

srizal_mh@yahoo.com	★	jurnal iost	2	Pada
asryasin89@gmail.com	★	Ekonomi syar		
Muhammad Nasir	★	Dftar RH		
nurdinpang., Nurdin, m...	★	Daftar Riwayat Hidup		
Sultan Ghina	★	Hasil BAP		
sultanghina@gmail.com	★	Penjelasan BAP		
sultanghina@gmail.com	★	BAP		
Syuhada Boz		(Tidak Ada Judul) BAP ut		
ikal.ikal13@gmail.c...	★	Artikel Dr. Nurdin dan Dr.		
mz_aj47@yahoo.com		Keberatan		
es/2199		itnikasari1997.cns@id		hahan

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Nuridin ¹, and Muhammad Nur²

¹Associate Professor, Ar-Raniry State Islamic University, the Faculty of Sharia and Law Banda Aceh, Indonesia.

²Assistan Professor, Malikussaleh University, Faculty of Law of, Lhokseumawe, Aceh, Indonesia.

We would like to inform you that your manuscript IJICC-J1179 has been accepted for publication in **International Journal of Innovation, Creativity and Change (ISSN 2201-1323)**.

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Thanks for submission of your work with us.

Regards,

Professor Dr. Vincent,

A handwritten signature in blue ink, appearing to read 'Vincent', with a stylized flourish at the end.

Associate Editor

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IMPLEMENTING ISLAMIC CRIMINAL LAW: DOES IT BREAK INDONESIAN LEGAL SYSTEM?

Nurdin,

Associate Professor, Ar-Raniry State Islamic University, the Faculty of Sharia
and Law Banda Aceh, Indonesia

Muhammad Nur

Assistan Professor, Malikussaleh University, Faculty of Law of, Lhokseumawe,
Aceh, Indonesia mnur@unimal.ac.id

Abstract

Islamic criminal law in Indonesia also known as Aceh Jinayat Law Qanun is a legal product in Aceh, whose source of legal material the Islamic Shari'a. The Aceh Jinayat Law Qanun should follow the legal system in force in Indonesia. The Indonesian National Legal System is based on Pancasila and the 1945 Constitution. Each existing legal domain must derive from Pancasila and the 1945 Constitution. Based on the results of the study, it appears that the enactment of the Aceh Jinayat Qanun is in line with the Aceh Government's specific authority on Islamic Shari'a. In legal perspective, this authority is legally legitimate as an attributive authority, which was previously not existent, but it has been made and established by the legislators or DPR (the People's House of Representative) which specifically held it up.

Keywords

Jinayat Law Qanun – Aceh - Legal Sistem - Indonesia

This article investigates the implementation of Islamic criminal law in Aceh, Indonesia. In some extends, Aceh is an autonomous province that can implement their own law. However, Aceh is also a part of Indonesian's province. Thus, all of Indonesian's law has also been applied in Aceh. In fact, in Aceh is not only implementing Indonesian's criminal law, but also implementing Islamic criminal law, commonly called Qanun Jinayat. The clash between Islamic criminal law and

Indonesian's criminal law has frequently happened in practice. Author will explore this problem to get future recommendation.

The Indonesian government's policy to implement the Islamic Shari'a in Aceh Province is carried out through the Law No. 44 of 1999 concerning the Implementation of the Privileges of the Special Province of Aceh.¹ Furthermore, the policy is strengthened through the 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 *faqeehah* (theology), *syar'iyah* (law) and *akhlak* (codes of conducts). The implementation of Islamic Shari'a includes the subjects of *ibadah* (religious practice), *ahwal al-syakhsyah* (family law), *muamalah* (civil law), and *jinayat* (criminal law), which were established through the Qanun of the Aceh Province.

The birth 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 the 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, namely to achieve social welfare. Such legal amendment actually serves as a bridge towards the fulfillment of human desires, wishing that anarchy,

