁸ Indonesia (3), *Undang-Undang tentang Perubahan Kedua atas Undang-Undang No. 7 Tahun 1989 tentang Peradilan Agama* (Law regarding the Second Amendment of Law Number 7 Year 1989 regarding Religious Court, UU No. 50 Tahun 2009, LN No. 159 Tahun 2009 (Law Number 50 Year 2009, SG No. 159 Year 2009), art. 2.

¹⁹ Indonesia (4), *Undang-Undang tentang Peradilan Militer (Law regarding Military Court)*, UU No. 31 Tahun 1997, LN No. 84 Tahun 1997 (Law Number 31 Year 1997, SG NO. 84 Year 1997), art. 5 paragraph (1).

Armed Forces. State Administration Courts are the implementers of judicial power for justice seekers in state administration disputes.²⁰

The composition, position, members and procedural law of the Supreme Court and the judiciary bodies under its supervision are provided for under law. The currently applicable legislative products related to the composition, position, members and procedural law of the Supreme Court and the judiciary bodies under its supervision are the following laws:

1. Law No. 48 Year 2009 regarding Judicial Power;
2. Law No 14 Year 1985 regarding the Supreme Court amended by Law No. 5 Year 2004 and Second Amendment with Law No. 3 Year 2009;
3. Law No. 2 Year 1986 regarding General Court amended by Law No. 8 Year 2004 and Second Amendment with Law No.49 Year 2009;
4. Law No. 5 Year 1986 regarding State Administration Court amended by Law No. 9 Year 2004 and Second Amendment with Law No. 51 Year 2009;
5. Law No. 7 Year 1989 regarding Religious Court amended by Law No. 3 Year 2006 and Second Amendment with Law No. 50 Year 2009;
6. Law No. 31 Year 1997 regarding Military Court.

In the context of developing the justice system, the law provides space for the formation of special courts. Such special courts include, among others, juvenile court, commercial court, human rights court, anti-corruption court, industrial relations court and fisheries court under the system of general courts, and the tax court in the system of state administration courts.²¹

Special courts are courts with the competence to examine, hear and adjudicate specific cases, which can only be established in one of the judiciary bodies under the Supreme Court's supervision as provided for under the law.²² Article 27 of the Law regarding Judicial Power states as follows:

(1) Special courts may only be established within one of the court systems under the supervision of the Supreme Court.

(2) The establishment of special courts is provided for under law.

[Unofficial translation.]

A formed special court becomes part of a specific court system. Such specific court system is one of the court systems under the Supreme Court's supervision. As special courts form part of one of the existing court systems, there is no Head of Special Courts. The Head of the Court system within which a special court is established is also the head of the special court concerned.²³ Special courts are part of a certain court system; accordingly, their position is also part of one of the existing court systems.

The competence of special courts to receive, examine and adjudicate cases only

²⁰ Indonesia (5), *Undang-Undang tentang Peradilan Tata Usaha Negara (Law regarding State Administration Court)*, UU No. 5 Tahun 1986, LN No. 77 Tahun 1986 (Law Number 5 Year 1986, SG No. 77 Year 1986), art. 4.

²¹ See elucidation on Article 27 paragraph (1) of the Law Number 48 Year 2009 regarding Judicial Power, which positions the special court as a court in a specific court system.

²² Indonesia (6), *Undang-Undang tentang Kekuasaan Kehakiman (Law regarding Judicial Power)*, UU No. 48 Tahun 2009, LN No. 157 Tahun 2009 (Law Number 48 Year 2009, SG No. 157 Year 2009), art. 1, sub-article 9.

²³ Lontoh, *et. al., Penyelesaian Utang Piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang* (Bandung: Alumni, 2001), p. 16.

for specific cases is part of the competence of a specific court system transferred to become the competence of the special court concerned as provided for under the law.

Achmad Ali defines the term *justice* as the function of administering justice or the process applied in seeking and finding justice, whereas he refers to the term *court* as the official agency which is one of the implementers of the function of administering justice, complemented by an official apparatus of professional judges.²⁴ Justice is one of the components affecting legal certainty. According to Baqir Manan, the justice system can be viewed from several aspects. First, all matters related to the administration of justice. In this respect, the justice system includes the institutional aspect, resources, procedures, infrastructure, facilities, and others. Second, the justice system viewed as the process of administering justice (examining and adjudicating cases).²⁵

Mochtar Kusumaatmadja is of the view that law in the broad sense of the word is not only the body of all principles and norms which regulate the life of people in society; rather, it also includes institutions and processes which enable the actual implementation of such norms in reality.²⁶ The institutions he is referring to are the courts as the ultimate place of seeking justice and truth. Mochtar states further that law cannot be separated from the system of values adhered to by a community.

The independence of judiciary institutions as implementers of judicial power has been increasingly strengthened since the implementation of the one roof judicial system by placing all courts, both from the judicial technical as well as the non-judicial technical aspect, under the Supreme Court's supervision. According to Baqir Manan, the judicial management system involves two aspects, namely the general administration management system (human resources, finances, and others) and the case management system.²⁷ Baqir Manan states further that, the general administration management system is handled by the secretariat. The secretariat is a unit supporting the court registrars' office (*kepaniteraan*) which handles the case management.

B. General Court and Religious Court

Courts are still relevant as *the last resort* for seeking the truth and justice, hence they are theoretically still being relied upon as institutions functioning and playing a role *to enforce the truth and justice*.²⁸ In the context of enforcing the truth and justice, each of the court systems under the Supreme Court's supervision has its own competencies. There are only two ways in which competence²⁹ can be obtained, namely by attribution or by delegation. A new competence is obtained by attribution. An existing competence is moved or transferred by delegation. Special courts obtain their competence by delegation in the form of moving or transferring an existing competence. Special courts do not obtain new competence; rather, they obtain their competence by delegation.

²⁴ Achmad Ali (1), *Menguak Tabir Hukum, 2nd ed.*, (Bogor: Ghalia Indonesia, 2011), p. 232.

²⁵ Baqir Manan (2), *Sistem Peradilan Berwibawa: Suatu Pencarian* (Yogyakarta: FH UII Press, 2005), p. 15.

²⁶ Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan* (Kumpulan Karya Tulis), edited by Otje Salman and Eddy Damian, (Bandung: Alumni, 2006), p. 30.

²⁷ Manan, *op.cit.*, p. 27.

²⁸ M. Yahya Harahap, *Hukum Acara Perdata, tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2008), p. 229.

²⁹ Philipus M. Hadjon, *et.al., Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gajah Mada University Press, 2011), p. 130.

