

Norm Disharmony between Customary Law and *Qanun* in Nanggroe Aceh Darussalam

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In Indonesia, conflict over norms or disharmony in laws and regulations is a legal problem that often occurs. This is motivated by the existence of several legal mechanisms that overlap between the regulations below and the regulations above. As happened in Nanggroe Aceh Darussalam Province between customary law and positive law, which in this case is Qanun law. In this article, we will discuss efforts to harmonize norms between customary law and Qanun in Nanggroe Aceh Darussalam using descriptive qualitative methods. Efforts to resolve disharmony in statutory regulations are resolved by several alternatives, namely: 1) Right to Judicial Review of Legislative Regulations; 2) Constitutional Route; 3) Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Legislative Regulation Makers issued by the Ministry of Law and Human Rights; 4) Regulation of the Minister of Law and Human Rights Number 2 of 2019 concerning Resolving Disharmony in Legislative Regulations Through Mediation.

Keywords: Customary Law, Harmonize, Qanun.

INTRODUCTION

Harmonization of legal regulations can be interpreted as a process of aligning or harmonizing legal regulations that are to be or are being prepared, so that the resulting legal regulations comply with good legal principles and statutory regulations.¹ Harmonization is carried out as an effort or process to adjust legal principles and systems in order to realize legal simplicity/utility, legal certainty and justice. Legal harmonization as a process in the formation of statutory regulations, overcoming conflicting matters and irregularities between legal norms in harmonious national legislation, in the sense of harmony, harmony, balance, integration, and consistency and adherence to principles.

Legislation in Indonesia is not as easy as what is defined in terms of the term harmonization of statutory regulations, but there is also disharmony between statutory regulations or what is termed disharmony in legal norms. The occurrence of disharmony between laws and regulations is an inevitability that occurs in Indonesia because laws and regulations in Indonesia are structured in stages so that what has been regulated or material that has been regulated has the potential to be re-regulated using a different legal mechanism.

Many experts try to define the meaning of dis-harmonization in the context of statutory regulations, but in simple terms, disharmony in statutory regulations can be understood as an event, where there are two or more regulations that regulate the same substance, but each of these regulations have no similarities in technical regulations. Apart from that, dis-harmonization of legal regulations can also be said to be an overlap between one regulation and another, resulting in conflicting regulations both vertically and horizontally, one of the reasons for the overlap in regulations is the result of too many legal regulations in Indonesia.

The granting of special autonomy to the province of the special region of Aceh as the Province of Nanggroe Aceh Darussalam raises hopes and provides opportunities for the growth of creativity, discretion and freedom for the provincial, district and city governments, as well as the people of Aceh as a whole, to reorganize their identity and develop their territory. Various levels of society and government take advantage of this opportunity. In fact, an enthusiastic response is needed to avoid a repeat of the centralized government structure of the New Order era.²

The people of Aceh are famous for their devotion and even fanaticism towards Islamic teachings. So that Islam becomes self-awareness and cultural identity. In Acehnese traditional proverb, "*hukon ngoen adat lage dzat ngoen*

¹ Risky Dian Novita Rahayu Rochim, *Harmonization of Norms in Legislation Concerning the Freedom of Judges*, Malang: Brawijaya University Scientific Journal, 2014.

² Al-yasa' Abubakar, *Islamic Criminal Law in NAD*. Banda Aceh: Islamic Sharia Service of Nanggroe Aceh Darussalam Province, 2006.

sifeut" which means "the relationship between sharia and custom is like a relationship between a substance", society incorporates religious teachings into customs and customary law in a way that is inherent and cannot be separated from its nature.

Aceh's special features include the implementation of religious life, customs, education, and the role of ulama in determining regional policies. The implementation of religious life which is realized in the form of implementing Islamic law is carried out thoroughly in a kaffah manner. This means that all dimensions of society's life are regulated by law which originates from the teachings of the Islamic religion, namely the teachings of Islamic law which are then implemented in *Qanun*.

The Nanggroe Aceh Darussalam Provincial Government is required by Law Number 18 of 2001 to form a Provincial *Qanun* in the context of implementing special autonomy for the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam. Furthermore, it was refreshed with Regulation Number 11 of 2006 concerning General Powers of Aceh which ordered the implementation of Islamic law throughout the Nanggroe Aceh Darussalam region, Article 16 paragraph (2) letter (a).

Islamic law applied in Aceh is formulated inward *Qanun*. *Qanun* the same as a type of regional regulation (*perda*) which has legal legitimacy. Enforcing law in Aceh is carried out in courts called sharia courts. Meanwhile, in enforcing the law at the level *mukim* And *village* carried out in customary courts. Explained in the general provisions of article 1 of Law no. 11 of 2006 concerning the Government of Aceh, what is meant by *mukim* is a legal community unit under a sub-district consisting of a combination of several *village* which has certain territorial boundaries led by *imeum mukim* or other names and is located directly under the sub-district head. Where as *village* or another name is a legal community unit that is under the mukim and led by *keuchik* or other names who have the right to manage their own household affairs.

