PROSPEK KOMPETENSI ABSOLUT PERADILAN AGAMA

ABSOLUTE COMPETENCE THE RELIGION COURT PROSPEC

¹Mohdar Yanlua, ²Sukarno Aburaera, ²Abrar Saleng, ³M. Arfin Hamid

¹Bagian Hukum Perdata Keluarga Institut Agama Islam Negeri Ambon
²Bagian Hukum Perdata Universitas Hasanuddin Makassar

Alamat Korespondensi:
Mohdar Yanlua
Fakultas Hukum Universitas Hasanuddin Makassar
Address: Jalan Imam Ghazali, Rt 04 Rw 17 Batumerah Ambon
Hp. 085243189231
Email: mohdaryanlua@yahoo.com
Abstrak


Kata Kunci: Prospek, Kewenangan, Peradilan Agama

Abstract

Prospects absolute competence of religious courts of each order of government Indonesia can not be separated from the political dynamics. The purpose of writing this article is to investigate the development of competence of religious courts under national law. Type of study or the writing of this article is to study literature (library research). approach to law and philosophical approach. Both approaches are used to encourage researchers to seek philosophical ratio legislators and legislation that will be known to any potential conflicts, ambiguities and vacuum at the level of dogmatic legal norms. Then analyzed qualitatively using reasoning and legal argument. From the results of other research obtained information that the prospect of the absolute authority of religious courts of the old order of government in order to reform development. Based on the analysis, it can be concluded that the prospective development of absolute competence of the religion court responded along with the dynamic development of Islamic law in Indonesia, there was a paradigm shift from the government’s accommodative paradigm to paradigm responsive.

Keywords: Prospect, Authority, Religious Courts.
INTRODUCTION

Absolute competence Religious Courts have historically experienced ups and downs. It can not be separated from the political dynamics that occur in any order of the government of Indonesia, even in the reign of the Old Order no efforts to eliminate religious court as executor of judicial power.

The authority of the Religious prior Government Regulation No. 54 Year 1957 on Java and Madura based on 1882 Gazette No. 152 only in the field of marriage. After the Government Regulation Number 54 Year 1957 expanded the authority to examine other matters including marriage, inheritance, wills, endowments, grants, charity and the Baitul Maal.

Birth of the Act (the Act) number. 1 of 1974, the authority extended to 22 areas of marital authority. Then with law No. 7 of 1989, further strengthening the authority of the Religious in the areas mentioned above.

In order government reform berdasarkan Law No. 3 of 2006, jonto Act No. 50 of 2009 the authority was renewed, adding authority in the field of charity, Islamic economics include 11 authorities, as well as property rights and the determination results in the testimony of witnesses see the new moon.

Based on the author's research competence in the context of absolute religious court of Justice in Indonesia, this paper tried to uncover the possible development of the Religious absolute competence to the central question how competence development prospects absolute religious court? The purpose of this study was to determine the development prospects of the absolute competence of religious courts each period of government in Indonesia.

MATERIALS AND METHODS ANALYSIS

In writing this article the author only uses materials such as books related to the material focus of this article. This type of research is often referred to as library research (library research). The approach is the approach of the legislation. The use of statutory approach opens opportunities for more in-depth research to find a consistent and relevance of the vertical and horizontal of the formal legal enforceability of the absolute authority of the Religious, and the philosophical
study of law principles. Collecting data gathering techniques used legal materials. Then analyzed using qualitative reasoning and legal argument.

RESULTS

Prospect of the absolute authority of religious courts rule on the order of the old order to reform development. As seen in Table 1

In Table 1 shows the authority of religious courts of the reign of the Old Order until the reign of the order of reforms experienced a very significant development. In the New Order government has a very significant role, because his time had put religious courts as judicial position of the same State with three other state courts. Absolute Authority in the field of family law expanded the brush directly to the Indonesian Muslim family law. In the reign of the Order of the Religious Reformation absolute authority in the field of family law than expanded in the field of Islamic finance and the legal rights of Muslims.

In this formation the held order amending the Constitution of the Republic of Indonesia Year 1945, which puts the judiciary to be under one roof at the Supreme Court. These changes affect the regulation of the judiciary. Held changes to the basic law of judicial power, so the implications of the change in the law courts. Religious Judicature Act also made changes. Act No. 7 of 1989 amended by Act No. 3 of 2006 jonto Law No. 50 Year 2009.