¹ Article 4 paragraph (1) stipulates that the delivery of religious life in the region is manifested through implementing the Islamic law for its adherents in the community. See also Idhar, Z. B. Torong, Yahya and Iskandar Muda. "Influence Behavior in Legislature Budget Development of Regions in the Province of Aceh and North Sumatra." *International Journal of Economic Research* 14.8 (2017): 147-159. See also Hasan, Basri, and AK Siti Nabiha. "Accountability of local government: The case of Aceh Province, Indonesia." *Asia Pacific Journal of Accounting and Finance* 3.1 (2016). see also Jonathan, Benthall. "Have Islamic aid agencies a privileged relationship in majority Muslim areas?: The case of post-tsunami reconstruction in Aceh." *Islamic charities and Islamic humanism in troubled times*. Manchester University Press, 2016. The delivery of religious life manifested through the implementation of Islamic Shari'a is carried out in holistic manner. This means that all dimensions of people's lives are made regulated in the shari'a law. Such arrangements cover the dimensions of politics, law, economics, education, health, socio-culture, and others. Therefore, the law applied in Aceh is the one that originates from religious teachings, namely the Islamic Shari'a, Syahrizal Abbas, et.al., 2007, *Dimension of Legal Thought in Islamic Shari'a Implementation in Aceh*, Ministry of Islamic Shari'a of Nanggroe Aceh Darussalam Province, Banda Aceh, P. 9

destruction, and chaos do not arise. Such policy to anticipate the emergence of negative conditions will comfort our people, especially those belonging to the lower-class society.²

The Qanun of Aceh Number 6 of 2014 concerning Jinayat Law is a regulation that complements and improves the previously existing qanuns. The scope of the Qanuns is based on the Islamic principles of territoriality and individuality, which means that the Jinayat Law Qanun particularly applies in the jurisdictional area of Aceh Province and for Muslims. According to Hamid Sarong, both Muslims and non-Muslims are imposed due to the consequence of *frechtdelicten*.³

The provision of Article 5 of the Jinayat Law Qanun affirms that the Qanun applies to:

- a. Every Muslim who commits *Jarimah* in Aceh;
- b. Every non-Muslim together with Muslim who commits *Jarimah* in Aceh and chooses to submit himself or herself voluntarily to Jinayat Law;
- c. Every non-Muslim in Aceh who commits a *Jarimah* whose provision of crime is not regulated in the Book of Criminal Code (KUHP) or the provision of the crime is outside of the Book of Criminal Code, but is 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 at complementing a thorough and comprehensive implementation of Islamic Shari'a in Aceh. In addition, the Qanun even strives to make a simple codification of jinayat law which predominantly regulates on sexual crime. The materials stipulated in the Jinayat Law Qanun includes; Chapter I: General Provisions,

² Saifullah. 2005, *Refleksi Sosiologi Hukum*, Refika Aditya, Bandung, p. 27. See also Thomas R. Malthus. "An essay on the principle of population as it affects the future improvement of society." *The Economics of Population*. Routledge, 2018. 41-50. see also Morris, Rosenberg. *Society and the adolescent self-image*. Princeton university press, 2015. see also Lipset, Seymour Martin. "Political man: The social bases of politics." (1959).

³ A. Hamid Sarong. 2014, *The Position of Non Muslims in the Jinayat Law System in Aceh*, *Journal*, Post Graduate Program of UIN (State Islamic University) Ar-Raniry, Darussalam Banda Aceh, P. 8. See also Paul Verhaeghe "On being normal and other disorders: A manual for clinical psychodiagnostics. Routledge, 2018.

Chapter II: the Scope of the Qanun Application, Chapter III: Reasons for Justifications and Forgiveness, Chapter IV: Jarimah and 'Uqubah, Chapter V: Combined Jarimah Actions, Chapter VI: Jarimah and Uqubah for Children, Chapter VII: Compensation and Rehabilitation, Chapter VIII: Other Provisions, Chapter IX: Transitional Provisions, Chapter X: Final Provisions.

The existence of the Jinayat Law Qanun in Aceh should follow the prevailing legal system⁴ in Indonesia because the law is a set of rules that contain a sort of entity that we understand through a system.⁵ A school of thought on the system states that a system is a complex entity which consists of parts in which one element is interrelated to another.⁶

In essence, the Paradigm of the Indonesian Legal System basically constitutes a single system which consists of elements or parts in which one is inter-related to another intended for achieving the goals on the basis of the 1945 Constitution which is inspired by the Pancasila philosophy.⁷ Legal development requires an integral legal system which concerns about not only legal material but

⁴ According to Friedman, Legal system is a system that includes legal substance, structure, and culture. The substance of legal system constitutes the rules, norms and real behaviors of humans in the system. The legal substance depicts the living law, not merely the rules in the book of law (law in book). Lawrence, M. Friedman, "American Law as an Introduction" in *Jurnal Keadilan*, Vol. 2, No.1, (2002), 48. See also Zaki Ulya. "Dinamika Penerapan Hukum Jinayat Sebagai Wujud Rekonstruksi Syari'at Islam di Aceh." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 5.1 (2016), 135-148.