In Indonesia, conflict over norms or disharmony in laws and regulations is a legal problem that often occurs. This is motivated by the existence of several legal mechanisms that overlap between the regulations below and the regulations above. As happened in Nanggroe Aceh Darussalam Province, between customary law and positive law, which in this case is *Qanun law*.

In practice, the legal reality that occurs in Acehnese society is that there is often disharmony in norms. This is characterized by an overlap in legal mechanisms when imposing a sentence in customary courts which are based on customary law and in sharia courts which are based on *Qanun*, There are differences even though the case at issue is the same.

One of the overlapping legal mechanisms between customary courts and sharia courts is the offense of *khalwat*. The problem of *khalwat* offenses originates from conflicting provisions found in *Qanun Jinayat* No. 6 of 2014. *Qanun* This suggests that the offense of *khalwat* is examined by both customary courts and sharia courts. Article 23 (1) *Qanun* This states that anyone who is proven to have committed the

crime of khalwat is threatened with a maximum of ten lashes or a fine of not more than one hundred grams of gold or imprisonment for a maximum of ten months. However, when it comes to the realm of customary law, the customary court is different in imposing punishment for this khalwat offense.

The application of Islamic law in NAD is one of the main ingredients in the special autonomy implemented in this westernmost province. The implementation of Islamic law in NAD is an interesting phenomenon to observe. As stated by Daud Rasyid, for legal observers in Indonesia, this is the first event after independence where a region under Indonesian legal authority implemented a legal system that was relatively different from national law.³ However, the application of Islamic law is formulated inward *Qanun*. There are several law enforcement mechanisms in sharia courts that overlap with customary courts in deciding a law on cases that are essentially the same. Departing from the background above, this research will discuss the Norm Disharmony Between Customary Law and *Qanun* in Nanggroe Aceh Darussalam.

RESEARCH METHODS

The type or nature of research used in this research is qualitative research. Qualitative research is research carried out with the aim of understanding the phenomena experienced by research subjects, for example behavior, perspective, motivation, actions, etc. as a whole and in the form of words and language in specific natural events. . This means that the approach in this research does not use numbers.⁴

This research is a type of normative legal research (*normative legal research*). Normative legal research is research conducted on the norms contained in positive law. The study objects of normative legal research include norms, basic rules, legal principles, statutory regulations, comparative law, doctrine and jurisprudence.⁵

RESULT AND DISCUSSION

Alternative Resolution of Disharmony in Legislative Regulations in Indonesia

From the perspective of legislation, conditions are not harmonious (*disharmony*) is very likely to happen, because Indonesia has so many laws and regulations. Harmonization of laws and regulations itself is an effort to harmonize, adjust, consolidate and conceptualize a draft statutory regulations with other statutory regulations, whether vertically, horizontally, or lower, and matters outside

³ David Rashid, *Formalization of Sharia in the Veranda of Mecca, in the Islamic Sharia Book Yes, Islamic Sharia No.* Jakarta: Paramadina, 2001.

⁴ Lexy J. Moleong, *Qualitative Research Methods*. Bandung: Rosdakarya Youth, 2001.

⁵ Amiruddin & Zainal Asikin, *Introduction to Legal Research Methods*. Jakarta: PT Raja Grafindo Persada, 2004.

the regulations are called harmonization of statutory regulations. As a result of the hierarchy, these laws and regulations are regulated systematically and do not conflict with each other.

The Constitution is always in the process of being refined and the laws and regulations that exist under it also have the potential to overlap and sometimes even conflict with each other. This causes laws and regulations to be inconsistent. Currently, many government regulations conflict with laws, either because the Government Regulations were written incompletely or because the laws were written later than the relevant Government Regulations. In some cases, there are also laws that are uniquely formed, different from setting regulations because they are really needed in the field where it is difficult to remember the material of the law because the actual law has recently been passed. In a situation like this, the government regulation could actually be considered invalid. However, the Law that is the basis for evaluating Government Regulations may also conflict with the newly amended Constitution because the Constitution itself has also undergone significant changes.

In Indonesia, the resolution of disharmony in statutory regulations is resolved with several alternatives, namely;

1. Right to Judicial Review of Legislative Regulations

According to the Dutch-Indonesian Law Dictionary "*Fockema Andreae*", the right to test means "testing" or "assessment", or testing or determining whether an act meets a higher standard. The phrase "*toetsingsrecht*" (Dutch) is a truncation of "*rechterlijk toetsingsrecht*" which implies the choice to see or the choice to assess or examine by a designated authority, regardless of whether the law is in conflict with the Constitution.

