International Journal of Innovation, Creativity and Change. www.ijicc.net
Volume 12, Issue 6, 2020

Implementing Islamic Criminal Law: Does it Break the Indonesian Legal System?

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This study aims to discuss Islamic criminal law in Indonesia, also known as the Law of Aceh Qanun, as a legal product in ACEH, which is a source of Sharia law. The main purpose of the law of Jinayat ACEH Qanun is to follow the prevailing legal system in Indonesia. The Indonesian national legal system is based on Pancasila and Constitution 1945. A clash between Islamic and Indonesian criminal law has frequently occurred in practice. The challenge is to obtain future recommendation. The results of the study prove that any existing legal domain must originate from Pancasila and Constitution 1945. Based on the results , the validity of ACEH Jinayat Qanun in consistent with the special authority of ACEH government concerning Sharia. Regarding the legal perspective, legal authority is a form of attribution, which did not exist previously , but has been established by legislators or DPR (the people of DPR), more specifically Heldit. The result show that each existing legal domain must derive from Pancasila and the 1945 Constitution. Therefore, the enactment of the Aceh Jinayat Qanun is consistent with the Aceh Government's specific authority on Islamic Shari'a. According to the legal perspective, this authority is legitimate as an attributive authority, which was previously non- -existent, but has been established by DPR legislators (the People's House of Representative) which specifically upheld it.

Keywords: *Jinayat Law Qanun – Aceh - Legal System - Indonesia.*

Introduction

The implementation of Islamic criminal law in Aceh, Indonesia. Aceh is part of the Indonesian province. Thus, all Indonesian law has been applied in Aceh. In fact, Aceh not

only implement Indonesian's, but also Islamic criminal law, commonly called Qanun Jinayat. The Indonesian government's policy is to implement the Islamic Shari'a in Aceh Province in order to carry out Law No. 44 of 1999 concerning the Implementation of the Privileges of the Special Province of Aceh (Idhar et al., 2017); (Hasan and Siti Nabiha, 2016); (Jonathan, 2016); (Syahrizal, 2007). Furthermore, the policy was confirmed through Law No. 11 of 2006 concerning the Governing of Aceh. Article 125 of the law stipulates that the Islamic Shari'a implementation in Aceh includes the domains of aqeedah (theology), syar'iyah (law) and morals (codes of conducts). The implementation of Islamic Shari'a includes the subjects of ibadah (religious practice), ahwal al-syakhshiyah (family law), muamalah (civil law), and jinayat (criminal law), which were established through the Qanun of the Aceh Province.

The development of the Aceh Qanun Number 6 of 2014 concerning the Jinayat Law is a form of criminal law policy in Indonesia that was carried out through an amendment of the legislation. As a matter of fact, the goal of amending the laws and regulations was to make sure that the law enforcement can achieve the objective of the law, to achieve social welfare. Such legal amendment actually serves as a bridge towards fulfilment of human desires; wishing that anarchism, destruction, and chaos do not arise. Such a policy anticipates the emersion of negative conditions which will comfort the population, especially those belonging to the lower classes (Saifullah, 2005); (Morris, 2015); (Lipset, 1959).

The Qanun of Aceh Number 6 of 2014 concerning Jinayat Law is a regulation that complements and improves previously existing qanuns. The scope of Qanuns is based on the Islamic principles of territoriality and individuality, which means that Jinayat Law Qanun in particular applies in the jurisdictional area of Aceh Province and for Muslims. According to Hamid Sarong, it can be imposed on both Muslims and non-Muslims due to the consequence of rechtdelicten (Hamid Sarong, 2014); (Paul, 2018). Provision of Article 5 of the Jinayat Law Qanun affirms that Qanun applies to:

a. Muslims who commit Jarimah in Aceh:
b. Non-Muslim and Muslims who commit Jarimah in Aceh and choose to submit themselves to Jinayat Law voluntarily;
c. Non-Muslims in Aceh who commit a Jarimah whose provision of crime is not regulated in the Criminal Code (KUHP) or the provision of crime outside the Criminal Code, but regulated in the Qanun;
d. A business entity that runs business activities in Aceh.

