

Legal Pluralism Within The Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia

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1

Abstract. This article aims to analyze various legal traditions working within the implementation of Islamic law after special autonomy in Aceh. Although Aceh's legal system follows the national legal system derived from civil law, diverse legal traditions still exist. The scope of this study is limited to the interaction of Aceh's legal traditions by taking the construction of juvenile and immoral criminal law and describing the social authorities who also operate the legal tradition to the parties in the case. This study presents the results using a case study model. Data obtained from interviews and documentation, analyzed using an *interlegality* approach. Based on the results of data analysis, it was found that the dialectic of legal traditions is determined by the role of actors acting as companions for victims to ensure that the rights of victims are not neglected. The traditions of Islamic law, customary law, and laws for protecting women and children are used interchangeably. The effort to combine these three legal traditions was carried out to obtain justice and guarantee the fulfillment of the victim's civil rights, such as the right to continue education, to relieve the trauma caused by the psychological pressure. The amalgamation of legal traditions in Aceh is an effective way to achieve justice for women and children and the construction of new laws to develop a national legal system that favors the interests of victims.

Keywords: Legal Pluralism, Shari'a, Interlegality, Criminal Law, Aceh

6

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Abstrak. Artikel ini bertujuan menganalisis ragam tradisi hukum yang bekerja dalam ruang pelaksanaan syariat Islam pasca otonomi khusus di Aceh. Meskipun sistem hukum Aceh mengikuti sistem hukum nasional yang berasal dari tradisi hukum sipil, praktek keragaman tradisi hukum masih tetap eksis terjadi. Lingkup kajian ini dibatasi pada interaksi tradisi-tradisi hukum Aceh dengan mengambil konstruksi hukum pidana anak dan asusila serta menguraikan otoritas-otoritas sosial yang turut mengoperasikan tradisi hukum kepada para pihak dalam kasus tersebut. Kajian ini menyajikan hasil penelitian dengan menggunakan model studi kasus. Data diperoleh pengamatan, wawancara dan dokumentasi, dianalisis menggunakan pendekatan interlegalitas. Berdasarkan hasil analisis data ditemukan bahwa dialektika tradisi-tradisi hukum ditentukan oleh peran aktor bertindak sebagai pendamping korban dalam usaha memastikan hak-hak korban tidak terabaikan. Tradisi hukum Islam, hukum adat dan undang-undang perlindungan perempuan dan anak digunakan secara bergantian. Usaha mengkombinasikan ketiga tradisi hukum ini dilakukannya sebagai upaya mendapatkan keadilan dan garansi terhadap pemenuhan hak-hak keperdataan korban, seperti hak melanjutkan pendidikan, menghilangkan traumatis akibat tekanan psikis yang dialaminya. Peleburan tradis-tradisi hukum di Aceh merupakan cara efektif untuk mewujudkan keadilan bagi perempuan dan anak dan konstruksi hukum baru bagi pembangunan sistem hukum nasional yang berpihak pada kepentingan korban.

Kata Kunci: Pluralisme Hukum, Syari'ah, Interlegalitas, Hukum Pidana, Aceh

Introduction

16

This study focuses that the agenda for the legalization of Islamic criminal law in Aceh is not developed on a single legal tradition but rather a variety of legal systems interrelated with local legal traditions. Various legal instruments are driven by a number of legal social institutions that have the authority to oversee the implementation of Islamic criminal law and ensure the operation of a legal system that has received recognition in national legislation.

This fact confirms that Aceh, which implements Islamic law, is a "contestation arena" where legal pluralism is flourished. Existing studies

show that the practice of legal pluralism in Aceh is more dominantly explained in civil cases, such as cases of guardianship, marriage, and land Franz von Benda Beckmeann dan Keebet von Benda Beckmeann,¹ Ratno Lukito,² Arskal Salim,³ Reza Banakar,⁴ Edy Ikhsan.⁵ Sufism aspect in the Islamic sharia political contestation such as in Moch Nur Ichwan, 2007,⁶ Sulistyowati on gender aspect.⁷ Meanwhile, jinayat (criminal) cases are often neglected in discussions about legal pluralism. The rules regarding criminal law norms do not work separately following certain legal traditions but instead deal with various legal traditions, which are in contact with each other and even depend on the meaning of the law in society.⁸

The diversity of Aceh's criminal law traditions is not something new, which shows its existence in the current era.⁹ Prior to the reformation, apart from national law, in terms of legal form and structure, Aceh's legal traditions, particularly customary law and Islamic law, were still very simple, not following the modern legal system that followed the positive

¹ Benda-Beckmann, Franz von Benda-Beckmann and Keebet von. "Transnationalisation of Law, Globalisation and Legal Pluralism: A Legal Anthropological Perspective." In *Hukum yang Bergerak: Tinjauan Antropologi Hukum*, edited by Sulistyowati Irianto, 1-28. Jakarta: Yayasan Obor Indonesia, 2009.

² Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi Tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia*, terj. Inyik Ridwan Muzir, Jakarta: Alvabet, 2008.

³ Arskal Salim, *Contemporary Islamic Law in Indonesia*, Eidinburgh University Press, 2015 ⁸

⁴ Reza Banakar, "Law Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law." in <https://www.researchgate.net/publication/228135590> retrieved on 29 January 2016.

⁵ ¹¹ Ikhsan, *Konflik Tanah Ulayat*, Jakarta: Obor, 2015.

⁶ Moch Nur Ichwan, "The Politics of Shari'atization: Central Governmental, and Regional Discourses of Shari'a Implementation in Aceh", in *Islamic Law and Contemporary Indonesia: Ideals and Institutions*, ed Michael Feener and Mark Cammack, Boston: Islamic Legal Studies Program, Harvard University Press, 2007.

⁷ Sulistyowati Irianto, *Perempuan di Antara Berbagai Pilihan Hukum; Studi mengenai Strategi Perempuan Batak Toba untuk Mendapatkan Akses kepada Harta Waris melalui Proses Penyelesaian Sengketa*, Jakarta: Yayasan Obor, 2005.