Examination of subject-specific legislation includes: Examination of the judiciary is referred to as *judicial review*, examination of the executive body is known as *executive review*, and legislative body checks are known as *legislative review*.⁶ Meanwhile, there are four types of testing of statutory regulations in Indonesia, namely:⁷

- a. Constitutional review
- b. Judicial review
- c. Legislative review which is also known as political review
- d. Executive review

⁶ Jimly Assiddiqie, *Principles of Post-Reformation Indonesian Constitutional Law*. Jakarta: PT. RajaGrafindo Persada, 2009.

⁷ Moh. Mahfud Mahmodin, *Constitution and Law in Controversial Issues*, Jakarta: PT. RajaGrafindo Persada, 2009.

2. Constitutional Route

After the constitution was amended, the constitutional design was discovered in the examination of statutory regulations.

This draft is confirmed by Article 24A of the 1945 Constitution which states that the Supreme Court (MA) reviews statutory regulations under the law by law and Article 24C of the 1945 Constitution which states that the Constitutional Court (MK) reviews laws against the Laws. 1945 Constitution (UUD 1945). In Indonesia, disputes over legal regulations are resolved by several institutions, including *judicial review*, where one institution or authority is given to two institutions of judicial power, both the Supreme Court (MA) and the Constitutional Court (MK), *executive review*, which is disharmony. Settlement by the authorized institution, either as the party issuing the legal product or the institution authorized to form statutory regulations, and *legislative review* namely testing by institutions that have legislative authority.

3. Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Legislative Regulation Makers published by the Ministry of Law and Human Rights. In Permenkumham Number 23 of 2018, it is explained that several ways are regulated to resolve the issue of overlapping legal regulations. Harmonization of Draft Legislative Regulations in CHAPTER I of the general provisions of article 1 paragraph (2) explains that harmonization is the process of harmonizing the substance of draft statutory regulations and the techniques for drafting statutory regulations, so that they become statutory regulations which constitute a unified whole in national legal system framework.⁸

As also stated in article 2 of the regulation, the designer must harmonize draft regulations from structural institutions, non-ministerial government institutions, or ministerial regulations. Harmonization according to plan is one of the stages that must be fulfilled in preparing regulations and guidelines. Harmonization is a necessity considering the existence of this regulation. Of course, the aim is to minimize legal and regulatory problems, especially those that conflict or even have overlapping regulations in the legal mechanisms implemented.

4. Regulation of the Minister of Law and Human Rights Number 2 of 2019 concerning Resolving Disharmony in Legislation through Mediation. Disharmony in Legislation through Mediation in terms of the urgency of issuing regulations. The Permenkumham guidelines were born as a reaction to the many issues regarding regulations and guidelines. This is made

⁸ Minister of Law and Human Rights Regulation No. 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Drafters of Legislative Regulations.

clear in the considerations considering letter b of Permenkumham Number 32 of 2017 which expressly states:

That in the administration of government there are regulations laws that conflict with each other both vertically and horizontally, which causes conflicts in legal norms, conflicts of authority between ministries/institutions and regional governments, creates injustice for the community and business actors, and hampers the climate for investment, business and national and regional economic activities in Indonesia..

The Ministry of Law and Human Rights has the authority to bring together related parties who experience conflicts between laws and regulations. This authority is more specifically carried out by the Directorate General of Legislation through the Director General of Litigation. Minister of Law and Human Rights Regulation Number 32 of 2017 as amended by Minister of Law and Human Rights Regulation Number 2 of 2019 concerning Resolving Disharmony in Legislative Regulations Through Mediation. This authority is a new authority that previously the Ministry of Law and Human Rights did not have. It is also explained in Permenkumham Number 2 of 2019 concerning Resolving Disharmony in Legislative Regulations Through Mediation in CHAPTER II Scope of Article 2. The types of legal regulations that are examined through Mediation are Ministerial Regulations, Regulations from Non-Ministerial Government Institutions, Regulations from Non-structural Institutions, and Legislative Regulations - Invitation in the Region.¹¹ This shows that when laws and regulations are found that are not harmonious between government institutions, or even non- government institutions, then there are several techniques or ways to harmonize the two government bodies. In Permenkumham Number 2 of 2019, institutional criteria have been regulated therein, this shows the government's seriousness in resolving legal conflicts or overlapping legal mechanisms.

Harmonization of Norms Between Customary Law and *Qanunin* Nanggroe Aceh Darussalam

The focus of this research study is the disharmony between customary law norms and *Qanunin* Nanggroe Aceh Darussalam. One example of a case regarding disharmony between customary law norms and *Qanun* in Nanggroe Aceh Darussalam is the Offense of *Khalwat*. As in *Qanun* Aceh regarding how customary justice operates and punishes violators (*khalwat*) has been previously enacted, namely *Qanun* No.9 2008.