The authority of religion is constitutionally absolute justice obtained through Law No. 3 of 2006 jonto Law No. 50 Year 2009. Article 2 of Law No. 3 of 2006 jonto Act No. 50 of 2009 mentioned the Religious is one of the perpetrators of the judicial authorities seeking justice for the people of the Islamic faith of the particular case. Religious Courts Law only regulates some areas of particular cases, but because the article is called quite clear explanation will give birth to multiple interpretations which allow an expansion of authority in other areas of civil law and criminal law. In addition to the elimination of the word civil in certain civil cases, as well as the addition of absolute authority of religious courts, the Islamic financial disputes and determination of the validity of the results rukyat beginning and end of Ramadan.
In the field of Islamic finance including Islamic banking disputes, Law No. 3 of 2006 jonto Act No. 50 of 2009 religious courts are the only institutions that resolve disputes, including disputes Islamic economics Islamic banking. However, Islamic banking law still gives the option for perpetrators of Islamic banking to use other agencies to resolve disputes Islamic banking. Both of these laws there are differences in the authority of religious courts in resolving disputes Islamic banking. Article 55 paragraph (1) of Law Islamic Banking Islamic financial services dispute resolution under the authority of religious courts, but in paragraph (2) counts the option to resolve the dispute Islamic bankers banks choose other institutions in accordance with the contents of the contract. The difference is seen in Table 2

Table 2 shows that there are differences in the principles and the rule of law in Islamic banking disputes. At the beginning of the draft law proposed Islamic Banking House of Representatives to the Government no one single article regulating Islamic banking disputes. This does not mean the activities of Islamic banking there is no dispute, but the view of the working committee bill drafters of Islamic banking because Islamic banking dispute that has become the authority in accordance with the Religious Courts Law No. 3 of 2006. Government holds the other, so insert a clause governing Islamic banking dispute resolution by the General Court. Completion sengeketa on Islamic banking by the General Court as related to Islamic banking transactions of a commercial nature. Though Islamic banking is not merely commercial but also are investment banking.

Approach law Article 55 paragraph (2) of Act No. 21 of 2008 has hit the letter i of Article 49 of Law No. 3 of 2006 jonto Law No. 50 Year 2009. As mentioned earlier, Act No. 21 of 2008 formally legally authorizes the courts to resolve disputes Religion banking. In the same article also gives the freedom for actors to Islamic banking through other means in the settlement of disputes in accordance with the contents of the contract. It is there choice of institution in the completion principle of Islamic banking disputes. Though the law the Religious change in Article 49 point (i) the authority of religious courts Islamic economics
no norms governing Islamic financial disputes in other ways. From a philosophical approach to the field of Islamic finance has become the authority of religious courts settlement meant that Islamic economics is only subject to the laws of Islam.

The provisions of Law No. 2 of 1986 jonto Law Number 8 Year 2004 jonto Law Number 49 Year 2009 concerning the General Court, stating that there are certain matters under the authority of the judiciary in a religious court (the principle of lex specialis). If both are against the principle of lex specialis is a special provision should be prioritized enforcement. It is based on the principle of lex specialis derogaad legi generalis the more specific provisions override the more general provisions.

In this context, the appropriate principle Lex specialis derogaad legi generalis economic disputes according to Islamic law the Religious a Religious Courts absolute authority. Religious Judicature Act does not recognize the principle of choice of law, meaning that if there is a dispute Islamic economics, the solution according to Islamic law. While the Act No. 21 of 2008 concerning Islamic Banking, the authority to resolve disputes than the Religious Islamic banking is also given to the subject of the law to choose an alternative solution as regards content contract agreement. This is in accordance with Civil Code Article 1338 provides freedom of covenant. Freedom includes the choice of legal institutions that would resolve disputes where one party committed an unlawful act.

Approach law, Islamic law bodies full compliance with the provisions of Islamic law and in case of violations and / or disputes are resolved according to the laws of Islam and the religious court has authority to resolve. Similarly to other legal entities (civil legal entity), although personality is not a Muslim but he did business activities or sharia, sharia economic or business activity; then efforts must be based on Islamic principles. In fact it should be, the Religious authority is not limited to these issues, but also about other issues of Islamic law which has been practiced by people in everyday life, therefore, the prospect of the Religious absolute competence development can also be given the authority settle lawsuit
offenses that are directly related to the areas of authority of law, and this can be possible, because:

1) specialized areas of law under the authority of the Religious substance is Islamic law. Therefore, either civil or criminal dispute resolution under Islamic law;
2) in terms of the application areas of law relating to the lives of Muslims, the Muslim judge who knows the complete Islamic law in case of dispute.
3) specialized areas of law under the authority of the Religious is a specific and particular force to the body of Muslims and Islamic law. (Arto, 2012)

The application of Islamic law in the life of the state is a collective social obligation or liability (legal genaralik) and in certain circumstances will be a specialist legal liability or individual liability (Anshori et.all, 2008). Collective obligation is the responsibility of the state. States have the authority and responsibility to enforce the values of Islamic law in the Muslim community living into positive law (Ali, 2002). While individual liability is the responsibility of every individual Muslim to carry out any rules set by the state and is responsible for the legal action does. Therefore, Muslims submission to Islamic law a requirement dharuriyat (Shah, 2002) which must be implemented.