⁸ Werner Menski, *Comparative Law in Global Context: The Legal System of Asia and Afrika*, New York: Cambridge University Press, 2006, p. 109; David N. Schiff "Socio-Legal Theory: Social Structure and Law", *Journal The Modern Law Review* 39, No. 3, (1976), p. 289.

⁹ The results of existing research indicate that the development and change of Aceh's law have so far been limited ¹⁶ the study of a single legal system following a positivistic legal logic that places law as a means of social control under the authority of the ruler (top-down). Aspects of the diversity of the legal system that have been studied are still comprehensive in nature and tend to analyze legal diversity with a positive legal approach.

legal format agreed upon by the legislature. The development and changes in the socio-political situation of Aceh as a Special Autonomy region were also followed by changes in the form and legal system that were previously implemented in Aceh. Aceh's legal tradition was originally in the form of living law, then it became positive law following the national legal system.

The status of the Special Autonomy region provides an opportunity for Aceh to adopt the customary law tradition and Islamic law into the national legal system prevailing in Aceh. The impact of the adoption of legal tradition has given rise to various norms and legal institutions as a forum for resolving legal cases in society. Such as the settlement of criminal cases using different legal traditions for cases such as violence against minors, both as perpetrators and as victims.¹⁰ In general, as stated in the qanun on *jinayat*, criminal cases that are resolved through litigation end in caning¹¹. However, there are also immoral cases such as sexual abuse of children (as victims or as perpetrators), which are resolved by the national legal system through the Criminal Code and customary law traditions.

Cases that arise due to various legal traditions in Aceh are analyzed using a legal pluralism framework that focuses on multiple regulations and legal institutions in Aceh, which also provides the authority to choose and determine their attitude towards legal sanctions that are received.¹² The emergence of various norms and regulations in resolving criminal cases in the community further adds to the complexity of legal practice in Aceh. This complexity can at least be seen in criminal cases, especially the partisanship of the parties (perpetrators and victims) in determining attitudes when faced with various rules and regulations related to disputes, given interpretations by the authorities who sometimes negate the alignment of the disadvantaged parties.

The results of existing research generate attention to the new development of legal relations and Acehese society by providing information about the people as a legal object of the authorities. Community

¹⁰ Meanwhile, immoral cases where the perpetrators are adults are resolved by customary law, not the *Qanun Hukum Jinayat* (Islamic criminal law). Dedy Sumardi, "Adat Takanai: Penyelesaian Sengketa Masyarakat Suku Jamee," *Laporan Penelitian Individual* at Lembaga Penelitian UIN Ar-Raniry, Banda Aceh, 2014, 28-31. ⁴

¹¹ Provisions on child protection are contained in Article 47 of Aceh Qanun Number 6 of 2014 concerning *Jinayat Law*. ⁵

¹² The regulation that regulates this authority is Law Number 44 of 1999 as the initial basis for implementing various Acehese legal traditions in the current era. As formal legal protection, more technical regulations related to criminal cases (*jinayat*) were regulated in the Qanun (Perda) in 2002 and 2003 on prohibitions on gambling, seclusion, and drinking alcoholic beverages.

is placed in the position of passive actors so that the dialogical relationship between law and society is rigid.¹³ The overall picture of Aceh's legal system is limited to Aceh as an ethnicity, not in a territorial context that has ethnic diversity, which results in the complexity of the legal system. Studies like this are influenced by the European legal system that dominated in the 19th century. Since the 20th century, the analysis of legal studies has not only focused on the themes of resolution of the dispute but has led to efforts to find variations in community legal practices, which influence each other.¹⁴

The change in orientation in understanding the relationship between law and society is a new way of looking at the sustainability of the legal system practiced in the Aceh legal tradition. Customary law and Islamic law are deeply rooted in the social life of the Acehnese. Both of them work side by side to realize the legal order of a plural society.¹⁵ Historically, the relationship between the law and society has been practiced since the early 17th-century AD. It was by making social norms¹⁶ the basis for the systematic operation of the legal system.¹⁷ Since the colonial period, the legal tradition that has existed differs in its legal form and structure from the modern legal structure. At this time, the characteristics of the law were seen as a living law legal system, which made social norms a normative basis¹⁸ to

¹³ Another concern is that legal research in Aceh is influenced by conflict "reasoning", which examining cases resolved through litigation and disputes that occur in society are limited to certain ethnicities. Arskal Salim, "Dynamic Legal Pluralism in Indonesia: The State and Sharia (Court) in the Changing Constellations of Aceh," *International Conference on Aceh and Indian Ocean*. Banda Aceh, Februari 2007, 24-26; Arskal Salim, *Contemporary Islamic Law in Indonesia*, Eidinburgh University Press, 2015, 23-37.

¹⁴ Sulistyowati Irianto, "Pluralisme Hukum dan Masyarakat Saat Krisis," in *Hukum dan Kemajemukan Budaya*, ed. E. K. M. Masinambaw, Jakarta: Yayasan Obor Indonesia, 2000, p. 66.

¹⁵ The close relationship between law and custom is complicated to separate and is unified. It is like the relationship between substances and characteristics that are always united. The doctrine that describes the strong relationship between law and custom is contained in the principle of *Hukom ngon adat lagee zat ngen sifeut (those two are inseparable)*.

¹⁶ The social norms referred to in this study are norms from the community's agreement that aim and guide at establishing social order.

¹⁷ Anthony Reid 1988, 143.

¹⁸ The use of the term "normative" in this study refers to the normative term formulated by anthropologists in explaining the reality of the sustainability of the legal system. They understand the term normative in the sense of "binding" based on people's behavior called social order. Legal experts view that social order is included as a social norm, not a binding legal norm originating from the authorities. Legal experts and anthropologists agree to understand the term normative in the sense of binding, having legal

bind people's behavior in carrying out the law so that the dialogical relationship between various legal systems and society could still survive in a heterogeneous society.