Sudikno states that the competence of each court system is absolute in nature. The competence assigned to a certain court system becomes its “absolute” competence to examine and adjudicated cases in that particular area. This referred to as absolute competence.³⁰ Sudikno goes on to state that, on the other hand, in any case which does fall under its absolute competence the court concerned does not have the competence to administer justice. Absolute competence among court systems can be compared to a rail which sets the boundaries for an orderly implementation of the competence to administer justice. Retnowulan states that absolute competence is the competence of judiciary bodies in examining certain types of cases in which other judiciary bodies absolutely do not have the competence to administer justice.³¹

Absolute competence related to the distribution of powers among judiciary bodies is evident from the granting of competence to the courts to administer justice based on the subject matter of the case (*atributie van rechtsmacht*). *Atributie* is granting competence to a certain court, in the form of complete competence which is not granted to another court system.³² Relative competence sets forth the competence to administer justice between courts of the same type (*distributie van rechtsmacht*).³³

It is the absolute competence of general courts to examine, adjudicate and settle criminal and civil cases in general.³⁴ The absolute competence of religious courts is to examine, adjudicate and settle cases involving persons adhering to the religion of Islam in the following areas: marriage, inheritance, testament, grants, endowments, alms, *infaq*, *shadaqah* and shariah economy.³⁵ The competence of the Shariah Court is based on the Islamic shari’a within the national legal system, which is further provided for in *quanun* of the province of Nanggroe Aceh Darussalam. The competence of the Shariah Court is applicable to followers of the religion of Islam.³⁶

C. The Special Character of the Province of Nanggroe Aceh Darussalam

The Regional Government of Aceh has been established based on the Government System of the Unitary State of the Republic of Indonesia. The 1945 Constitution of the State of the Republic of Indonesia (hereinafter briefly referred to as the 1945 Constitution) recognizes and respects the government units of regions with a special or specific character. The granting of special autonomy and the change of name from Province of the Special Region of Aceh to the Province of Nanggroe Aceh Darussalam is based on Law No. 18 Year 2001 regarding Special Autonomy for the Province of Special Region of Aceh as the Province of Nanggroe Aceh Darussalam.

Recognition by the State of Indonesia of the special and specific character of the region of Aceh is stated in Law No. 11 Year 2006 regarding the Regional Government of Aceh, with the principles of the broadest autonomy for an accelerated materialization

³⁰ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Penerbit Liberty, 2002), p. 63.

³¹ Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktik* (Bandung: CV Mandar Maju, 2002), p. 11.

³² Wirjono Prodjodikoro, *Hukum Acara Perdata di Indonesia*, (Bandung: Sumur Bandung, 1992), p. 39. Compare with Mertokusumo, *op.cit.*, pp. 41-42. Compare also to Sutantio, *op.cit.*, pp. 11-12.

³³ Sutantio, *op.cit.*, p.11.

³⁴ Indonesia (2), *op.cit.*, art. 50.

³⁵ Indonesia (3), *op.cit.*, art. 49.

³⁶ Indonesia (7), *Undang-Undang tentang Otonomi Khusus bagi Provinsi Daerah Istimewa Aceh sebagai Provinsi Nanggroe Aceh Darussalam (Law Regarding Special Autonomy for NAD)*, UU No. 18 Tahun 2001, LN No. 114 Tahun 2001 (Law Number 18 Year 2001, SG No. 114 Year 2001), art. 25 paragraphs (1) and (2).

of welfare based on justice and welfare oriented justice. Special autonomy is autonomy granted in addition to the existing autonomy and for a more complete implementation of previously recognized special character.³⁷ In an effort to facilitate the materialization of special autonomy for NAD, the government adopted Law No. 18 Year 2001 regarding Special Autonomy for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam (NAD). Article 31 paragraph (1) of Law No. 18 Year 2001 sets forth that implementing provisions of this law concerning the government's competence are to be stipulated in the form of Regional Regulation. At the same time, it is stated in paragraph (2) that the implementing provisions of this law concerning the competence of the Provincial Government of NAD are to be stipulated in a *Qanun* (Regional Regulation) of the Province of NAD. It means that special autonomy for NAD is implemented both with government regulation as well as *qanun* (regional regulation). It is implemented with government regulation concerning matters related to the competence of the central government, and with *qanun* (regional regulation) in matters related to the competence of the regional government of NAD. In such case, for the purpose of implementing the special autonomy law, the *qanun* (regional regulation) has the same function as government regulation.

According to Al-Yasa Abubakar,³⁸ there are two factors serving as a background for the creation of the special character in the form of special autonomy, namely as follows:

1. *The conflict in Aceh in the form of the separatist movement of Gerakan Aceh Merdeka (Independent Aceh Movement) since 1976;*
2. *Reform calling for change in all aspects, particularly in the relationship pattern between central-regional.*

The implementation of the special character of NAD includes the following: the implementation of religious life; the implementation of customary life; the implementation of education; and the role of ulemas in determining regional policy. The implementation of religious life is materialized in the form of *implementing the Islamic shari'a for its followers* within the community, while maintaining inter-faith harmony. Making endeavors and adopting regional policies concerning the life of the community in accordance with the teachings of Islam and enhancing faith and devotion to Allah swt.

The special character of NAD lies in the implementation of the Islamic Shari'a in the following areas: *aqidah* (creed), *shari'a* (Islamic law) and *akhlak* (moral). Islamic Law (*Syariat Islam*) includes: a. *Ibadah* (worship); b. *Ahwal al-syakhshiyah* (family law); c. *Muamalah* (private law); d. *Jinayah* (criminal law), e. *Qadha* (judicature); f. *Tarbiyah* (education); g. *Dakwah* (proselytizing); h. *Syiar* and; i. *Pembelaan Islam* (Defending Islam).³⁹

The implementation of Islamic Shari'a through the operationalization of the Shariah Court as the Islamic shari'a court in addition to other courts namely the General Court, Military Court and the State Administration Court. Decree of the President of the Republic of Indonesia No. 11 Year 2003 regarding the Shariah Court and the Shariah Court in the Province of NAD (hereinafter briefly referred to as *Keppres*

³⁷ Al-Yasa' Al-Yasa' Abubakar and Marah Halim, *Hukum Pidana Islam di Aceh: Penafsiran dan Pedoman Pelaksanaan Qanun tentang Perbuatan Pidana* (Banda Aceh: Dinas Syariat Islam Aceh, 2011), p. 6.

³⁸ *Ibid.*, p. 1.