Of course, a dispute resolution authority was resolved in the Religious and the law is enforced Islamic law. While criminal matters finalized in the General Court and the law is not enforced Islamic law. Differentiation occurs settlement in areas of Islamic law has been positive because the religious court has no discretion to resolve criminal cases. Though the Religious in the kingdom or work-Islamic sultanates resolve criminal cases.

According to Amin Summa (interview) when his contract is based on the principles of Islamic law as mandated by law, then the case of dispute resolution should also be based on the principles of Islamic law. Like the Islamic family law that regulates such marriage contract under Islamic law and marital settlement decision is also based on the principles of Islamic law. Similarly, in the economic or financial contract which is based on the principles of Islamic law, in the event of a dispute, the settlement must also be based on the principles of Islamic law, for it is a strange thing when economies contract / or financial which is based on legal principles Islam, then the problem is not solved by a system of Islamic law.
Criminal case related to the field of Islamic law in the positive no significant willingness of giving authority to the religious court to resolve the criminal case directly related to family law, such as domestic violence. As mentioned that the court held a hearing to finalize the divorce if indeed there are reasons and the court found that between husband and wife in question is no longer possible to live harmoniously reconciled again in the household. Several reasons can be used as an act of crime or offense, ie one of the parties commit adultery or an alcoholic, junkie, gambler, etc. are hard to cure. Similarly, one of the parties to violence or severe abuse that endanger the other. If the reasons are considered strong evidence and a consideration of the law by religious court judge to drop the divorce judgment, the act of a crime or violation between husband and wife will be a reason for a party to a complaint to the investigating authorities.

DISCUSSION

This study related to the prospect of absolute authority of religious courts. Authorities absolute religious courts established in article 49 of Law Religious Courts. In fact, the development shows a significant increase in the context of the implementation of Islamic law in Indonesia. Apparently, this development can not be separated from the social dynamics of Muslim societies law. Expansion of authority, also when viewed from the legal system theory raised by Friedman, especially about legal substances contained accommodation legal norms, the real behavior patterns of society and the law of life and not just existing rules in the book of the law or the law in books. Substance also means the products produced, covering a decision is issued, the new rules are drafted. Therefore, the expansion of the authority in accordance with the development of law and legal needs of the community, especially the Muslim community. Eugien Ehrlich in (Soekanto 1985) stated that ... the law is a good law in accordance with the laws of life in the community. He also stated that positive law will only be effective if in harmony with the laws that exist in the community. (Soekanto 1991). David N. Schiff states ... laws and regulations of mutual interrelation, especially evident from the social changes that happen very quickly, so that the interests of individuals in the community should be accommodated within the
rules of law. (Widyaningsih et. al, 1987). He also stated that there is a relationship between different patterns of behavior that manifests in the form of law with the real behavior of the individual.

Given the existence of religious courts as a legal structure, proportional to its authority as a legal substance. So the structure of the law and legal substance should be equally strong, and some of the authority that had been assumed by the Religious, apparently possessed not the result of a strategic planning of the managers or authorities (by design), but since the matter has been practiced sociologically by the community. (Jokosutomo 1985)

Based on the description, then the expansion of some of the Religious authority is a necessity, given the areas of law that the authority of the Religious, is something that has been attached to the Muslim community. In other words, Islamic law under the authority of the Religious far has been the law of life and practiced by society (Rashid, 2003).

The level of implementation of Islamic law he is applicable and acceptable to the various types of local culture. Islamic law is a moral force of society (moral force of people) are capable of positive law vis-à-vis the state, whether written or unwritten (Aripin 2008). Any person claiming to be a Muslim should do business based on the principles of Islam, and is subject to the laws of Islam. In fact it is an obligation. Thus any unlawful act should be resolved according to Islamic law. That means, the Religious authority is not limited to specific issues, but also about other issues of Islamic law which has been practiced by people in everyday life. There are two interesting things in the history of the Religious sustainability: first, the law of Islam has always been maintained and carried out in a Muslim family, the second, the transformation of the judge to the functions carried out by the religious court in Indonesia. (Manan 2007).