The Qanun of Aceh Number 6 of 2014 concerning Jinayat Law aims to complement and attain comprehensive implementation of Islamic Sharia in Aceh. In addition, the Qanun strives to achieve simple codification of Jinayat law which predominantly regulates sexual crime.

Literature Review

According to Sunaryati Hartono, the Indonesian National Legal System is based on Pancasila and the 1945 Constitution. Each existing domain of law is an integral part of the national legal system and must be based on Pancasila and the 1945 Constitution. The hierarchy of the national legislation comprises of Pancasila based on the 1945 constitution, the Jurisprudence, and finally Customary Law (Sunaryati Hartono, 1991); (Michael, 2017); (Paul, 2018). Based on the afore stated discussion, the main question is how to achieve implementation of the Aceh Jinayat Law Qanun on the basis of the Indonesian National legal system .

Ismail Sunny illustrates the politics of law as a process of accepting Islamic law. He divides the process into two periods. The first consists of the period of persuasive source where each Muslim willingly accepts the implementation of Islamic law. The second is the period of authority source in which every Muslim believes that the Islamic law has a force of power to be carried out. In other words, Islamic law can be applied in a formal juridical manner provided that it is codified into the national legislation (Sunny, 1997); (Vranken, 2016); (Irlich, 2017).

Indonesia is not a secular country; therefore, the state does not need to separate the people's religious life from state affairs (Afdol, 2009); (Folk, 2018); (Massimo, 2018); (Rosita, 2018) This is proven through article 29 paragraphs 1 of the 1945 Constitution, which stipulates that the state must be based on belief in one God. Article 29 of the Constitution implies that not all laws and regulations can be in conflict with the tenets revealed by the Almighty God (Afdol, 2009); (Folk, 2018); (Massimo, 2018); (Rosita, 2018).

The Paradigm of the Indonesian Legal System is that it consists of elements, or parts in which one is inter-interrelated to the other, intended for achieving goals based on the 1945 Constitution and inspired by the Pancasila philosophy (Ahmad, 2013); (Tanujaya et al., 2017); (Encep, 2015).

According to Sunaryati Hartono, the Indonesian National Legal System is based on Pancasila and the 1945 Constitution. Each existing legal domain in Indonesia is part of the national legal system and must refer to Pancasila and the 1945 Constitution as the two most supreme entities in the hierarchy of the Indonesian legal system after which come the laws and regulations, Jurisprudence and finally customary law (Sunaryati Hartono, 1991); (Matheson, 2017); (Max, 2018).

Law is a product of social reality. How is it formed? In other words, how do the social balancing relations lead to the formation of norms that are considered legal ? (Jhon and Frits, 2005); (Rachel, 2016); (Jon, 2015); (Nader, 2015). The historical school of thought led by

Von Savigny views that the law develops under the recognition of a nation and brings with it unique characteristics, including national consciousness or so called Volksgeist (soul of a nation) which emerges naturally as the customary law in each nation (Jhon and Frits, 2005); (Rachel, 2016); (Jon, 2015); (Nader, 2015). Based on this notion, a legal order or a modern legal system is established through a process that accommodates customs, doctrines or tenets, as well as legislation and jurisprudence (Jhon and Frits, 2005); (Jerome and Brian, 2017).

A law that originates from habits is established through a process of social reality which gives birth to the soul of a nation. Therefore, a law is inseparable from a nation's historical perspectives . This notion is a basic guideline for adherents of the historical school of thought. Likewise, the adherents of the rational natural school of law postulate that a law comes from human conscience and rationality. If a law arises from rationality and conscience , it will give birth to justice.