⁵ Hans Kelsen, *General Theory on Law and State*, Nusa Media, Bandung, (2008), 3

⁶ Satjipto Rahardjo, *Science of Law*, Citra Aditya Bakti, Bandung, (2000), 48. See also Marco Raffler, et al. "Finite element model approach of a cylindrical lithium ion battery cell with a focus on minimization of the computational effort and short circuit prediction." *Journal of power sources* 360 (2017), 605-617.

⁷ Ahmad Muliadi, *Politics of Law*, Print I, Akademi Permata, Padang, (2013), 46. See also Pranoto Iskandar, "The Pancasila Delusion." *Journal of Contemporary Asia* 46.4 (2016), 723-735. See also Saidin, O. K. "Transplantation of Foreign Law into Indonesian Copyright Law: The Victory of Capitalism Ideology on Pancasila Ideology." (2015). See also Muhammad Siddiq Armia, 'Implementing Islamic Constitutionalism: How Islamic Is Indonesia Constitution?' (2018) 15(2) *Al 'Adalah* 437-450. See also Muhammad Siddiq Armia, 'Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience' (2018) 26(2) *Intellectual Discourse* 903-930.

also all legal components such as legal material, legal culture, legal institutions and apparatus, and legal facilities and infrastructure.⁸

According to Sunaryati Hartono, the Indonesian National Legal System is based on Pancasila and the 1945 Constitution. Every 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 the Pancasila based on the 1945 constitution, the Jurisprudence, and finally the Customary Law.⁹ Based on the afore stated discussion, the main question is how to make the Aceh Jinayat Law Qanun implemented on the basis of the National legal system of Indonesia.

Ismail Sunny illustrates the politics of law as a process of accepting the Islamic law. He describes the process into two periods. The first is the period of *persuasive source* where every Muslim is believed to willingly accept the implementation of Islamic law. The second is the period of *authority source* where every Muslim believes that the Islamic law has the forcing power of being carried out. In other words, Islamic law can apply in a formal juridical manner provided that it is codified into national legislation.¹⁰

⁸ Nur Rohim Yunus, Implementation of Islamic Shari'a on Regional Regulation in Indonesia's National Legal System, *Hunafa: Jurnal Studia Islamika*, Vol. 12, No. 2, (December 2015). 262

⁹ Sunaryati Hartono, *Politics of Law towards a Single National Legal System*, Alumni, Bandung, (1991), 64. See also Matheson, Michael J. "The United States position on the relation of customary international law to the 1977 protocols additional to the 1949 Geneva Conventions." *The Development and Principles of International Humanitarian Law*. Routledge, (2017), 233-245. See also Howell, Paul Philip. *A manual of Nuer law: Being an account of customary law, its evolution and development in the courts established by the Sudan Government*. Routledge, 2018.

¹⁰ Ismail Sunny, *Islamic Tradition and Innovation in Indonesia in the Field of Islamic Law*, quoted from *Miscellany of Islamic Justice in Indonesia*, Vol. I, Ulul Albab Press, Bandung, 1997, P. 40-43. See also Vranken, Marjolein JM, et al. "Barriers to access to opioid medicines: a review of national legislation and regulations of 11 central and eastern European countries." *The Lancet Oncology* 17.1 (2016): e13-e22. See also Irlich, Ulrike M., et al. "Recommendations for municipalities to become compliant with national legislation on biological invasions." *Bothalia-African Biodiversity & Conservation* 47.2 (2017), 1,11.

Indonesia is not a secular country; therefore, the state does not need to separate the people's religious life from the state affairs.¹¹ This is proven through article 29 paragraph 1 of the 1945 Constitution which stipulates that the state is based on the belief on the One God. Article 29 of the constitution implies that all laws and regulations cannot be in conflict with the tenets revealed by the Almighty God.¹²