³⁹ Indonesia (8), *Undang-Undang tentang Pemerintahan Aceh (Law regarding the Government of Aceh)*, UU No. 11 Tahun 2006, LN No. 62 Tahun 2006 (Law Number 11 Year 2006, SG No. 62 Year 2006), art. 125.

No. 11 Year 2013), was issued for the implementation of Law No. 18 Year 2001. Article 1 of *Keppres* No. 11 Year 2003 states that the Religious Court which already exists in the Province of NAD shall be changed to become Shariah Court Article 3 of *Keppres* No. 11 Year 2003 states that the authority and competence of the Shariah Court shall be those of the Religious Court added by other authorities and competences related to the life of the community in worship and *Syiar Islam* implemented in a *qanun* (regional regulation). By virtue of Article 13 paragraph (1) of Law No. 11 Year 2006 regarding the the Government of Aceh, the function of *qanun* (regional regulation) is to regulate the implementation of special autonomy in matters related to the authorities of the regional government of NAD.

III. Field Data

A. Fostering of the Courts by the Supreme Court

The Supreme Court is at the top of all court systems, and it conducts the fostering of the judiciary under a one-roof system. The Shariah Court in the territory of NAD is fostered by the Supreme Court, both from the judicial aspect (case handling) as well as non-technical judicial aspect (matters not related to case handling such as secretarial matters and others). Secretarial matters are fostered by *Dirjen Badilag* (Director General of Religious Court Bodies of the Supreme Court) which has its office at Jl. Ahmad Yani, Central Jakarta. According to the information obtained, *Dirjen Badilang* is responsible for fostering the Shariah Court in the territory of NAD in matters related to general administration, such as human resources, finances. Fostering is conducted in the same manner as the fostering of other religious courts.⁴⁰ Fostering from the judicial technical aspect related to case handling by the Registrars' Office of the Supreme Court is conducted by the Deputy Chief Justice for the System of Religious Courts.⁴¹

B. Judicature in the Province of NAD

The judicature in the territory of Nanggroe Aceh Darussalam is a part of the justice system in Indonesia. In addition to the Shariah Court there are other court systems such as general court, military court and state administrative court. Following are the various court systems in the territory of Nanggroe Aceh Darussalam and locations thereof:

Table 1. Court Systems in NAD

No.	PERADILAN TINGKAT PERTAMA DI BANDA ACEH	LOCATION
1	District Court Class IA Banda Aceh	Jl. Cut Meutia No. 23 Banda Aceh
2	City Shariah Court	Jl. Sukarno Hatta Mibo Banda Aceh
3	Military Court I-01	Jl. Lhueng Bata No. 108 Banda Aceh
4	State Administration Court	Jl. Ir. Mohd. Taher No. 25 Lhueng Bata Banda Aceh

Source: Based on the researcher's field observation

⁴⁰ Interview with the Director General of Religious Court Bodies (*Dirjen Badilag*), on 16 May 2014 at the Secretariat of the Supreme Court.

⁴¹ Interview with the Deputy Chief Justice for the System of Religious Courts (*Tuada Uldilag*) of the Supreme Court, Andi Syamsu Alam, on 28 and 29 April 2014 at the building of the Supreme Court.

C. Competence of the Shariah Court in Nanggroe Aceh Darussalam

As Idris Mahmudy has stated,⁴² the relative competence of the Shariah Court in Aceh as the successor of the Religious High Court in Aceh covers the entire jurisdiction of the province of NAD, supervising 20 Shariah Courts at the municipality/regency level as indicated in the table below:

Table 2. Shariah Court at the Municipality/regency level and Relative Jurisdiction

No.	SHARIAH COURTS AT THE MUNICIPALITY/REGENCY LEVEL	JURISDICTION
1	Shariah Court of Banda Aceh	City of Banda Aceh
2	Shariah Court of Sabang	City of Sabang
3	Shariah Court of Lhoksukon	North Aceh Regency
4	Shariah Court of Idi	East Aceh Regency
5	Shariah Court of Kuala Simpang	Aceh Tamiang Regency
6	Shariah Court of Blangkejeren	Gayo Lues Regency
7	Shariah Court of Kutacane	South-East Aceh Regency
8	Shariah Court of Sinabang	Simeulue Regency
9	Shariah Court of Meuredeu	Pidie Jaya Regency
10	Shariah Court of Calang	Aceh Jaya Regency
11	Shariah Court of Singkil	Aceh Singkil Regency, City of Subulussalam
12	Shariah Court of Tapak Tuan	South Aceh Regency, South-West Aceh Regency
13	Shariah Court of Sigi	Pidie Regency
14	Shariah Court of Bireuen	Bireuen Regency
15	Shariah Court of Lhokseumawe	City of Lhokseumawe
16	Shariah Court of Takengon	Central Aceh Regency
17	Shariah Court of Meulaboh	West Aceh Regency, Nagan Raya Regency
18	Shariah Court of Jantho	Aceh Besar Regency
19	Shariah Court of Langsa	City of Langsa
20	Shariah Court of Simpang Tiga Redelong	Bener Meriah Regency

Source: Results of interview with the Head of the Shariah Court in Aceh

The absolute competence of the Shariah Court is identical to the competence of the Religious Court, in accordance with Article 49 of Law No. 3 Year 2006 added by certain competences in the area of *jinayah* (criminal law) based on *qanun* (regional regulation) of Aceh.⁴³ Competence of the Shariah Court in Aceh and the basis thereof:

⁴² Interview with the Head of the Shariah Court of Aceh, Dr. Idris Mahmudy, on Wednesday, 10 September 2014 at the Shariah Court in Aceh.

⁴³ The researcher's interview with the Head of the Shariah Court of the City of Banda Aceh, Drs. Misran,

Table 3. Yurisdiksi absolut Mahkamah Syar'iyah and Landasannya

No.	AREA OF COMPETENCE		BASIS
I	Family/ private law	(a) marriage; (b) inheritance; (c) testament; (d) grant; (e) <i>wakaf</i> ; (f) <i>zakat</i> (alms); (g) <i>infaq</i> ; (h) <i>shadaqah</i> ; and (i) shariah economy".	Article 49 of Law No. 3 Year 2006 concerning the Amendment to Law No. 7 Year 1989 concerning Religious Court
II	Additional competence: <i>Jinayah</i> / Criminal Law	<i>Aqidah</i> (creed), <i>ibadah</i> (worship) and <i>syiar Islam</i> Alcoholic Beverages Gambling <i>Khalwat</i> (seclusion)/ <i>Mesum</i> (immorality) Management of <i>Zakat</i> (Alms)	<i>Qanun</i> of the Province of NAD No. 11/Year 2002 <i>Qanun</i> of the Province of NAD No. 12/Year 2003 <i>Qanun</i> of the Province of NAD No. 13 Year 2003 <i>Qanun</i> of the Province of NAD No. 14 Year 2003 <i>Qanun</i> of the Province of NAD No. 7 Year 2004

Source: Results of document review conducted by the researcher

III.DISCUSSION

A. The Position of the Shariah Court in Indonesia's Justice System

Special autonomy has already been granted to the Province of Nanggroe Aceh Darussalam. The special character is implemented, among other things, in the area of religious life. *Qadha*, as Islamic judicature, is implemented in the form of Shariah Court based on *Keppres* No. 11 Year 2003. *Qadha* at the first instance is referred to as Shariah Court at the Municipality/Regency level and at the appellate level it is referred to as the Shariah Court of Aceh, whereas for cassation it is referred to the Supreme Court.