The main issue analyzed next is how the relationship between Aceh's criminal law traditions in resolving *jinayat* cases after the special autonomy. The explanation of the legal relationship of criminal law traditions is analyzed using the interlegality framework. The concept of interlegality aims to explain the adaptation process of state legal norms into Aceh customary law norms or religious (Islamic) law so that it can produce a "new legal order" after Special Autonomy integrated with Aceh's socio-cultural system as a manifestation of the experience and practice of local wisdom in the midst of the Acehnese people. This argument provides the basis for the view that the relationship between law and society is unified. Consequently, the laws that apply in people's lives become more "active" and continually adapt to their environment.

On the other hand, awareness of legal diversity as an analytical tool to communicate criminal law traditions that are driven by actors in the *jinayat* case, where each provides space for reframing the values contained in Islamic law traditions and customary law to be adjusted. With the legal ideology of the nation-state. The purpose of this study is to capture the meaning behind the interaction process of merging criminal law traditions in Aceh, which later results in an "Aceh legal hybrid" as a contribution to the development and change of Acehnese law. The scope of this study is limited to the relationship between Acehnese criminal law traditions in criminal cases (*jinayat*) based on cultural plurality and the diversity of legal instruments after the declaration of Islamic law. It then describes the social authorities that participate in operating the legal system for the parties in violence against children, which reflects their attitude towards various legal traditions, which are mutually dependent on each other in defending their interests.

power, and regulating. It is just that they have different opinions regarding the search for normative grounds. If anthropologists base "normative" on the behavior or actions of the community, legal experts such as Hart and Hans Kelsen represent Positivism figures, they understand "normative" as law formulated by the state and is binding. On this basis, jurists distinguish between legal norms and social norms. Legal norms are as described above, while social norms are the same as normative meanings in the view of anthropologists. Muhammad Khalid Mas'ud, "Pencarian Landasan Normatif Syariah Para Ahli Hukum Muslim," in *Dinamika Kontemporer dalam Masyarakat Islam*, ed. Dick Van Der Meij, Jakarta: INIS, 2003, p. 2-3.

This study uses a socio-legal approach as a combination or collaboration of legal and social science theories that aim to analyze the operation of various legal traditions in Acehese society without ignoring the normative aspects of law through a doctrinal approach (*black letter*). Technically, the socio-legal approach in this study examines the legal products that apply in Aceh, especially on criminal law, critically analyzed by looking at the aspect of taking sides with the actors as research subjects who participate in moving the law in society. The data was obtained by observing legal cases that allowed various legal options to be applied and interviewing informants and actors who acted as assistants in resolving legal disputes. In addition, these actors were interviewed in-depth to obtain the reasons for their choice of law.

Theoretical Framework: Interlegality and Legal Integration

This study reveals the practice of criminal law traditions of children and the emphasis is on placing *jinayat* cases under the supervision of the state legal system. The state legal system adheres to centralism's ideology, which aims to oversee various legal systems other than state law whose position is under the state legal system, such as customary law, religious law, or living law, which sometimes have not been accommodated in the state legal system. The operation of the legal system other than state law is supervised by a state that adheres to the *civil law* tradition, even in some instances "forced" uniformity in its implementation. As a result, the independence of a not-state-law legal system is limited to being creative in creating and implementing legal norms originating from the community.¹⁹ Griffiths classifies this working model of the legal system under state supervision as *Weak Legal Pluralism*.²⁰

This categorization is then used as the basis for analyzing Aceh's legal pluralism in the context of the *civil law* legal tradition. Despite the fact that there are various legal traditions in Aceh, which in the end are integrated into a state legal system, it is still within the framework of *weak legal pluralism*. The model of legal system integration in the national legal framework in Aceh is explained through the theory of *weak pluralism*.

¹⁹ Ratno Lukito, "(R)evolusi Hukum Indonesia: Menggagas Postulat Hukum Pancasila," paper was presented in National Seminars and Workshops "Prospek dan Tantangan Mewujudkan Pembangunan Hukum Nasional Berbasis Pancasila yang Berkeadilan," Fakultas Hukum Universitas Islam Indonesia Yogyakarta, 5 Desember 2017, 33. (1-46); Ratno Lukito, *Postulat Hukum Pancasila*, Yogyakarta: Suka Press, 2020.

²⁰ John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism* 24, (1986), p. 4-5.

Legal pluralism is a phenomenon of legal interaction that occurs in the legal system in a nation-state. This fact often causes differences in norms due to the diversity of legal traditions even though these differences in norms can still be appropriately managed and are seen as a legal dialectic process that continuously influences each other in forming a new legal order.²¹ The description of the process and results towards the integration of Aceh's law is analyzed using the theory of *interlegality*.²²

The theory of *interlegality* suggests that the diversity of laws in a country, even though they have different legal traditions, both state law, customary law and Islamic law, their existence cannot be seen as a separate element from different social domains, because they both create *legal order*. The originator of interlegality theory, De Sausa Santos, states that the theory emphasizes the aspects of the process and results of accepting the values contained in various legal traditions. The mixing process resulted in a new legal order or *legal hybrid*.²³ Interlegality can also be used to observe the dominance of state law or official law²⁴ which has the power of legal certainty, then open dialogue is held to defend the justice of minority groups because of assimilation pressures.²⁵

In this study, *interlegality* theory is used to reveal the meaning behind the process of adopting the values contained in criminal law traditions, both those originating from state law, Islamic law, and Acehese customary law. This adoption process resulted in a new value system used as the basis or guide in resolving *jinayat* cases in the community. Borrowing

9

²¹ Tom G. Svensson, "Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway," in *The Journal of Legal Pluralism and Unofficial Law*, 37: 51. (51-77). DOI: 10.1080/07329113.2005.10756587.

²² The triangular concept of legal pluralism explains that the world legal system is basically developed with three global legal systems which are religious/ethical/customary law, state law, and community law. The legal triangle relationship works interdependence between various legal systems to form a society that is aware of diversity. Werner Menski, *Comparative Law*, p. 243-248.