Indonesia adheres to a mix of miscellaneous legal systems. However, its main legal system constitutes the Continental European legal system. In addition, Indonesia has also imposed customary and religious (Islamic) laws. In short, there are three legal systems applied in Indonesia; customary law, Islamic law and Continental European law. However, there are specific instruments and requirements regarding who should comply with the law amongst the three legal systems. In a dynamic sense, the three legal systems can serve as the raw material for national law (Supomo, 1982); (Christoph, 2016); (Andrew, 2015); (Calvo-Flores, 2015). The Indonesian legal system has unique characteristics. Besides having a tendency to adhere to the system of civil law, it is still recognised in its implementation.

Etymologically, autonomy is defined as self-government (auto = oneself, nomes = government). In Greek, the term autonomy comes from the word autos = self, and nemein = submit, or hand in; which means the power of self-regulation. Therefore, semantically (begrif), autonomy contains the notion of independence and freedom to regulate and take care of oneself.

According to Ateng Sjafrudin, autonomy means freedom over governing oneself, but not independence (Ateng, 1985); (Garry, 2018); (Hélène, 2015); (Crawford, 2015). According to Tresna, the essence of autonomy as freedom means that an autonomous region is not governed in a top-down manner, but solely governed through its own initiative in regulating and managing its regional households. BagirManan suggests that autonomy contains the notion of independence to regulate and manage its own household affairs. Freedom lies in independence there is no independence without freedom (Bagir, 1990); (Sylvia, 2017); (Benjamin, 2015); (Tajul, 2019); (Mary, 2018).

The essence of the concept of regional autonomy implementation is the effort to maximise expected results to simultaneously avoid complexity and other obstacles that may hinder the implementation of regional autonomy. Thus, the demands of the community can be manifested in real terms through the application of regional autonomy without ignoring the continuity of public services. According to DidikSukriono, the philosophy or principle of regional autonomy consists of the sharing and distribution of power and empowering regional administration. The philosophy applies in the context of achieving the ultimate goal of autonomy, namely regional independence, especially independence of the community (Didik, 2013); (Katherine, 2015); (Jeffery, 2015); (Kemi, 2015).

The rationale for special autonomy stipulated in the constitution is affirmed by article 18 paragraphs (b) of the 1945 Constitution, which underlies that the State recognises and respects the specialty or privileges of regional government units that are regulated by law. The core concept of special autonomy is authority, which is inherent in rights and obligations, to regulate and manage its own government affairs and the interests of its local community. This notion is similar to the content of article 2 paragraph (3) of Law No. 23 of 2014 as amended by Law Number 9 of 2015 which states that a regional government carries out the widest possible autonomy, except for the matters that belong to the affairs of the Government (centre) with the aim of improving public welfare, public services, and regional competitiveness.

Results and Discussion

The Central government places Aceh Province as a special autonomous region based on the provisions of Article 18 B paragraph (1) of the 1945 Constitution, which stipulates that the State recognises and respects the specialty or privileges owned by regional government units that are regulated by Law. Based on the principle of autonomy, namely internal right self-determination, an autonomous region has the right to decide its own destiny and take care of the internal affairs in its region. It also has the authority to regulate its own household affairs including the authority to form its regional regulations. Aceh's special autonomy is entitled to special privileges where it can apply its own distinct legal system through the application of its Islamic Shari'a. (Nur Rohim, 2015); (Coulson, 2017); (Ahron, 2017); (Abdel Salam, 2018). The specificity of Aceh refers to distinctive characteristics of Ace's people in relation to the struggle for independence of the Republic of Indonesia which had been performed by the Acehnese people.

The basic consideration for granting autonomy is that according to the 1945 Constitution, the system of government of the Unitary State of the Republic of Indonesia, recognises and respects regional government units that are special or distinct in nature. Based on the state administration history of the Republic of Indonesia, Aceh is considered to be a special or

distinctive regional government unit due to the fact that the distinctive characteristics of the Aceh history have been recognised
as being featured with persistent fighters with strong endurance during the struggle against Dutch colonialism. The ideal anatomy according to the afore-elaborated framework provides a philosophical, juridical, and sociological basis for the establishment of LoGA (Law on the Governing of Aceh). This law stipulates that the Aceh Government is an inseparable part of the Unitary State of the Republic of Indonesia. The broadest autonomy order applied in Aceh, based on this Law, is a subsystem in the national government system. Thus, special autonomy is basically not only a right, but also a constitutional mandate that should be utilised as much as possible for the people's welfare in Aceh.