As evident from Table 1 related to the court systems in NAD, there are 4 (four) court systems as mandated by Article 24 paragraph (2) of the 1945 Constitution. The name Religious Court is not mentioned in any of the above mentioned 4 (four) court systems. The religious court system in the territory of NAD is implemented by the Shariah Court. Accordingly, the Shariah Court is the religious court system for the territory of NAD.

Based on *Keppres* No. 11 Year 2003, it is evident that the Shariah Court of NAD used to be the Religious Court, just like the Religious Court in the territory of other provinces in Indonesia. Accordingly, the Shariah Court as Islamic Shari'a Judicature in Aceh implements the functions of and has the position as religious court system. The Shariah Court of Aceh was inaugurated on 1 Muharram 1424 H/March 4, 2003 M. The Shariah Court of Aceh used to be known as the High Religious Court of Banda Aceh with the position of an appellate court. The Shariah Court at municipality or regency level used to be the first instance Religious Court at the municipality or regency level within the system of religious courts.

Parallel to the changes taking place in state administration, Indonesia's justice

SH.MM on Thursday, 11 September 2014 at the Shariah Court of Banda Aceh.

system went through changes over time. By virtue of *Keppres* No. 11 Year 2003, the name of the Religious Court in the territory of NAD was changed to Shariah Court. In the administration of judicial power, the Supreme Court has the position of the highest state court, and it conducts fostering under the one-roof system, in matters of general administration as well as case administration. Viewed both from the aspect of administrative management as well as case management, the Shariah Court is fostered by the Supreme Court simultaneously with court management in the system of religious courts. Fostering in the area of general administration is conducted by the Directorate General of Religious Court Bodies (*Dirjen Badilag*) of the Supreme Court of the Republic of Indonesia located at Jl. Ahmad Yani, Central Jakarta. Fostering from the case management (judicial) aspect is conducted by the Deputy Chief Justice for the System of Religious Courts, just like the fostering of other religious courts. It can be concluded that judicial power in the territory of NAD is implemented by the District Courts within the system of general courts, the Shariah Court within the system of religious courts, the State Administration Court within the system of state administration courts, and the Military Court within the system of military courts.

The Religious Court for the territory of NAD was changed to become Shariah Court by virtue of *Keppres* No. 11 Year 2003. Viewed from its historical background, the Shariah Court is the successor of the Religious Court for the territory of Nanggroe Aceh Darussalam. Fostering at the Supreme Court from the case management aspect is conducted by *Tuada Uldilag* (Deputy Chief Justice for the System of Religious Courts), whereas fostering in the area of general secretarial matters is conducted by *Dirjen Badilag* (Directorate General of Religious Court Bodies). Based on the above mentioned two facts, namely, first, from the historical aspect the Shariah Court is the successor of the system of religious courts in the territory of NAD, and second, fostering at the Supreme Court treats the Shariah Court as part of the Indonesian justice system within the system of religious courts, rather than a special court.

The position of the shariah court in the system of the Indonesian justice system is properly defined in Article 128 (1) Law No. 11 Year 2006 regarding the Government of Aceh, as follows:

Peradilan syariat Islam di Aceh adalah bagian dari sistem peradilan nasional dalam lingkungan peradilan agama yang dilakukan oleh Mahkamah Syar'iyah yang bebas dari pengaruh pihak manapun.

[The Islamic Shari'a judiciary in Aceh is part of the national justice system within the system of religious courts implemented by the Shariah Court which free from influence from any party whatsoever. (Unofficial translation)]

Accordingly, the formulation of Article 3A paragraph (2) of the Law regarding Religious court is incorrect, as it positions the Shariah Court within the system of religious courts and the system of general courts at the same time. In reality, the position of the Shariah Court in the territory of NAD is only in the system of religious courts. Viewed from a clearly put perspective, the Shariah Court does not simultaneously stand in two court systems. The position of the Shariah Court has been formulated incorrectly in Article 3A paragraph (2) of the Law regarding Religious Court.

B. Absolute Competence of the Shariah Court of NAD

Each court system under the Supreme Court's supervision has its own separate

competence respectively. In the simile used by by Sudikno Mertokusumo,⁴⁴ the absolute competence of each court system is like a rail which sets the boundaries of competence in administering justice. With the boundaries set in the competence to administer justice, there should be no overlap in competence among the respective court systems.

It is impossible for overlap to occur in the absolute competence of the respective court systems. Absolute competence is the competence of judiciary bodies in examining certain cases which absolutely cannot be examined another judiciary body. Quite obviously, a court the absolute competence of which does not cover a certain case does not have the competence to administer justice in such case.

The absolute competence of a certain court system is obtained by attribution or delegation as stated by M. Hadjon.⁴⁵ The basis of absolute competence of each court system can be found in the law that serves as a basis for the establishment of the court system concerned. Accordingly, each court system obtains its absolute competence by attribution. At the same time, the competence of special courts is not obtained by attribution, but by delegation. Obtaining competence by delegation means that there is a transfer of competence rather than the granting of a new competence. Related to the competence of the Shariah Court in NAD, it is evident that its competence is competency by attribution. It has obtained such competence by attribution by virtue of Article 49 of Law No. 3 Year 2006 similarly to the competence of religious courts in other regions in Indonesia. In addition to that, the shariah court has additional competences in the implementation of the *syiar Islam*⁴⁶ based on *qanun* (regional regulation). To the extent that it is related to the authorities of the provincial government of NAD, by virtue of Article 13 paragraph (1) Law No. 11 Year 2006 regarding the Government of Aceh it possible to grant additional competence to the shariah court based on *qanun*. The *qanun* has the function of regulating the implementation of special autonomy in matters under the authority of the regional government of NAD in the context of the implementation of the Law regarding Special Autonomy for NAD.