²³ Cited from Andre J. Hoekama, "European Legal Encounters Between Minority and Majority Culture: Cases of Interlegality," in *The Journal of Legal Pluralism and Unofficial Law*, 37, p. 10-11

²⁴ The term non-official law refers to the theory of multi-layered legal systems, *official law*, *unofficial law*, and *legal postulates*. Masaji Chiba *Asian Indigenous Law in Interaction with Received Law*, London & New York: Kegan Paul International, 1986, p. 5-9; Ratno Lukito, "(R)evolusi Hukum Indonesia, p. 19.20.

²⁵ Craig Proulx, "Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System" in *The Journal of Legal Pluralism and Unofficial Law*, 37:51, p. 81-82. DOI: 10.1080/07329113.2005.10756588.

the term A. Qodri Azizy, the process of adopting different legal traditions into the national legal system is called eclecticism.²⁶

The legal adaptation process is based not only on the characteristics of legal identity but also on the Acehnese people's social environment. Each legal system contains various legal traditions bound by multiple interests (*subculture*) that describe the social setting as a place where the law occurred and practiced. This condition is also analyzed using the application theory of legal pluralism such as the *Semi Autonomous Social Field* theory.²⁷ *Autonomous Social Field* theory aims to obtain a complete picture of the social setting of the Acehnese people where the village apparatus has the authority as an agent to make the rule of law. The laws made to create social order are such of *reusam* (customary norms) that exist in every village. In Aceh, the existence of *gampoeng* (village) is a reflection of the semi-autonomous social field. The village authority has spawned a number of *qanuns* (*semi-autonomous self-regulation*) as evidence of the proliferation of legal pluralism. Until now, not to generalize – almost all *gampoeng* have *qanun* (local laws) and *reusam* created by village apparatus accompanied by state officials. In terms of form and format, it follows the state legislation system through the systematization of plural customary norms.

Acehnese Legal Traditions: Basis for Diversity in Criminal Law

Aceh's criminal law tradition is developed on the spirit of plurality. During the Aceh kingdom, the legal system was supervised by the kings of Aceh which was integrated with the Islamic legal system. This can be traced in the historical records of the Aceh kingdom in the past. Based on the obtained information, there were criminal sanctions in the form of *canned* and *qishas* (retaliation in kind) applied to perpetrators of crimes by the king of Aceh.²⁸ In the history of Islam Nusantara, the Acehnese government

²⁶ A. Qodri Azizy, *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum*, Bandung: Teraju Mizan, 2004, p. 8.

²⁷ Even that culture has the authority to operate a legal system that has no place in the country's legal system. This social authority in More's terms is called a *semi autonomous social field*. Moore theory cited from Mc. Galanter, "Keadilan di Berbagai Ruang Lembaga Peradilan, Penataan Masyarakat secara Hukum Rakyat," dalam *Antropologi Hukum* 7: *Sebuah Bunga Rampai*, peny. T.O. Ihromi, Jakarta: Yayasan Obor Indonesia, 2003, 118; Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "Transnationalisation of Law, Globalisation and Legal Pluralism: A Legal Anthropological Perspective," in *Hukum yang Bergerak: Tinjauan Antropologi Hukum*, ed. Sulistyowati Irianto, Jakarta: Yayasan Obor Indonesia, 2009, p. 21-22.

²⁸ Qadhi Malikul Adil, a judge at the time Sultan Alauddin Riayatsyah al-Qahhar (1537-1571) once sentenced the *qishash* law as a "positive" law at that time to the murderer named Reje Linge XIV (now Central Aceh). He was proven to have ordered Tjik Seuroeue

system was a sultanate or a royal system. Likewise, the cultural aspect still emphasizes the feudal form, untouched by science and technology or industrial development. In this context, it can be understood that the law is interpreted as a network relationship of community members based on an agreement of values and shared by the community. This kind of government condition does not require legal system legislation (positivization).²⁹

The complexity of the problems of the Acehnese people in the past is different from the current situation, where society has changed along with the development of industry, technology, and information. Of course, the condition of society in the modern era is very complex, especially when faced with the problem of globalization, which in certain respects differs in perspective between various legal systems.³⁰ Such conditions require adjustments to the changes in Aceh's legal system to the currents of plural society and heterogeneity in the fields of religion, culture, and law.

In the 19th century, the change in the government system from the "sultan" system to the nation-state system had a significant influence on changes in the contemporary Acehnese legal system. The presence of a constitution is a hallmark of a new government (nation-state) as a guide for the rulers to run their government, aiming to regulate and supervise people's behavior on behalf of the principle of social order or *social engineering*. The demand for codification is an alternative solution to carry out the legal aspirations of the community in line with the principles of modern state governance. Ignoring the codification weakens the demands of society's increasingly complex aspirations. Such conditions have also influenced Aceh's political system based on special autonomy status, choosing the legislative path through compromising and accommodative politics to realize

(Cik Serule) to kill Bener Meria (A stepbrother from father side of Reje Linge). However, the *qishash* law was not implemented by the Sultan taking because of the advice of Empu Beru or Datu Beru, a female cleric from the Lingge kingdom who was also a relative of Reje Linge XIV, asking the Sultan to replace the *qishash* law with *diyat*. The reason was that Reje Linge who was the perpetrator of the murder and Bener Meria, the victim of the murder, was the sister of Empu Beru. If the law of *qishash* was applied, Empu Beru would not only lose his brother Bener Meria, but also Reje Linge. This request was granted by the Sultan, and was replaced by paying a *diyat* of 100 buffalos which were received by his mother and half-sister (Sengeda). M. Junus Djamil, *Gajah Putih Iskandar Muda*, Kuta Radja: Lembaga Kebudayaan Atjeh, t.th, p. 69.

²⁹ Satjipto Rahardjo, *Relevansi Hukum Adat dengan Modernisasi Hukum Kita*, Yogyakarta: FH UII, 1998, p. 162-163.

³⁰ SulistyowatiIrianto, "Pluralisme Hukum dalam Perspektif Global," in *Hukum yang Bergerak*, p. 30-34.

the aspirations of the Acehese people and the Central Government.³¹ This step is one way to strengthen the legal system implemented in Aceh following the legal system of the nation-state government. However, the Indonesian constitution allows local governments to determine the "local" legal system through cultural and political choices of legislation.