¹¹ Minister of Law and Human Rights Regulation No. 2 of 2019 concerning Resolving Disharmony in Legislative Regulations Through Mediation.

Meanwhile Article 13 paragraph 1 *Qanun* This stipulates that khalwat violations are under the jurisdiction of customary courts, Article 16 regulates each of the penalties that can be applied to khalwat violators including: "advice, a warning, a statement of apology, compensation (sayam), ransom (diyati), fines, and restitution, exclusion by villagers, eviction from the village, elimination of customary rights, and other forms of punishment according to local customs."

Yusrizal and Amalia emphasized that village elders in different gampongs and at different times adjudicated and resolved khalwat violations that occurred in their respective areas. These include punishing violators by giving advice, paying fines and two million rupiah in cash, and even being expelled from the village. However, in practice, public humiliation has become a village norm that provides sanctions for perpetrators of khalwat. The perpetrators were often bathed in murky water and taken half-naked through village streets. This kind of public humiliation continues to occur in various regions in Aceh.

There are often cases where customary court decisions force couples who violate khalwat to marry. This kind of decision is not included in *Qanun* but it has been widely practiced. This shows an indicator of inaccuracy in policy formation which has an impact on disharmony in norms between customary law and law *Qanun* Aceh.

Harmonization of norms between customary law and statutory regulations, in this case law *Qanun* Aceh has relevance to the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Drafters of Legislative Regulations.

Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Drafters of Legislative Regulations states in article 2: Drafters must harmonize draft regulations from non-structural institutions, Non-Ministerial Government Institutions, and Regulations Minister. Harmonization according to plan is one of the stages that must be fulfilled in preparing regulations and guidelines. Harmonization is a necessity considering the existence of this regulation. The goal is to minimize legal and regulatory issues, especially those that conflict or overlap.

For this reason, the presence of Permenkumham Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-structural Government Institutions, or Draft Regulations from Non-structural Institutions by Drafters of Legislative Regulations is one of the alternatives to harmonize customary law and *Qanun* Aceh. One way is to prevent overlapping legal mechanisms such as the khalwat offense case in Aceh.

It does not rule out the possibility that customary law will be more dominant in practice than positive law in this case *Qanun* Aceh. Therefore, in hierarchical theory, laws and regulations below the law must not conflict with the law above, in this case

Customary law is hierarchically below the law. *Qanun*. In Permenkumham Number 23 of 2018 in Chapter III concerning Procedures Harmonization has been explained comprehensively in each existing article, related to harmonization procedures.

Permenkumham number 23 of 2018 contains article 6 paragraph (3) which reads, Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions as intended in paragraph (1) includes: (a) Initiating agencies (b) institutions government or related agencies. There is an alternative solution provided by the Minister of Law and Human Rights, which is continued in Article 6 paragraph (4) which reads: apart from the elements referred to in paragraph (3), the Initiator can include expert sources in the Harmonization meeting for costs charged to the Proponent's budget.

It is then reaffirmed in Article 8 paragraph (1): In the case of Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions: (a) discussing crucial issues, and/or (b) attended by high-ranking leaders and ministerial administrators or non-ministerial government institutions, the Director General coordinates and chairs the Harmonization meeting.

CONCLUSION

In Indonesia, the resolution of disharmony in statutory regulations is resolved with several alternatives, namely;

1. Right to Judicial Review of Legislative Regulations
2. Constitutional Route
3. Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Legislative Regulation Makers published by the Ministry of Law and Human Rights.
4. Regulation of the Minister of Law and Human Rights Number 2 of 2019 concerning Resolving Disharmony in Legislation through Mediation.

Harmonization of norms between customary law and statutory regulations, in this case law *Qanun* Aceh has relevance to the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Drafters of Legislative Regulations.

Harmonization according to plan is one of the stages that must be fulfilled in preparing regulations and guidelines. Harmonization is a necessity considering the existence of this regulation. The aim is to minimize legal and regulatory problems, especially the possibility of conflicting or overlapping norms.

Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-structural Government Institutions, or Draft Regulations from Non-structural Institutions by Regulatory Drafters. Legislation is an alternative to harmonize customary and customary law *Qanun* Aceh.

In hierarchical theory, laws and regulations below the law must not conflict with the law above it, in this case Customary law is hierarchically below the law *Qanun*. In Permenkumham Number 23 of 2018 in Chapter III concerning Procedures for Harmonization, each existing article has been explained comprehensively.

Then in Article 8 paragraph (1): In the case of Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions: (a) discussing crucial issues, and/or (b) attended by high-ranking leaders and administrative officials of ministries or institutions non-ministerial government, the Director General coordinates and chairs the harmonization meeting.

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