Since the Dutch colonial government abandoned this archipelagic land, the existence of Islamic law has begun to be considered significant and receive good attention during the preparation of the national legislation. Efforts to restore and place the Islamic law in its original position continued to be carried out by Islamic leaders on various occasions. Their struggle began since the early process of laying down the legal foundation for our country when they were working in the BPUPKI (Investigating Agency in Efforts to Preparation for the Indonesian Independence) institution. After exchanging ideas through discussions and consultations, the Indonesian leaders who contributed as the drafters and formulators of the Republic of Indonesia's Constitution which later came to be known as the 1945 Constitution reached an agreement which was set forth in a treaty known as the Jakarta Charter (June 22 1945). The Jakarta Charter, which was later accepted as the Preamble of the 1945 Constitution, stipulates among other things that the state is founded on the basis of Divinity with the obligation of carrying out the Islamic law for its adherents. This phrase (seven words) was then eliminated by the PPKI (Preparatory Committee for the Indonesian Independence) and replaced it with the word "the One God".¹³

¹¹ Afdol, *Legislation of Islamic Law in Indonesia*, Airlangga University Press, Surabaya, 2009, P. 1. See also Folk, Holly. "Protestant Continuities in The Church of Almighty God." *The Journal of CESNUR* 2.1 (2018), 58-77. See also Massimo Introvigne, "Captivity Narratives: Did The Church of Almighty God Kidnap 34 Evangelical Pastors in 2002?." *The Journal of CESNUR* 2.1 (2018): 100-110. See also Rosita Šoryt. "Religious Persecution, Refugees, and Right of Asylum: The Case of The Church of Almighty God." *The Journal of CESNUR* 2.1 (2018), 78-99

¹² *Ibid.*

¹³ Marzuki, *The Prospect of Islamic Criminal Law Implementation in Indonesia*, LP3ES, Jakarta, 1989, P. 231. See also, Ridho Al-Hamd. "The Jakarta charter in post-Soeharto Indonesia: Political thoughts of the elites in Muhammadiyah." *Masyarakat Indonesia* 41.1 (2016), 43-56. See also M. MUKHTASAR SYAMSUDDIN. "Indonesian philosophy: its meaning and

The emersion of the formalization of the Islamic shari'a is a consequence of the development of the Islamic law itself. To study the formalization of Islamic shari'a in Indonesia in the perspective of the Indonesian legal system, the discourse on Islamic judicial authority needs to be further discussed. Hence, to find out more about how Islam actually plays a role in seeking the truth and upholding justice for people's lives, we need to make efforts to compile the books of fiqh (codification of Islamic jurisprudence) and establish various judicial institutions engaged in litigation and non-litigation matters apart from the formal judiciary institution such as dispute resolution bodies and legal aid agencies.¹⁴

Throughout the course of the history of law in Indonesia, the presence of Islamic law in the national law constitutes an existential struggle. In the same span of history, Islamic law has always reinforced its existence, both as a positive or written law and as an unwritten law in various fields of legal life and practice. This is what is called the theory of existence.¹⁵

Islamic law as an integral part of the Islamic tenets is a source of law that needs to be institutionalized in Indonesia because empirically Islamic law is the

relevance in the context of Asian countries development." International journal of the Asian Philosophical association 8.2 (2015), 201-214. See also Alexander Seran,. "Pancasila and the Struggle for a Moral Grammar." *Prajñā Vihāra* 17.1 (2016), 33.

¹⁴ Rahmat Rosyadi and Rais Ahmad. *Formalization of Islamic Shari'ain the Perspective of Indonesia's Legal Order*, Ghalia Indonesia, Bogor, 2006, 55. Ibnu Hadjar, *Islamic Shari'a and Indonesian Positive Law*, *Jurnal Al-Mawarid*, Ed. XVI, (2006), . 5. See also Burridge, Andrew, and Nick Gill. "Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals." *Antipode* 49.1 (2017), 23-42. See also Silke Roth. "Aid work as edgework—voluntary risk-taking and security in humanitarian assistance, development and human rights work." *Journal of Risk Research* 18.2 (2015), 139-155. See also Fernando Chang-Muy, J. D., and Elaine P. Congress, eds. *Social work with immigrants and refugees: Legal issues, clinical skills, and advocacy*. Springer Publishing Company, (2015).