The legal system that worked and prevailed in Aceh was previously part of the culture of the Acehese society which was integrated with the customary law system, then changed its function and form following changes in the Indonesian political system, specifically the governance of the nation-state pattern. This model has an impact on the formation of law in the current era. The political path is the only alternative taken by the people of Aceh to implement the legal system to get official recognition from the authorities or the state.³² This step is taken as a new model for the nationalization of Islamic law, which is built based on the *fiqh* (Islamic Jurisprudence) paradigm, and customary law is "equivalent" to the implementation of the national legal system.³³

The rules contained in customary law and Islamic law are internalized into the national legal system. So that the legal awareness of the community as a living law legal system, then becomes a formal legal system fused with the state legal system. The three legal systems above are not

³¹ Haedar Nashir, *Islam Syariat: Reproduksi Salafiyah Ideologis di Indonesia*, Bandung: Mizan, 2013, p. 349-355.

³² Based on the social history of Aceh's Islamic law, the first central figure who wanted the positivization of Islamic law in Aceh was Tgk. Muhammad Daud Beureueh. The political negotiation between Tgk. Muhammad Daud Beureueh with the President of the Republic of Indonesia, Soekarno, was dramatic with a number of political rhetoric with promises of privilege. The politics of awareness that Soekarno played to test the commitment of the Aceh people to take part in helping Indonesia's struggle against colonialism was promised in the form of rewards for the positivization of Islamic law in Aceh. This promise was later demanded by Tgk. Muhammad Daud Beureueh to Soekarno in written form (codification in the present context), which ended "failed" and only ended in an oral agreement. This failure was the cause of a radical movement led by Tgk. Muhammad Daud Beureueh and a number of his followers who were organized in a forum called PUSA. This movement struggled to demand the political promises made by President Soekarno when he was in Aceh until the completion of independence. This traumatic event continued with the outbreak of a bloody event, the Aceh revolution under the DI/TII movement. Taufik Abdullah, *Islam dan Masyarakat: Pantulan Sejarah Indonesia*, Jakarta: LP3ES, 1987, p. 181-182; Michael Feener, "State, Shari'a and Its Limits," dalam *Limits of The State: Reconfigurations of Practice, Community and Authority in Contemporary Aceh*, ed. R. Michael Feener, David Kloos, Annemarie Samuel, Leiden: Koninklijke Brill nv, 2016, p. 9-10.

³³ Al Yasa Abubakar, *Penerapan Syariat Islam di Aceh: Upaya Penyusunan Fiqih dalam Negara Bangsa*, Banda Aceh: Dinas Syariat Islam Aceh, 2013, p. 68-74.

derived from the same legal source, but from various legal sources according to the characteristics of the people who propose the legal system. The national legal system in Aceh is representative of the colonial legal system or the European legal system due to the implantation of the *civil law* system.

The process of legal assimilation is a determining factor in the acceptance of Islamic law as a legal system applies in Aceh. Islamic law is not a legal system that comes from the local community's culture but a legal system that comes from revelation applicable to all cultures of the global community. This is different from the customary law system, which is a legal system that originates from the behavior and habits of the Acehnese people from generation to generation. However, the presence of the Islamic legal system can be said to be more readily accepted by the Acehnese people under the Acehnese customary law philosophy, which emphasizes that religious and customary law have a dialectical relationship in the form of a unified whole.

The application of the three legal systems above is not solely based on sociological aspects but also gets recognition from the government as the driver. The national legal system has a strong desire to unify the legal system in the national legal system, on the other hand, it is the diversity of laws that becomes an alternative solution for a plural society to obtain legal justice. In this context, the law is not solely sourced from state law, but the law that is practiced in everyday life.³⁴

However, political initiatives in positive law in Aceh are one way to restore relations between the Acehnese people and the Central Government, which had previously faded due to the political rhetoric of the past government related to the desire to implement Islamic law in Aceh. The existence of Islamic law and customary law that was previously carried out based on individual awareness of the community then changed its form into a law formed and enforced by the authorities. As a result, the laws that are formed and formulated by the authorities seem forced and look rigid. The dimension of legal dynamics does not work optimally as the legal conditions run by the Acehnese people based on individual awareness. In the modern era, changes in direction in understanding law are influenced by the rapid development of social sciences. The emphasis is that law is seen from a sociological aspect, which is the main concern of legal sociologists in explaining legal practice in society.

³⁴Roger Cotterrel, "Why Must Legal Ideas Be Interpreted Sociologically?," *Journal of Law and Society* 25, no. 2 (1998), p. 175. <https://doi.org/10.1111/1467-6478.00086>; Satjipto Rahardjo, *Hukum dan Masyarakat*, Bandung: Angkasa, 1984, p. 20-21.

Legal Pluralism Post-Declaration of Shari'a: Integration of Islamic Criminal Law and Recognition of Customary Law into the State Legal System

Constitutionally, Islamic law is part of legal pluralism that recognizes the diversity of culture, religion, race, and ethnicity,³⁵ in addition to the political aspirations of every citizen.³⁶ In this context, the idea of implementing Islamic law as positive law in Aceh leads efforts to strengthen the Islamic law through a number of regulations regarding the implementation of Islamic law. The Aceh government and the legislative have the community's support to fight for Islamic law in a legal-formal manner to obtain legal protection so that sharia regulatory products at the regional level gain legitimacy for the implementation of Islamic law from the juridical-formal side.

The new face of Aceh's legal tradition began when the government officially declared the implementation of Islamic law by opening access to the development of the Aceh legal system in the context of developing a pluralistic national legal system. The national legal system that tends to be positivistic has placed the central role of the state as the "ruler of law" through the legislative process (*taqnin*), so that the existence of law becomes subjective-ruler, the recognized law is the law written in the legislation.