Based on the afore-stated explanation, the Aceh Province's position is different from other provinces. This includes the presence of mechanisms on how to resolve conflicts and disputes concerning criminal cases and religious issues.

The status of Islamic law legislation, which leads to the application of Islamic Sharia in Aceh, is the people's right of Aceh. Juridical legitimacy in the application of Islamic law is stipulated in Law Number 11 of 2006 concerning the Law on Governing of Aceh (LoGA / UUPA). Article 125
states that:

(1) The Islamic Shari'a implemented in Aceh includes the domains of aqeedah (theology), syar'iyah (law) and akhlak (code of conduct).
(2) The Islamic Shari'a as referred to in paragraph (1) includes the fields of worship (religious practice), ahwalalsyakhshiyah (family law), muamalah (civil law), jinayat (criminal law), qadha '(justice), tarbiyah (education), da'wah (mission), syiar (propagation) and defence of Islam.

(3) Further provisions regarding the implementation of Islamic Shari'a as referred to in paragraph (1) shall be regulated through the Aceh Qanun.

Article 127 of the LoGA confirms:

(1) Aceh Provincial Government and the district / municipality governments are responsible for the implementation of Islamic shari'a.

(2) Aceh Provincial Government and the district / municipality governments guarantee freedom, harmony, respect of religious values embraced by religions "adherents and protectors of fellow religions" adherents in carrying out their religious practices according to their respective religions.

(3) The Central Government, Aceh Government and the district / municipality governments allocate funds and other resources for the implementation of Islamic Shari'a.

(4) The establishment of places of worship in Aceh must obtain permission from the Aceh Government and / or district / municipality governments.

(5) Further provisions regarding the granting of permissions as referred to in paragraph (4) shall be regulated by qanunin consideration of laws and regulations.

As a consequence of the delegation of special authority to rule and administer government affairs and the interests of people , Autonomous Region is granted the authority to legislate Regional Regulations. Article 236 of Law Number 23 Year 2014 concerning Regional Government

stipulates:

(1) To administer the Regional Autonomy and Assistantship Tasks, the Autonomous Region legislates Regional Regulations.
(2) Regional Regulation as referred to in paragraph (1) is legislated by the DPRD (Provincial House of Representative) with the approval of the head of the Province.
(3) The Regional Regulation as referred to in paragraph (1) contains materials on:

a. implementation of Regional Autonomy and Assistance Tasks; and
b. Further elaborated provisions of higher legislations.

(4) In addition to the content materials as referred to in paragraph (3), Regional Regulation may contain local content material in accordance with the provisions of legislation.

Furthermore, Article 237 stipulates that the principle of legislation and the material content of Regional Regulation follow the provisions of law and the legal principles that develop in the community as long as they are not in conflict with the principles of the Unitary State of the Republic of Indonesia Aceh Province as a special autonomy region based on Law Number 11 2006 concerning the Governing of Aceh which has a legal order in the legal and national legislation system. In Article 1 number 21 of Law No. 11 of 2006, it is affirmed that "Aceh Qanun is a statutory regulation which is equal to provincial regulations that regulate government administration and the life of Acehnese people.

Article 1 paragraph 7 of Law No. 12 of 2011 concerning Procedures for Legislation Making stipulates, "Provincial regulations are statutory regulations legislated by the Provincial House of Representatives with the approval of the Governor. Furthermore, Article 12 of

Law Number 12 of 2011 asserts that the material content of a regional regulation constitutes all the material contents in the context of the implementation of regional autonomy and assistance tasks, the accommodation of regional special conditions, and further elaboration of higher degree legislation.