Both the general courts as well the religious courts are the implementers of judicial power, however; they have different absolute competence. The competence of general courts is aimed at justice seekers in general. The competence of religious courts is aimed at people who embrace the religion of Islam, for specific cases. Such specific cases are intended to be handled by the religious courts within a limited scope, while the scope of general courts is broader as it is related to justice seekers in general.

Specific cases which fall under the competence of the religious courts by virtue of Article 49 of the Law regarding Religious Court are limited to dispute settlement at the first instance among people who are the followers of the religion of Islam in the following areas: (a) marriage; (b) inheritance; (c) testament; (d) grant; (e) *wakaf*; (f) *zakat* (alms); (g) *infaq*; (h) *shadaqah*; and (i) shariah economy. Disputes are related to conflicting interests between the parties in the form of differences in private rights and obligations.⁴⁷ It means that the competence of religious courts is currently

⁴⁴ Mertokusumo, *op.cit.*, p. 43.

⁴⁵ Hadjon, *et.al.*, *loc.cit.*

⁴⁶ [Translator's Note] [*Syiar Islam*: "all activities that carry with them the values of religious worship to adorn and elevate the observance of Islam." See R. Michael Feener, *Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia, 1st ed.*, (Oxford: Oxford Islamic Legal Studies, 2014), p. 208.]

⁴⁷ Sutantio and Oeripkartawinata, *op.cit.*, p.1. See also Ahmad Mujahidin (2), *Pembaharuan Hukum*

limited to the settlement of disputes in private law cases. Despite the fact that it is the successor of the religious courts in the territory of NAD, the the shariah court has been granted additional competence based on *qanuns* in the context of implementing and enforcing the *syiar Islam*. Accordingly, the shariah court's competence in the territory of NAD is not merely limited to dispute settlement; rather, it also includes examining and adjudicating other caes to the extent that it is provided for in *qanun* such as violation of the *qanun* concerning *maisir* (gambling), the *qanun* setting forth provisions on alcoholic beverages (*khamar*) and the like, and the *qanun* setting forth provisions concerned *khalwat* (immorality) which are part of the *jinayah* (criminal law). Thus, the absolute competence of the shariah court in NAD is not merely delegation of the competence of the religious courts. The absolute competence of the shariah court in NAD is obtained by attribution.

Based on the analysis of the previous sub-chapter, the position of the Shariah Court in the territory of Nanggroe Aceh Darussalam is within the system of religious courts. Further analysis is required for positioning the Shariah Court as a special court as formulated in Article 3A paragraph (2) of the Law on Religious Court. Special courts are part of a particular court system, which means that their competence is transferred from the competence of the main court they belong to. By such transfer of competence (delegation), the main court no longer has the competence to examine and administer justice within the competence transferred to the special court concerned. An example to illustrate the relationship between the special court and its main court is the relation between the Commercial Court and the District Court. The District Court is the implementer of general justice at the first instance for justice seekers both in civil law as well as criminal law disputes. The Commercial Court has the competence to adjudicate petitions for bankruptcy as well as in all matters related to bankruptcy by virtue of Law No. 37 Year 2004, and in certain intellectual property right cases. Prior to the establishment of the Commercial Court, the District Court had competence for bankruptcy petitions and all matters related to bankruptcy. With the establishment of the Commercial Court as a special court for general justice, the District Court no longer has competence to examine and adjudicate bankruptcy cases and all bankruptcy related cases. Bankruptcy cases have been delegated to become the competence of the Commercial Court. Viewed from the aspect of the source of its competence, as stated by Philipus M Hadjon, it becomes evident that the competence granted to the Commercial Court as a special court constitutes delegation of competence from the District Court.

Comparing the competence of the Religious Courts and the Shariah Court is not in the context of delegation of competence. All competences of the Religious Court also constitute the competences of the Shariah Court, as provided for under Article 49 of the Law on Religious Court. This is also in view of the fact that the Religious Courts in NAD were continued and changed to become the Shariah Court by virtue of *Keppres* No. 11 Year 2003. By continuing the Religious Courts and changing their name to become Shariah Court, all competences of the Religious Courts became the competences of the Shariah Court. Based on their corresponding competences, it can be concluded that the Shariah Court in NAD is identical to the Religious Courts. Accordingly, the Shariah Court in NAD does not have the position of a special court of the Religious Courts. Particularly in view of the fact that the Shariah Court has an organizational structure of its own and it is chaired by the respective Heads of the Shariah Court at the level of province, as well as the level of regency/municipality.

Acara Peradilan Agama dilengkapi Format Formulir Beperkara (Bogor: Ghalia Indonesia, 2002), p. 2.

The study of the Shariah Court in NAD from the aspect of its competence and leadership composition is not based on its position as a special court. This is done bearing in mind the fact that the Province of NAD has been granted broad autonomy, including the implementation of *syariat Islam*. One of the aspects of *syariat Islam* being implemented is the *qadha* (judicature). The Islamic judicature is implemented by the Shariah Court in its capacity as the continuation and change in name of Religious Courts in the territory of NAD.

The competence of the Shariah Court⁴⁸ includes examining, hearing, adjudicating, and settling disputes in areas of *ahwal al-syakhsyah* (family law), *muamalah* (private law), and *jinayah* (criminal law) based on Islamic shari'a. Competence in the area of *ahwal al-syakhsyah* (family law) and *muamalah* (private law), is the competence granted to the Religious Courts by virtue of Article 49 of the Law regarding Religious Court. However, competence in the area of *jinayah* (criminal law) is not included in the competence granted to the Religious Courts. It means that the absolute competence of the Shariah Court in NAD is the competence of the Religious Courts by virtue of Article 49 of the Law regarding Religious Court added by competence in the area of *jinayah* (criminal law) based on Islamic shari'a based on *qanun* in NAD. As Table 3 above indicates, the Shariah Court's competence in the area of *jinayah* is based on the following 5 (five) matters, namely: *Aqidah* (creed), *ibadah* (worship) and *syiar Islam* (*Qanun* of the Province of NAD No. 11/Year 2002), Alcoholic Beverages, (*Qanun* of the Province of NAD No. 12/Year 2003) Gambling (*Qanun* of the Province of NAD No. 13 Year 2003), *Khalwat* (Seclusion)/*Mesum* (Immorality) (*Qanun* of the Province of NAD No. 14 Year 2003) and the Management of *Zakat* (Alms) (*Qanun* of the Province of NAD No. 7 Year 2004) which are additional competences granted to the Shariah Court in NAD.