Following the declaration, the Aceh government, together with the Aceh House of Representatives (DPRA), legislated the legal system as an alternative or political choice to develop and implement various legal systems in the context of the *nation-state*.³⁷ The normative juridical basis for the legalization is the ratification of Law Number 44 of 1999 on the Privileges of Aceh in customs, education, and the authority for the Aceh region to implement Islamic law as a sub-national legal system. The presence of this law was still considered vague. It had not provided clarity or detail to Aceh regarding the authority to carry out Islamic law in a *kaffah* (entirety) manner. The ambiguity of authority was resolved with the enactment of Law Number 18 of 2001 concerning Special Autonomy for the Province of Nanggroe Aceh Darussalam.

³⁵ Dedy Sumardi, "Islam, Pluralisme Hukum dan Refleksi Masyarakat Homogen," *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 50, no. 2, (2016), p. 494; Faisal, *Pluralisme Hukum di Indonesia: Kekuatan, Kelemahan, Peluang dan Ancaman*, Yogyakarta: Maghza Pustaka, 2004, p. 8.

³⁶ Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, cet. III, Jakarta: Raja Grafindo Persada, 2012), p. 284.

³⁷ Al Yasa Abubakar, *Penerapan Syariat Islam*, p. 68-74.; Jamhari Makruf and Iim Halimatussa'diyah, *Shari'a and Regional Governance in Indonesia: A Study of Four Provinces*, *Australian Journal of Asian Law* 15, no. 1 (2014), p. 10-11.

Law No. 18 of 2001 concerning Special Autonomy is valid for five years, then it changed along with the Helsinki MoU on August 10, 2005.³⁸ This agreement has an impact on the direction and new policies of the Aceh government, especially in the field of legal pluralism. All policies related to the government system are regulated in Law Number 11 of 2006 concerning the Government of Aceh. Customary law and Islamic law previously in the form of *living law* seemed to exist and were integrated in the daily practice of the community, then changed their form into a formal legal system, merged with the national legal system. The perceived impact is obedience to the law, and there has been a shift in intention from individual awareness to compliance with the state legal system.

The relationship between state law and customary law is deeply merged when customary norms are accommodated in sharia *qanuns*. *Jarimah* immoral violation, for example, in addition to being resolved by sharia *qanuns*, can also be decided by customary law according to the place of occurrence. Moreover, the authority to settle *jinayat* cases based on customary law further emphasizes the semi-autonomous social field marked by the presence of the *reusam* (customary norms) in every village in Aceh. This *reusam* then contributes to the variation of legal pluralism that is increasingly growing outside the state legal system.

Qanun Sharia and Reproduction of Diversity of Legal Traditions

Operational regulations regarding the implementation of Islamic law in Aceh are formulated in the regional regulations (*qanun*). Two years after the declaration of Islamic law, the Aceh government had succeeded in issuing a number of sharia *qanuns* and adat *qanuns* in 2003. This *qanun* is a solution to the above problem, regulation operation of the Special Autonomy Law within the framework of the national legal system. Furthermore, between 2002 and 2004, a number of operational *qanuns* for the implementation of Islamic law as Islamic law was ratified, especially those relating to Islamic criminal law or *jinayat*, namely:

1. Qanun Number 10 of 2002 concerning Islamic Sharia Courts.
2. Qanun Number 11 of 2002 concerning the Implementation of Islamic Sharia in the fields of *Akidah* (Islamic Creed), worship and Islamic *syiar* (symbol);
3. Qanun No. 12 of 2003 concerning alcoholic beverages (*Khamr*) and something similar;
4. Qanun Number 13 of 2003 concerning *Maisir* (Gambling);

³⁸Ikrrar Nusa Bakti, *Beranda Perdamaian: Aceh Tiga Tahun Pasca MoU Helsinki*, Yogyakarta: Pustaka Pelajar, 2008, p. 3.

5. Qanun Number 14 of 2003 concerning the prohibition of seclusion (suspicious close proximity);
6. Qanun Number 7 of 2004 concerning the management of *zakat* (Almsgiving).

The relatively more extensive authority to implement Islamic law in accordance with the mandate of Law Number 11 of 2006 resulted in Qanun Number 6 of 2014 concerning *Jinayat* Law, namely the law that regulates *jarimah* (criminal act) and *'uqubat* (punishment). In this *qanun* the acts that are included in *jarimah* (criminal acts) are *khamr*, *maisir*, seclusion, *ikhtilath* (intimate acts between men and women who are not husband and wife willingly), adultery, sexual harassment, rape, *qadzaf* (accusations of adultery), *liwath* (homosexual), and *musahaqah* (lesbian). Whereas the *uqubat* (punishment) included in this *qanun* is *uqubat hudud* (determined punishment) in the form of canning, and *ta'zir* (discretionary punishment) such as canning, fines, imprisonment, and restitution. The *qanun* on the law of *jinayat* which was compiled based on Law Number 18 of 2001 is limited to the *qanun* on *maisir*, *khamr* and *khalwat* as long as it is not regulated in the Aceh Qanun concerning *Jinayat* Law.

The interesting thing related to legal pluralism in the *qanun* of *jinayat* is that although Islamic law is more dominant in the material of this *qanun*, in the case of child protection, this *qanun* gives the authority to settle the case using local customary law and the national legal system, such as Law No. 35 of 2014 concerning child protection. The dilemma now is that there is an article that gives punishment to minors if they are proven to have committed a crime. Whereas in the law on child protection, it is emphasized that underage children are not subject to criminal sanctions, but are given guidance by involving the community. In the case of child protection, the law that works is dominated by customary law which is considered effective in protecting children with the wisdom of each village. In this context, the village apparatus as an agent of lawmaker reflects the application of theory of Moree's *semi-autonomous social field*.

In Aceh, *Qanun* is a regional regulation that received recognition from the legislature, which is a reflection of the *semi-autonomous social field* theory. Therefore, the authority to make *qanuns* is not only exercised by the state, in this case, the legislative body. In accordance with the laws of the Aceh government, the village, and its apparatus function as a *semi-autonomous social field* that under certain conditions can make rules or decisions that encourage the community to obey the rules they make.