According to the provisions of the Law No. 11 of 2006, the Government of Aceh has specific authority to regulate certain matters as qanun material content, including the implementation of Islamic sharia. Article 125 stipulates:

(1) Islamic Shari'a implemented in Aceh includes matters of aqeedah (theology), syar'iyah (tenets) and akhlak (ethics).
(2) Islamic Shari'a as referred to in paragraph (1) includes matters of worship, ahwal al-syakhshiyah (family law), muamalah (civil law), jinayat (criminal law), qadha '(justice), tarbiyah (education), dakwah (mission), syiar (propagation), and defence of Islam.
(3) Further provisions regarding the implementation of Islamic Shari'a as referred to in paragraph (1) shall be regulated through Aceh Qanuns.

This authority is legally valid as an attributive authority (attribute van bevoegheid) which was created or manifested by legislators (DPR). Such authority was previously non-existent, but it was later created specifically as an attribution (Faisal, 2009). Qanun is part of the national legislation system, and therefore the norms or legal rules that are regulated or the material contents of the Qanun are the sub-systems of the national legal system. It is called a "sub-system" because the area of application is specific or local. Although the qanun is enacted in a certain region, the enforcement of qanun still involves the institutions of the national justice system (Faisal, 2009).

The implementation of legislation through Regional Regulations or other kind of regulations has previously occurred in Indonesia . Hence, the authority of the Qanun as the executor of the Law is neither novel nor special. According to the theory of legislation, such matters are called legislative delegations (statutory powers) where lower regulation arrangements are only carried out if they bear the power of law. This means that there should be a legal basis, which allows a matter to be regulated under lower degree legislation (Qanun or regional regulation). Thus, Qanun only regulates what is delegated (authoris) by the Law (Husni, 2005).

Based on the concept of authority delegation, the material content of legislation that has been delegated can only be regulated through legislation that receives the delegation. This means that if the law has delegated a matter to regional regulations, the government regulation or presidential regulation does not have the authority to regulate on the matter. Such matter is

related to the autonomy that has been granted to a certain community so it can carry out development in its region.

Conclusion

The central government can no longer interfere with the administration of matters which have been delegated to the region, except for the purpose of guiding, co-ordinating and supervising. Thus, the autonomous region has the authority to regulate and administer its government affairs according to its own initiative based on the aspirations of its community. (Haposan, 2007) Therefore, there is no contradiction between the regulations concerning Islamic Sharia, which have been enacted in Aceh Province and other legislations in Indonesia, because Aceh is a special autonomous region. The principles become crucial and functional in a legal system (law order) to create harmonization and synchronization of the (national) legal system. In case of the emergence of conflicts between certain sectors in the legislation system both vertically and horizontally, these principles should be functioned. It is worth noting that there should not be any overlapping or conflict between regulations in the legal system (Thomas, 2018) ; (Tom Campbell, 2016) ; (Vranken, 2016) ; (Wilfrid and Andrzej, 2015) ; (Yahya, 1980) ; (Zaki, 2016); (Jimmy).

The enactment of the Aceh Jinayat Qanun is consistent with the Aceh Government's specific authority on Islamic Sharia. This authority is legally valid as an attributive authority (attributie van bevoegheid) which was legislated or manifested by legislators (DPR / National House of Representatives). Such attribution was previously non- existent, but it was later created as a special authority. Qanun is a part of the national legislative system, and therefore the norms or legal conditions that are regulated or the material contents of Qanun constitute the sub-systems of the national legal system. It is called a sub-system because the jurisdiction of its enactment is limited to a specific region or locality. Although it is enacted in a specific region, the enforcement of the legislation still involves institutions of the national justice system. Therefore, there is no contradiction between regulations regarding Islamic Sharia, which have been implemented in the Province of Aceh and those of other laws and legislations in Indonesia as Aceh is a special autonomous region.

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