Such additional competence granted to the Shariah Court in NAD is possible based on broad autonomy, particularly in the implementation of the special character in the area of religious life. The purpose of the administration of religious life is the enforcement of *syariat Islam* implemented based on *qanun* (Regional Regulation for NAD). At the same time, the Shariah Court's additional competence in the area of *jinayah* (criminal law) is not based on delegation from the competence of the general court system. Such additional competence is attribution by virtue of Law No. 18 Year 2001 concerning Special Autonomy for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darusalam.

Based on the laws and regulations underlying it, as well based on its competence, the Shariah Court is not in the position of a special court. In fact, a comparison of the competence of the Shariah Court to that of the Religious Court indicates an expansion in the Shariah Court's competence. Such expansion includes the following areas: *Aqidah* (creed), *ibadah* (worship) and *syiar Islam*; Alcoholic Beverages; Gambling; *Khalwat* (Seclusion)/*Mesum* (Immorality); and the Management of *Zakat* (Alms).

The expansion of the Shariah Court's competence in the territory of NAD is understandable based on its broad autonomy. The special character of the administration of *syariat Islam* calls for law enforcement through the *syariat Islam* judicature which is based on the *qanuns* in Aceh. Viewed from the aspect of *stufenbau des recht*, the expansion of the Shariah Court's competence in the field of *jinayah* (criminal law) does not create inconsistency between the Law regarding the Religious Court and the *qanuns* in administering the special character of the Province of NAD.

⁴⁸ Indonesia (8), *op.cit.*, art. 128.

Due to the special character of NAD in the administration of the *syariah Islam*, it also obtains formal juridical legality under Law No.18 Year 2001. Accordingly, the competence of the Shariah Court in NAD is not in the capacity of a special court's competence.

The opportunity for further expansion of the Shariah Court's competence in the future remains open, to the extent that it is related to the administration of the *syariat Islam* and that it is based on the *qanuns*. The foregoing leads to the conclusion that the formulation of Article 3A paragraph (2) of the Law regarding Religious Court which positions the Shariah Court in the territory of NAD as a special court, is incorrect.

C. Reformulation of Article 3A paragraph (2) of the Law on Religious Court

One of the development sectors receiving attention and being set as priority other than development in the economic sector is law development aimed at the policy of enhancing the substance (material) of law, the structure of law (institutional framework) and legal culture.⁴⁹ According to Achmad Ali, structure is related to the number and type of judicial institutions, their jurisdiction (the types of cases under their competence) in case handling, as well as the quality, appointment and the number of Supreme Court justices, and others.⁵⁰ The development and reform of the justice system is conducted as a link in the chain of law development. The reason for linking the reform of the justice system to law development is due to the fact that the judicature is an important legal institution.⁵¹

Over time, Indonesia's justice system has been going through changes parallel to the changes in applicable state administration. The granting of special status in the form of broad autonomy to the province of NAD is materialized in the administration of religious life. The judicature (*qadha*) which is in line with the culture of the community of NAD is the *Syariat Islam* judicature implemented through the Shariah Court. With reference to Article 1 Sub-article 15 of Law No. 11 Year 2006 regarding the Government of Aceh, which sets forth as follows:

Mahkamah Syar'iyah Aceh dan Mahkamah Syar'iyah kabupaten/kota adalah pengadilan selaku pelaksana kekuasaan kehakiman dalam lingkungan peradilan agama yang merupakan bagian dari sistem peradilan nasional.

[The Shariah Court of Aceh and the Shariah Court at the regency/municipality level is a court which implements judicial power within the system of religious courts forming a part of the national justice system. (Unofficial translation)]

It is evident from the above that the shariah court is purely an implementer of judicial power within the system of religious courts. This is in accordance with the classification of court systems as intended Article 24 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia and Article 18 of the Law regarding Judicial Power.

Viewed from the operational aspect, the Shariah Court is the Religious Court for the region of NAD, the competence of which has been expanded in the context of

⁴⁹ Efa Laela Fakhriah, *Bukti Elektronik dalam Sistem Pembuktian Perdata, 1st ed., 1st print*, (Bandung: Alumni Bandung, 2009), p. 1.

⁵⁰ Achmad Ali (2), *Keterpurukan Hukum di Indonesia: Penyebab dan Solusinya* (Bogor: Ghalia Indonesia, 2005), p. 2.

⁵¹ Mujahidin (1), *Peradilan Satu Atap di Indonesia* (Bandung: Refika Aditama, 2007), p. 3.

implementing special autonomy in the field of *syariat Islam*. The expansion of the Shariah Court's competence as part of the religious court system is a new phenomenon. The competence of Religious Courts is normally limited to the areas of family law and *muamalah* (private law).

It is a rather remarkable development in the context of Indonesia's law development that for the first time, the religious court system through the Shariah Court has competence in the field of criminal law (specifically in the field of implementing the *syariat Islam*).

Religious Courts as institutions implementing the law are also going through development. In principle, the process of creating and amending legislative products adjusted to the growth and development taking place in society is a reflection of the nature of legal norms as dynamic legal norms. Law as instrument of social control is bound to be subject to constant change and development parallel to the development of society. This is in line with the opinion expressed by the followers of von Savigny stating that ideal law is the law which constantly adapts to the level of development in society.⁵²

Expansion in the form of granting additional competence to the Shariah Court is an adjustment of the law to the developments taking place in society. Development of the judiciary is implemented parallel to the changes taking place in the state administration system, specifically in the government of Aceh. The granting of broad autonomy to the provincial government NAD in the area of administering religious life (Islam) calls for an adjustment in the judicature in the context of enforcing *syariat Islam*. The expansion of the competence of the shariah court as a religious court for the territory of NAD is inevitable based on Law No. 18 Year 2001. At the same time, the said Law regarding Special Autonomy for NAD is implemented based on the *qanun* in Aceh to the extent that it is related to the authority of the government of the Province of NAD, as a basis for the expansion of the Shariah Court's competence.

Based on the changes and developments taking place in the region of NAD it would appear that the competence of the Shariah Court may be further expanded gradually in the future, considering that the Shariah Court may be assigned other tasks and authorities as provided for in *qanun*, as stated in Article 51 of Aceh *Qanun* No. 10 Year 2002, whereas the competence of the Religious Court by virtue of Article 49 of the Law on Religious Court will also continue to be the Shariah Court's competence.