For Muslims submission to Islamic law in totality is a must, it is a necessity if the completion of the criminal case related to the issue of marriage, inheritance, wills, endowments, Islamic finance has the authority of the Religious and settled according to Islamic law. Completion of criminal families like mayhem, and adultery, in the case of divorce, or disputes endowments in the case
of abuse of power management of waqf property. Similarly, the completion of the
criminal justice authorities of Islamic finance has become common. Obedience to
the law of Islam is not merely confined to the legal aspects of worship, but these
aspects of worship of any other than an obligation for Muslims. Therefore, Islamic
law be enforced in conjunction with the person who pledged himself as a Muslim.

In Islamic doctrine, Islam faith was pronounced orally, believed to be in
the hearts and enactment. The consequences of the adherents of this doctrine is the
duty of enforcing Islamic law individual and collective obligations. So every
Muslim is obliged both individually and collectively subject to the laws of Islam.
If so, then both individual Muslims and Islamic legal entities have no choice but
to make Islamic law in the settlement. From the civil law approach to the areas of
law brought the authority of religious courts settled according to Islamic law.
While criminal sanctions in the areas of law that the authority of the general court,
and resolved not according to Islamic law. And if it is associated with the Islamic
principle of personality itself on the principle of submission to Islamic law in
totality, then there is no other alternative to not enforce the totality of the areas of
Islamic law under the authority of religious courts, including criminal matters
contained in the legal norms in fields of Islamic law.

CONCLUSION

Competence development prospects absolute reign of the Religious of the
old order to the order of reforms reign showed significant improvement, despite
ups and downs. The increase can not be separated from the social dynamics of
Muslim societies law. At each order of government absolute competence
development in conjunction with the Religious respond to the dynamics of the
development of Islamic law in Indonesia, resulting in a paradigm shift from the
government's accommodative paradigm to paradigm responsive.
BIBLIOGRAPHY


Peraturan Perundang-undangan

Undang-Undang Nomor 2 Tahun 1986 jonto UU Nomor 8 Tahun 2004 jonto UU Nomor 49 Tahun 2009 tentang Peradilan Umum

Undang-Undang Nomor 7 Tahun 1989 jonto UU Nomor 3 Tahun 2006 jonto UU Nomor 50 Tahun 2009 tentang Peradilan Peradilan Agama.

Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah

Undang-Undang Nomor 1 Tahun 1974 tentang Pokok-pokok Hukum Perkawinan
Table 1. Religious Courts absolute authority by government periodization

<table>
<thead>
<tr>
<th>Serial Number</th>
<th>period of government</th>
<th>Type the absolute authority of religious court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Government of the Old Order</td>
<td>By Gazette 1882 No. 152 for Java and Madura authority only in the field of marriage. Government Regulation No. 54 Year 1957 on the authority of religious courts outside Java and Madura, including marriage, inheritance, referee, endowments, grants, charity and the Baitul Maal.</td>
</tr>
<tr>
<td>2</td>
<td>New Order Government</td>
<td>Under Law No. 1 of 1974 in the field of marriage is 22, and the authority to execute judgment religious court must receive confirmation from the District Court. Law Number. 7 In 1989 the Religious authority other than marriage expanded in the Inheritance and wills under Islamic law grants infak and sedakah</td>
</tr>
<tr>
<td>3</td>
<td>Government Reform Order</td>
<td>Under Law No. 3 of 2006, legislation jonto nomor50 In 2009, the authority of PA include: Marriage 22 authority, Inheritance and wills (deleted principles of choice of law), grants, and sedakah infak, zakat, Islamic economics 11 authority, rights and the determination of the results of reckoning rukyah. Banking dispute with the content of the contract terms do not appoint general courts or sharia arbitration</td>
</tr>
</tbody>
</table>

Sources of primary legal materials 2012

Table 2. Principles and legal norms concerning the absolute authority in the PA Justice Law religion and Islamic Banking Act

<table>
<thead>
<tr>
<th>Serial Number</th>
<th>Principle and rule of law</th>
<th>law the Religious</th>
<th>Islamic Banking Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The principle of law</td>
<td>Principles of Islamic personality and legal submission</td>
<td>The principle of submission Legal personality principle and the principle of law based on the contents of the contract choice</td>
</tr>
<tr>
<td>2</td>
<td>The rule of law</td>
<td>Article 49 letter i dispute settlement authority of Islamic finance including Islamic banking is no choice of law</td>
<td>Article 55 paragraph (2) There is an alternative settlement Islamic banking</td>
</tr>
</tbody>
</table>

Sources of primary legal materials 2012