¹⁵ Abdul Halim Barkatullah and Teguh Prasetyo, *Islamic Law Responds to Continuously Developing Challenges of Time*, Pustaka Pelajar, Yogyakarta, (2006), 70-71. See also Wilfrid Gangbo and Andrzej wi ch. "Existence of a solution to an equation arising from the theory of mean field games." *Journal of Differential Equations* 259.11 (2015), 6573-6643. See also Edward W. Taylor. "Transformative learning theory." *Transformative learning meets bildung*. Brill Sense, (2017), 17-29.

living law that has long existed in the Indonesian society since the early period of advent of Islam into this archipelagic land, which was the seventh century.¹⁶

The existence of Islamic law in the national legal system varies in four forms: 1) it exists in the sense as an integral part of the Indonesian national law; 2) it exists in the sense of being recognized by national law as independent, forceful and authoritative; and is given the status as national law; 3) it exists in its function as a *filter* for Indonesian national legal materials; and 4) it exists in the sense as the main material and the main element for the establishment of the national law.

According to Ahmad Muliadi national law was formed out of:¹⁷

- a. Religious Law (what it includes is the principle)
The religious legal system is a legal system on the basis of certain religious provisions, which are commonly found in the Religious Scriptures.
- b. Customary Law (what it includes is the principle)
The customary legal system and the traditional law are the laws of the Indonesian indigenous people, which have grown and developed in Indonesian society for a span of hundreds or thousands of years ago.
- c. Western law (what it includes is the systematic)
The European civil law system is a civil law imposed in Indonesia by the colonial government based on the principle of concordance.
- d. The international law both civil and public (as a reality bias of the influence of world globalization).
It is the law that regulates legal relations between one State and another and among citizens of different countries and states

It is apparent that the Islamic law is an integral part of the national law. It is a sub-system of the national legal system. As a sub-system, the Islamic law is

¹⁶ Ahmad Mansur Suryanegara, *Discovering History*, Mizan, Bandung, (1995), 74-76. See also Hugh Kennedy. *The Prophet and the age of the Caliphates: the Islamic Near East from the sixth to the eleventh century*. Routledge, 2015. See also John Haldon. "The works of Anastasius of Sinai: a key source for the history of seventh-century East Mediterranean society and belief." *Languages and Cultures of Eastern Christianity: Greek*. Routledge, (2017), 323-363.

¹⁷ Ahmad Muliadi, *Op. Supra*, 54. See also Yaman Akdeniz. "*Internet child pornography and the law: national and international responses*". Routledge, (2016). See also A. Hamid Sarong and Nur A. Fadhil Lubis, "The Child Rights In Islamic Law With A Special Focus On Aceh, PETITA, Vol.4, No.1, (2019), 31-41.

expected to provide a dominant contribution in the context of developing and renewing the national law that reflects the legal awareness of the Indonesian people. It is possible because the majority of the Indonesian population are Muslims.¹⁸

Based on Article 29 paragraph (1) of the 1945 Constitution and its Amendments and the interpretation of Hazairin on it, Islamic law is the referring source of the national law establishment in Indonesia. The Decree of the MPR RI (People's Consultative Assembly of the Republic of Indonesia) Numb IV / MPR-RI / 1999 concerning GBHN (Outlines of the State's Direction), Chapter IV, Policy Direction, A. Law, paragraph 2, stipulates that Islamic law, Customary Law, and Western Law are referring sources of the national law formulation. Indonesia sets the order of the state's comprehensive and integrated legal system by recognizing and respecting religious and customary law in addition to renewing the discriminatory legislation inherited by colonial including the national legislations that contain gender injustice and the legislations that are incompatible with the demands of the reform through legislation making.¹⁹

A rule of law will apply effectively in the community if the demand of the law²⁰ is congruent with the aspirations and the needs of the community. It is undeniable that the majority of the population of Indonesia are Muslims and therefore the authorities should consider the Islamic law in the process of formulating the national law so as that the national law will not be in conflict with the Islamic law. The positivization of Islamic law is based on philosophical, juridical and sociological values of the Indonesian people. Therefore, the state is obliged to make the Islamic law a positive law for the Indonesian Muslims because the way of thinking, the vision

¹⁸ M. Sularno, *Islamic Shari'a and the Efforts of Positive Law Establishment in Indonesia*, *Journal Al-Mawaridi*, Ed. XVI, (2006), 216-217

¹⁹ Indonesia, *Decision of the MPR RI (Consultative Assembly of the Republic of Indonesia)*, *Output of General Meeting, Year 1999 and the First Amendment of the Indonesia's 1945 Consitution*, BP Panca Usaha, Jakarta, (1999),. 64. See also Amy Mullins. "Medicare payment reform: making sense of MACRA." *Family practice management* 23.2 (2016): 12-15. See also Tom Campbell D. "The legal theory of ethical positivism". Routledge, (2016).