The formulation of Article 3A paragraph (2) of Law No. 50 Year 2009 which positions the Shariah Court as a special court within the system of general courts and within the system of the religious courts at the same time inconsistently with Article 27 paragraph (1) of the Law regarding Judicial Power needs to be corrected imminently. The inconsistency can be resolved by referring to Bagir Manan's view on umbrella law and the laws under such umbrella law. Based on its position as an umbrella law, the Law regarding Judicial Power, as stated by Baqir Manan, must be capable of reaching out to various forms of regulations and policies. Based on Baqir Manan's view that the Law on Judicial Power is the umbrella law and the Law on Religious Court is the law under the said umbrella law. Beyond all question, the formulation of the Shariah Court's position as special court as provided for in Article 3 A paragraph (2) of the Law on Religious Court should be adjusted and it should be consistent with the provisions of Article 27 paragraph (1) of the Law on Judicial

⁵² Theo Huijbers, *Filsafat Hukum dalam Lintasan Sejarah [The Philosophy of Law from A Historical Perspective]* (Yogyakarta: Yayasan Kanisius, 1984), p. 118.

Power. Namely, that a special court can only be established within one of the existing court systems under the Supreme Court's supervision. Viewed from the aspect of its position and competence, it becomes evident that the Shariah Court does not in fact possess the capacity of a special court as intended above.

If there is a change in the position of the shariah court as a special court within Indonesia's justice system, such change must continue to comply with the provisions of Article 27 paragraph (1) of the Law regarding Judicial Power as its umbrella law. The error in the formulation of the Shariah Court as a special court in Article 3A paragraph (2) of Law No. 50 Year 2009 has led to an inconsistency between the umbrella law and the law under it; hence there is a need to make the appropriate correction in the formulation of the law concerning religious court accordingly.

It is relatively easy to make the necessary correction in the formulation of Article 3A paragraph (2) of the Law regarding Religious Court which is inconsistent with Article 27 paragraph (1) of the Law on the Basic Principles of Judicial Power. Such correction can be adequately made only at the level of normative provisions. In principle, the error leading to the above mentioned inconsistency between laws and regulations has occurred only at the level of normative formulation. In the actual implementation of judicial power, no overlap of competence has been found between general courts and religious courts in the territory of NAD. Therefore, such inconsistency occurs only at the normative level, which can be corrected by revising the wording of Article 3A paragraph (2) of the Law regarding Religious Court. Basically, such revision is only related to the position of the Shariah Court as implementer of justice within the system of religious courts rather than in the position as special court. In other words, only a normative error has occurred in formulating the Shariah Court's position and competence, while no error has been found in its practice and operational implementation. This is due to the fact that the Shariah Court's position and competence is not inconsistent with the provisions of the Law regarding Judicial Power.

For the purpose of resolving the inconsistency in formulation in order to avoid misperception or misunderstanding, there is a need to renew the formulation by using wording which positions the Shariah Court in the appropriate manner. The formulation of the Shariah Court's position and competence in Indonesia's justice system refers to it as Religious Court for the territory of NAD with expanded competence in the context of administering special autonomy in the area of implementing *syariat Islam*.

The renewed formulation of the Shariah Court's position and competence as a result of this research has been able to provide an answer to and clarify the Shariah Court's position and competence in Indonesia's justice system.

IV. Conclusion

The Shariah Court does not stand in two court systems at the same time as formulated in Article 3A paragraph (2) of the Law regarding Religious Court. The general administration and case administration of the Shariah Court is part of the system of religious courts. The existence of the Shariah Court within the system of religious courts is in compliance with Article 24 paragraph (2) of the 1945 Constitution, Article 18 of the Law regarding Judicial Power.

The Shariah Court's competence is not in its capacity as a special court. In fact, the Shariah Court has additional competences as a result of which it has expanded

competence compared to the competence of Religious Courts.

The formulation of Article 3A ayat (2) of the Law on Religious Court concerning the shariah court needs to be revised. A more appropriate wording to describe the Shariah Court's position and competence in Indonesia's justice system is as follows:

Mahkamah Syar'iyah merupakan Pengadilan Agama untuk wilayah Nanggroe Aceh Darussalam dengan perluasan kewenangan dalam rangka penyelenggaraan otonomi khusus dalam bidang pelaksanaan syariat Islam.

[The Shariah Court is a Religious Court for the territory of Nanggroe Aceh Darussalam with expanded competence in the context of the administration of special autonomy in the area of the implementation of syariat Islam.]

Bibliography

Legal Documents

- Indonesia. *Keputusan Presiden tentang Mahkamah Syar'iyah di Provinsi Nanggroe Aceh Darussalam (Presidential Decree regarding The Shariah Court in the Province of Nanggroe Aceh Darussalam)*. Kepres No. 11 Tahun 2003 (Presidential Decree No. 11 Year 2003).
- Indonesia. *Undang-Undang Dasar 1945 (1945 Consitution)*.
- Indonesia. *Undang-Undang tentang Kekuasaan Kehakiman (Law regarding Judicial Power)*. UU No. 48 Tahun 2009, LN No. 157 Tahun 2009, (Law Number 48 Year 2009, SG No. 157 Year 2009).
- Indonesia. *Undang-Undang tentang Otonomi Khusus bagi Provinsi Daerah Istimewa Aceh sebagai Provinsi Nanggroe Aceh Darussalam (Law Regarding Special Autonomy for NAD)*. UU No. 18 Tahun 2001, LN No. 114 Tahun 2001 (Law Number 18 Year 2001, SG No. 114 Year 2001).
- Indonesia. *Undang-Undang tentang Pemerintahan Aceh (Law regarding the Government of Aceh)*. UU No. 11 Tahun 2006, LN No. 62 Tahun 2006 (Law Number 11 Year 2006, SG No. 62 Year 2006).
- Indonesia. *Undang-Undang tentang Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh (Law regarding Adminstration of the Special Character of the Special Region of Aceh)*. UU No. 44 Tahun 1999, LN No. 172 Tahun 1999 (Law Number 44 Year 1999, SG No. 172 Year 1999).
- Indonesia. *Undang-Undang tentang Peradilan Militer (Law regarding Military Court)*. UU No. 31 Tahun 1997, LN No. 84 Tahun 1997 (Law Number 31 Year 1997, SG No. 84 Year 1997).
- Indonesia. *Undang-Undang tentang Peradilan Tata Usaha Negara (Law regarding State Administration Court)*. UU No. 5 Tahun 1986, LN No. 77 Tahun 1986 (Law Number 5 Year 1986, SG No. 77 Year 1986).
- Indonesia. *Undang-Undang tentang Perubahan Kedua atas Undang-Undang No. 2 Tahun 1986 (Law regarding the Second Amendment of Law No. 2 Year 1986 regarding General Court)*. UU No. 49 Tahun 2009, LN No. 158 Tahun 2009 (Law Number 49 Year 2009, SG No. 158 Year 2009).
- Indonesia. *Undang-Undang tentang Perubahan Kedua atas Undang-Undang No. 7 Tahun 1989 tentang Peradilan Agama (Law regarding the Second Amendment of Law Number 7 Year 1989 regarding Religious Court)*. UU No. 50 Tahun 2009, LN No. 159 Tahun 2009 (Law Number 50 Year 2009, SG No. 159 Year 2009).