Finding Justice: *Interlegality* and Customary Law Traditions

Basically, customary law is a community norm based on experience and is part of a coercive custom. It is a system of maintaining order that is supported by power organizations in society.³⁹ The system of maintaining order does not only occur between humans but also occurs between humans and nature. The harmonious continuum between society and nature is seen to be so strong in custom, that it affects all aspects of customary law rules. The existence of the society as a community becomes the starting point for every legal consideration, thus it is not found in customary law "the concept of the individual" as the main reference in assessing the behavior of indigenous peoples. On this basis, the two principles that characterize the application of punishment in the customary law system are the principle of *balance* and *harmony* in the relationship between *humans* and *nature*.⁴⁰

The principles of balance and harmony are the main characteristics of the concept of diversity of punishments in customary law because customary law always bases its teachings on a communal approach. As Van Vollenhoven explains, punishment in custom is not always imposed on criminal acts; penalties can also be imposed on the community from which the offender is or where the offense occurred.⁴¹ Therefore, in the customary law concept of punishment, it is not only the perpetrators of crimes or violations who are held accountable, but the family or relatives of the perpetrators are also held accountable, including the domicile of the perpetrator.⁴² In certain places, the image of the area where the violation of customary law occurred is also debounced. This way of thinking is what Hilman Hadikusuma meant that customary law is not the product of rational thought but the product of communal thought.⁴³

These values find their philosophical foundation to maintain balance and harmony in the relationship between humans and nature. Therefore, the main reason for considering the punishment system in customary law is to maintain balance. All traditional expressions have the same value. Committing mistake is taken seriously if it is proven to damage the balance.

³⁹ Surojo Wingjodipuro, *Pengantar dan Asas-Asas Hukum Adat*, Bandung: Alumni, 1979, p. 228.

⁴⁰ Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi Tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia*, Jakarta: Pustaka Alvabet, 2008, p. 61-62.

⁴¹ Pendapat Van Vollenhoven cited from Ratno Lukito, *Hukum Sakral dan Hukum Sekuler*, p. 64.

⁴² I Dewa Made Suartha, *Hukum dan Sanksi Adat: Perspektif Pembaharuan Hukum Pidana*, Malang: Setara Press, 2015, p. 22-23.

⁴³ Hilman Hadikusuma, *Hukum Pidana Adat*, edisi 3, Bandung: Penerbit Alumni, 1989, p. 23.

Meanwhile, the punishment for the violation is decided by community in accordance with the authority it has, as confirmed in the *semi autonomous social field* theory.

Interlegality and *Jinayat* Cases

The diversity of the cultures in Aceh is evidence that the law that works in the social field has a variety of legal sanctions which are reflected in the legal culture of the local community. *Autonomous sosial field* from each village are very vulnerable to being influenced by other *semi-autonomous social fields*. In this case, state law and customary law are contesting within resolving cases in the community.⁴⁴ This results in the determination of legal institutions used by the disputing parties. For example, violence against children can be resolved by local customary law, but accompanied by state officials or it can use the customary justice system accompanied by government officials or women NGO activists.

Cases and events in society that require settlement through customary law can occur within the same family, between residents of one village, or between residents from one village with residents of other villages. If those involved are residents of the same village, the solution is carried out in their village. If the dispute involved people from different villages, the settlement will be in the *pemukiman* (district) or the village of one of the parties. If the case occurs in a shop or market, or another shopping place, apart from the settlement itself, the feast (*kenduri*) must be held at the place where the case occurred.

This study describes cases of *jinayat* involving the role of the *semi-autonomous social field* to resolve the case. The following description presents two examples of criminal cases that occur in different legal cultures. These examples at least give an idea of the central role of the *semi-autonomous social field* in gender-sensitive *patrilineal* and *matrilineal* societies.

a. Violence Against Children

The dominance of criminal cases involving minors has contributed to the proliferation of legal pluralism in Aceh. Existing regulations contain a variety of sanctions and ways of solving them based on the type and criminal case involving children as perpetrators or as victims. For example, violence

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⁴⁴ Sulistyowaty Irianto, *Perempuan di Antara Berbagai Pilihan Hukum; Studi mengenai Strategi Perempuan Batak Toba untuk Mendapatkan Akses kepada Harta Waris melalui Proses Penyelesaian Sengketa*, Jakarta: Yayasan Obor Indonesia, 2005, p. 66-69.

against children that occurred in Neuheun Village⁴⁵ chose to be resolved through the formal justice system (litigation),⁴⁶ not based on the *gampong reusam*. When this kind of case occurs, the settlement of cases involving children as perpetrators or victims can be resolved by a *diversion* system. Even at that time, *Qanun Jinayat* has been passed and it regulates various sanctions and criteria for children who can be punished.

In a plural dimension legal instruments, the child protection rules are found, such as in Aceh Qanun Number 11 of 2008, there is a clause mention⁵ that cases of children in conflict with the law are resolved in the village, Aceh Qanun Number 6 of 2014 provides op⁴rtunities for village officials to resolve cases involving children under age. Aceh Qanun Number 6 of 2014 concerning Jinayat Law regulates cases of children in conflict with the law.

5

Article 66:

If a child who has not reached the age of 18 (eighteen) commits or is suspec⁵d of committing *jarimah*, then the child is examined based on the laws and regulations of juvenile criminal justice.

Article 6⁴

(1) '*Uqubat* at most 1/3 (one third) of the '*Uqubat* that has been determined for adults and/or returned to their parents/guardians or placed in a place provided by the Aceh Government or Regency/City Government.

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(2) The procedure of '*Uqubat* against children, which is not regulated in the laws and regulations regarding the juvenile justice system, is regulated in the Governor's Regulation.

The settlement of children's cases through the judiciary has an impact on children's psychology. During the examination process, the child is required to attend every stage of the trial until he gets a judge's verdict. So far, the rights of children as regulated in Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning child protection are increasingly being neglected. In this case, state law plays a more crucial role

⁴⁵ Interview with LI, Officer of the Community Welfare Service Center (Puskesmas) of Neuheun Village, July, 12, 2020.