²⁰ Frank, Jerome, and Brian H. Bix. *Law and the modern mind*. Routledge, (2017).

of life, and the characters of a nation are essentially reflected in the culture and living law of its people. The laws that apply in Indonesia must remain consistent to and based on the values as revealed by the Supreme One God and continue to respect the values of Islamic law. In other words, national laws, especially those that apply to Indonesian Muslims should not contain provisions that are contrary to the Islamic law.²¹

A law is a set of rules that contain a sort of entity that is understood as a system.²² According to Friedman, a legal system is a system that comprises a substance, a structure, and a legal culture. The substance of a legal system encompasses rules, norms and real behaviors of the humans in the system.²³ The legal substance illustrates a *living law*; it is not simply the rules written in a book of law (*law in book*).

In essence, the Paradigm of the Indonesian Legal System is a system which consists of elements or parts in which one is inter-interrelated to another, intended for achieving the goals based on the 1945 Constitution and inspired by the Pancasila philosophy.²⁴

²¹ Masruhan, *Positivization of Islamic Law of Reform Era in Indonesia*, *Jurnal Islamica*, Vol. 6, No.1, September (2011), 126. See also Powell, Emilia Justyna. "Islamic law states and peaceful resolution of territorial disputes." *International Organization* 69.4 (2015), 777-807. See also Daniel Pipes. "In the path of God: Islam and Political Power". Routledge, (2017).

²² Hans Kelsen, 2008, *General Theory on Law and State*, Nusa Media, Bandung, P. 3. Clive Lawson. "Collective learning, system competences and epistemically significant moments." *High-technology clusters, networking and collective learning in Europe*. Routledge, (2017), 182-198.

²³ Lawrence, M. Friedman, "American Law as an Introduction" in *Jurnal Keadilan*, Vol. 2, No.1, (2002), 48. See also Angélica Torres-Berrío, et al. "DCC confers susceptibility to depression-like behaviors in humans and mice and is regulated by miR-218." *Biological psychiatry* 81.4 (2017): 306-315. See also Joshua Duntley D. "Adaptations to dangers from humans." *The Handbook of Evolutionary Psychology* (2015), 1-23.

²⁴ Ahmad Muliadi, *Politics of Law*, Print I, Akademi Permata, Padang, (2013), 46. See also Tanujaya, Benidiktus, Rully CI Prahmana, and Jeinne Mumu. "Mathematics instruction, problems, challenges, and opportunities: A case study in Manokwari regency, Indonesia." *World Transactions on Engineering and Technology Education* 15.3 (2017), 287-291. See also Encep Syarief Nurdin. "The Policies on Civic Education in Developing National Character in Indonesia." *International Education Studies* 8.8 (2015), 199-209.

According to Sunaryati Hartono, the Indonesian National Legal System is based on Pancasila and the 1945 Constitution. Every 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 the customary law.²⁵

Law is a product of social reality. Then, how is it formed? In other words, how do the social balancing relations lead to the formation of norms that are considered legal norms?²⁶ The historical school of thought led by Von Savigny views that the law grows and develops under the recognition of a nation and brings with it unique characteristics, namely national consciousness of the nation or so called *Volksgeist* (soul of a nation) which emerges naturally to the surface as customary law in every nation.²⁷ Based on this notion, it can be simplified that a legal order or a modern legal system is established through a process that accommodates the customs, doctrines or tenets, legislation and jurisprudence.²⁸

²⁵ Sunaryati Hartono., *Politics of Law towards a Single National Legal System*, Alumni, Bandung, (1991), 64. See also Michael J Matheson. "The United States position on the relation of customary international law to the 1977 protocols additional to the 1949 Geneva Conventions." *The Development and Principles of International Humanitarian Law*. Routledge, (2017), 233-245. See also Paul Philip Howell. "A manual of Nuer law: Being an account of customary law, its evolution and development in the courts established" by the Sudan Government. Routledge, 2018. See also Max Gluckman. "Ideas and procedures in African customary law: studies presented and discussed at the Eighth International African Seminar at the Haile Sellassie I University, Addis Ababa, January 1966. Routledge, (2018).