- Province of Nanggroe Aceh Darussalam. *Qanun tentang Khalwat (Mesum)*(*Qanun of regarding Khalwat (Immorality)*). Qanun No. 14 Tahun 2003, LD No. 27 Seri D No. 14 (Qanun No. 14 Year 2003, Provincial Gazette No. 27 D Series No. 14).
- Province of Nanggroe Province of Nanggroe Aceh Darussalam. *Qanun tentang Maisir (Perjudian)* (*Qanun regarding Maisir (Gambling)*). Qanun No. 13 Tahun 2003, LD No. 26 Seri D No. 13 Tahun 2003 (Qanun No. 13 Year 2003, Provincial Gazette No. 26 D Series No. 13).
- Province of Nanggroe Aceh Darussalam. *Qanun tentang Minuman Khamar dan Sejenisnya* (Qanun regarding Khamar (Alcoholic Beverages) and the like). Qanun No. 12 Tahun 2003, LD No. 25 Seri D No. 12 Tahun 2003 (Qanun No. 12 Year 2003, Provincial Gazette No. 25 D Series No. 12).
- Province of Nanggroe Aceh Darussalam. *Qanun tentang Pengelolaan Zakat (Qanun regarding the Management of Zakat (Alms))*. Qanun No. 7 Tahun 2004 (Qanun No. 7 Year 2004).
- Province of Nanggroe Aceh Darussalam. *Qanun tentang Peradilan Syariat Islam. (Qanun regarding Syariat Islam Judiciary)*. Qanun No. 10 Tahun 2002, LD No. 2 Seri E No. 2 Tahun 2002 (Qanun No. 10 Year 2002, Provincial Gazette No. 2 E Series No. 2 Year 2002).

Books

- Abubakar, Al-Yasa' Al-Yasa' and Marah Halim. *Hukum Pidana Islam di Aceh: Penafsiran dan Pedoman Pelaksanaan Qanun tentang Perbuatan Pidana*. Banda Aceh: Dinas Syariat Islam Aceh, 2011.
- Ali, Achmad *Keterpurukan Hukum di Indonesia: Penyebab dan Solusinya*. Bogor: Ghalia Indonesia, 2005.
- Ali, Achmad. *Menguak Tabir Hukum*. 2nd ed. Bogor: Ghalia Indonesia, 2011.
- Didi *et.al. Peran Peradilan Agama Dalam Pengembangan Access to Justice di Indonesia* (The Role of Religious Court in the Development of Access to Justice in Indonesia). Jakarta: Dirjen Badilag RI (Directorate General of Religious Court Bodies of the Republic of Indonesia), 2012.
- Djalil, Basiq. *Peradilan Agama di Indonesia*. Jakarta: Kencana Prenada Media Grup, 2010.
- Fakhriah, Efa Laela. *Bukti Elektronik dalam Sistem Pembuktian Perdata*. 1st ed. 1st print. Bandung: Alumni Bandung, 2009.
- Hadjon, Philipus M., *et.al. Pengantar Hukum Administrasi Indonesia*. Yogyakarta: Gajah Mada University Press, 2011.
- Harahap, M. Yahya. *Hukum Acara Perdata, tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*. Jakarta: Sinar Grafika, 2008.
- Huijbers, Theo. *Filsafat Hukum dalam Lintasan Sejarah [The Philosophy of Law from A Historical Perspective]*. Yogyakarta: Yayasan Kanisius, 1984.
- Kusnadi, Kusumaatmadja, Mochtar. *Konsep-Konsep Hukum Dalam Pembangunan (Kumpulan Karya Tulis)*. Edited by Otje Salman and Eddy Damian. Bandung: Alumni, 2006.
- Lontoh, *et. al. Penyelesaian Utang Piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*. Bandung: Alumni, 2001.
- Manan, Baqir. *Sistem Peradilan Berwibawa: Suatu Pencarian*. Yogyakarta: FH UII Press, 2005.
- Manan, Baqir. *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Indonesia dalam Undang-Undang No. 4 Year 2004*. Jakarta: Mahkamah Agung RI, 2005.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group,

- 2007Mertokusumo, Sudikno. *Hukum Acara Perdata Indonesia*. Yogyakarta: Penerbit Liberty, 2002. Mujahidin, Ahmad *Peradilan Satu Atap di Indonesia*. Bandung: Refika Aditama, 2007.
- Rasjidi, Lili and IB Wiyasa Putra. *Hukum Sebagai Suatu Sistem*. Bandung: Mandar Maju, 2003.
- Salman, Otje. *Filsafat Hukum Perkembangan dan Dinamika Masalah*. Bandung: Refika Aditama, 2010.
- Soekanto, Soerjono and Sri Mamudji. *Penelitian Hukum Normatif Suatu Tinjauan Singkat* Jakarta: PT. Rajagrafindo Persada, 2009.
- Soemitro, Roni Hanitijo. *Metode Penelitian Hukum dan Jurimetri*. Jakarta; Ghalia Indonesia, 1990.
- Sumner, Cate and Tim Lindsay. *Reformasi Peradilan Pasca Orde Baru, Pengadilan Agama di Indonesia dan Keadilan Bagi Masyarakat Miskin [Courting Reform: Indonesia's Islamic Court and Justice for the Poor]*. Cooperation between Lowy Institute and Institut Studi Islam Fahmina, Cirebon West Java, 2011.
- Sutantio, Retnowulan and Iskandar Oeripkartawinata. *Hukum Acara Perdata dalam Teori dan Praktik*. Bandung: CV Mandar Maju, 2002.

Articles

- Asril. "Pengadilan-Pengadilan Khusus di Indonesia." www.legalitas.org. Accessed on 14 April 2014.
- Mutaqin, Dadan. "Penyelesaian Sengketa Perbankan Syariah di Luar Lembaga Peradilan." *Varia Peradilan* No. 26 (2008).