⁴⁶ Data on children in conflict with the law obtained from the Banda Aceh District Court as released by BPS in 2012 amounted to 20 cases, in 2013 there were 7 cases, in 2014 there were 14 cases and in 2015 there were 10 cases.

than customary law or the law that lives in society. The principle of legal certainty still dominates in the cognitive space of the victim so that the victim chooses a solution through the judiciary solely to obtain legal certainty.

b. Immoral Offences

This case occurs in a matrilineal culture. In Aceh, the legal culture of matrilineal society (*aneuk jamee tribe*) lives in the southern region of Aceh. For the Aneuk Jamee tribe, all disputes in society, criminal and civil matters, ranging from household problems to criminal problems are resolved with a separate legal culture called the *takanai* legal tradition.⁴⁷ Cases of adultery or infidelity between a husband and a widow are big and considered shameful.

In Takanai customary law, this case is considered serious and hurts the social feelings of the community. This can be seen from the customary sanctions given to adultery or infidelity. As for the customary sanction given to the adulterer, in addition to being fined 1 (one) goat plus IDR 1,000,000 money as a customary fine, there is also additional punishment for the adultery/infidelity perpetrator in the form of apologizing to the community for the disgraceful act they have done. This sanction is a moral sanction imposed on the adultery perpetrators to show their regret for the actions that they have done. They are ostracized in everyday life. There are also other sanctions, especially for adulterers *ghairu muhsan* (unmarried adulterer), besides being forced to marry, they must also apologize to the community and pay a fine the size of which is agreed upon by the forum (*kaum*). Some were even expelled from the custom in the sense of being told to leave the village without a time limit for return.

Furthermore, if the perpetrator is a traditional leader or community leader, besides being subject to the above customary punishments/sanctions, the traditional symbols (*se-limbago*) attached to him are also revoked. In other words, a good name or a sign of greatness or a customary title is stripped away in public by other traditional leaders such as the *hulubalang*. One of the informants said:

⁴⁷ *Takanai* is one of the local wisdom in the Jamee Aneuk community as an effort to resolve disputes through peace. This local wisdom refers to the imposition of customary sanctions, especially in matters of dispute, both within the family, between residents, and even between villages. Interview with SM, community leader of Suak Bakung Village, Maret, 26, 2019. The principle of imposing sanctions in the *Takanai* custom is based on the principle of balance and harmony in the relationship between humans and nature. This unity of principle becomes a consideration in assessing an action that will be subject to customary sanctions if the values adopted and agreed upon by the community are violated, resulting in an imbalance in an indigenous community. Dedy Sumardi, *Adat Takanai*, p. 23-24.

The case of infidelity occurred around 2000, and until now, the man (husband who is already married) has been expelled from this village and to this day is not allowed to return to the village, while the woman is still in the village. Both men and women who commit adultery should both leave this village.⁴⁸

From several cases obtained, it is known that customary sanctions are fines in the form of goats, buffalo, and some money, as well as moral sanctions such as an open apology to the community and social sanctions such as expulsion from the village, and are not allowed to return to the village for an unspecified time. This form of sanctions and fines in the Aneuk Jamee traditional tradition is called *takanai* or *mambayie kasalahan*.

Sociologically, the society's stratification can be realized vertically and horizontally. In the *Aneuk Jamee tribe*, the kinship system is more likely to follow the Minang kinship system, West Sumatra. In terms of kinship, they still adhere to the *matrilineal* system. The kinship system is classified into nephew and *mamak* stratification. Mamak or another term is *niniak mamak*⁴⁹ is the lineage of the mother or the woman, either the mother's brother or sister, male or female. In the *aneuk jamee* kinship system, *niniak mamak* have a major role in maintaining friendly relations among relatives and other members of the community. The *niniak mamak* in the *aneuk jamee* kinship system has a central role in Moore's term, *semi-autonomous social field*, which is authorized to take and determine all decisions or family deliberations, including the settlement of criminal cases.⁵⁰

Before being resolved by the village apparatus, the *jinayat* case in the *aneuk jamee* legal culture above was first discussed in a family meeting involving male or female *niniak mamak*. Generally, male *ninik mamak* comes from the perpetrator's or victim's mother side. Female *ninik mamak* usually replaces this position if a family does not have male *ninik mamak*.

Conclusion

The diversity of legal traditions in Aceh from the perspective of interaction and interlegality has emerged before the implementation of Special Autonomy status for the Aceh region. The integration and unity of

⁴⁸ Interview with UA (initials) the person from Gampong Suak Bakung, on July, 6, 2019.

⁴⁹ In the Aneuk Jamee language, the term *ninik mamak* is called *niniak mamak*. AZ, community leader of Suak Bakung Village, Juli, 30, 2019.

⁵⁰ Interview with SD, community leader of Suak Bakung Village, July, 2 2019.

Aceh's criminal law traditions is a characteristic result of the process of interlegality of legal traditions. In fact, it produces a legal document that obtains official recognition from the government or the national legal system. The document is a *Qanun (Perda)*. Sharia regulates both individual and public obedience. The incorporation of legal norms originating from different legal traditions into the national legal system actually expands the functional meaning of the law, both in terms of legal material, legal institutions, and the legal culture of the Acehnese people.

The issuance of *qanuns* on *jinayat* is an act of respect to victims of violence against minors. Children's rights in the tradition of customary law and Islamic law can be explored according to their perception of customary law, such as psychological reasons for children, children's freedom from the pressure of perpetrators, and appropriate (logical) material losses. For the people of Aceh, the settlement of *jinayat* cases that occur in the community prefers the non-litigation route because the settlement process is in line with the local wisdom of each region. However, despite their tendency to be very satisfied with the settlement through non-litigation, the elements of certainty and legal force positively influence them in determining the choice of legal settlement through litigation. For this reason, Aceh's legal institutions need to consider elements of local wisdom in resolving legal cases in Aceh.

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UA, the person from Suak Bakung Village, Juli, 6, 2019.

SD, community leader of Suak Bakung Village, Juli, 2, 2019.

AZ, community leader of Suak Bakung Village, Juli, 30, 2019

SM, community leader of Suak Bakung Village, Maret, 26, 2019

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