²⁶ Jhon Gilissen and Frits Gorle, 2005, *History of Law, an Introduction*, Refika Aditama, Bandung, P. 23. See also Rachel E Kranton. "Identity economics 2016: Where do social distinctions and norms come from?." *American Economic Review* 106.5 (2016): 405-09. See also Jon Robson. "Aesthetic testimony and the norms of belief formation." *European Journal of Philosophy* 23.3 (2015): 750-763. See also Nader Sohrabi Safa, et al. "Information security conscious care behaviour formation in organizations." *Computers & Security* 53 (2015): 65-78.

²⁷ *Ibid*, 15.

²⁸ Jhon Gilissen and Frits Gorle, *History of Law, an Introduction*, Refika Aditama, Bandung, (2005). See also Jerome Frank, and Brian H. Bix. *Law and the modern mind*. Routledge, 2017. See also Gunther Teubner. "Global Bukowina: legal pluralism in the world society." *Critical theory and legal autopoiesis*. Manchester University Press, (2019).

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

Indonesia is a country that adheres to a mix of miscellaneous legal systems. However, its main legal system is the Continental European legal system. In addition to the Continental European legal system, Indonesia has also imposed customary and religious (Islamic) laws. In short, there are three legal systems applied in Indonesia; they are customary law, Islamic law, and Continental European law. However, there are specific instruments and requirements in the aspects of who should comply with the law of among the three legal systems. In a dynamic sense, the three legal systems can serve as the raw materials for the national law.²⁹ The Indonesian legal system has unique characteristics. Besides having a tendency to adhere to the *civil law system*, the customary law system is still recognized in its implementation.

Etymologically, *autonomy* is defined as self-government (*auto* = oneself, *nomos* = 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 (*begrijf*), autonomy contains the notion of independence and a freedom to *regulate* and *take care* of oneself.

²⁹ R. Supomo, *Legal System in Indonesia prior to World War II*, Pradnya Paramita, Jakarta, (1982), 34. See also Christoph Helbig, et al. "How to evaluate raw material vulnerability-An overview." *Resources Policy* 48 (2016), 13-24. See also Andrew Gilden. "Raw Materials and the Creative Process." *Geo. LJ* 104 (2015), 355. See also Calvo-Flores, Francisco G., et al. *Lignin and lignans as renewable raw materials: chemistry, technology and applications*. John Wiley & Sons, (2015).

According to *Ateng Sjafrudin*, autonomy means a freedom overgoverning oneself, but not independence.³⁰ According to *Tresna*, the essence of autonomy as a freedom means that an autonomous region is not governed on top-down manner, but it solely governs on its own initiative in regulating and managing its regional households. *BagirManan* suggests that autonomy contains the notion of an independence to regulate and manage its own household affairs. In independence lies a freedom; there is no independence without freedom.³¹

The essence of the concept of regional autonomy implementation is an effort to maximize the expected results to achieve simultaneous to avoiding the complexity and other things that hinder the implementation of a regional autonomy. Thus, the demands of the community can be manifested in its real terms through the application of regional autonomy without ignoring the continuity of public services. According to *Didik Sukriono*, the philosophy or principle of regional autonomy is *sharing of power, distribution of power and empowering of regional administration*. The philosophy applies in the context of achieving *the ultimate goal of autonomy*, namely the regional independence, especially the independence of the community.³²

³⁰ Ateng Sjafrudin., *The Law Tide of Regional Autonomy*, Binacipta, Bandung, (1985), 23. See also Garry Wills. "Inventing America: Jefferson's declaration of independence." Vintage, (2018). See also Hélène Rey. "Dilemma not trilemma: the global financial cycle and monetary policy independence". No. w21162. National Bureau of Economic Research, (2015). See also Crawford Young. "Politics in Congo: decolonization and independence." Vol. 2313. Princeton University Press, (2015).

³¹ Bagir Manan, *The Relationship between the Center and the Region according to Decentralization Principles based on the 1945 Constitution*, Unpad, Bandung, (1990), 122. See also Sylvia Chant. "Single-Parent Families: Choice or Constraint? The Formation of Female-Headed Households in Mexican Shanty Towns." *Development: Critical Essays in Human Geography* (2017), 61. See also Benjamin R. Barber. "The Death of Communal Liberty: A History of Freedom in a Swiss Mountain Canton." Princeton University Press, 2015. See also Tajul Arifin, The Guaranteeing Capital Punishment Is Peaceful And Harmonious Life: Proofing from Around the World, PETITA, Vol.4, No.1, (2019), 56-66. See also Mary T. Clark Augustine. "Philosopher of Freedom: A Study in Comparative Philosophy." Pickle Partners Publishing, (2018).

³² Didik Sukriono, *The Law, Constitution and Autonomy Conceptions*, Setara press, Malang, (2013), 135. See also Katherine A. Ornstein, et al. "Epidemiology of the homebound population in the United States." *JAMA internal medicine* 175.7 (2015), 1180-1186. See

The rationale for special autonomy that is stipulated in the constitution is affirmed by article 18 paragraphs (b) of the 1945 Constitution which underlies that the State recognizes and respects the specialty or privileges of regional government units that are regulated by law. The core concept of special autonomy is the authority, which is inherent to 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 the Law No. 23 of 2014 as amended by the 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 (center) with the aim of improving public welfare, public services, and regional competitiveness.

Special autonomy (as a form of asymmetric political decentralization) acts as a middle way. On one hand, the community can still exercise its rights to self-determination by utilizing the granted political, social, economic, and cultural freedom without having to pose a threat to the sovereignty of the state. On the other hand, the central government does not need to worry that the implementation of special autonomy will bring about disintegration. This is what is meant by internal self-determination.

Article 1 paragraph (6) of the Law No. 23 of 2014 concerning Regional Government determines that Regional Autonomy grants the right, authority, and obligation onto autonomous regions to regulate and administer Government Affairs and the interests of its local communities within the system of the Unitary State of the Republic of Indonesia. Article 1 paragraph (7) states that an autonomous region is a legal community unit that has regional boundaries and

also Jeffery R. Webber, *"The indigenous community as 'living organism': José Carlos Mariátegui, Romantic Marxism, and extractive capitalism in the Andes."* *Theory and Society* 44.6 (2015), 575-598. See also Kemi C. Yekini, et al. *"Impact of board independence on the quality of community disclosures in annual reports."* *Accounting Forum*. Vol. 39. No. 4. Taylor & Francis, (2015).

the authority to regulate and administer the government affairs and the interests of its local community according to its own initiatives based on the aspirations of the people within the system of the Unitary State of the Republic of Indonesia. The Law Number 11 of 2006 concerning Aceh Government states that Aceh is a provincial territory, under the leadership of a governor, which constitutes a legal community unit that owns a specialty and is given a special authority to regulate and manage its own government affairs and the interests of its local community in line with the laws and regulations within the system and principles of the Unitary State of the Republic of Indonesia on the basis of the 1945 Constitution of the Republic of Indonesia.

It is a policy of the Central government to place 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 recognizes 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*, the autonomous region has the right to decide its own destiny and to take care of the internal affairs in its region. It 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.³³ The specificity of Aceh refers distinctive characteristics of the Aceh'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 the autonomy is that the system of government of the Unitary State of the Republic of Indonesia, according to the 1945

³³ Nur Rohim Yunus, *Implementation of Islamic Shari'a on Regional Regulation in Indonesia's National Legal System*, Hunafa: *Jurnal Studia Islamika*, Vol. 12, No. 2, December (2015), 276. See also Coulson, Noel. "A history of Islamic law." Routledge, 2017. See also Ahron Layish. "Women and Islamic law in a non-Muslim state: A study based on decisions of the Shari'a courts in Israel". Routledge, (2017). See also Abdel Salam Sidahmed. "Islamic fundamentalism." Routledge, (2018).

Constitution, recognizes 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 a special or distinctive regional government unit because of the distinctive characteristics of the Aceh history that has been recognized as being featured with persistent fighters with strong endurance during struggle against the Dutch colonialism.

The ideal anatomy according to the afore-elaborated framework provides a philosophical, juridical, and sociological basis for the establishment of the 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 more than that, is also a constitutional mandate that should be utilized as much as possible for the people's welfare in Aceh.

Based on the afore-stated explanation, the Aceh Province has a position different from other provinces. This includes the presence of mechanism on how to resolve conflicts and disputes concerning criminal cases and religious issues. Departing from the above thoughts, the status of Islamic law legislation which leads to the application of Islamic Shari'ain Aceh is the right of the people of Aceh. Juridical legitimacy in the application of Islamic law is stipulated in the 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 conducts).
- (2) The Islamic Shari'a as referred to in paragraph (1) includes the fields of worship (religious practice), ahwalasyakhshiyah (family law), muamalah (civil law), jinayat (criminal law), qadha '(justice), tarbiyah (education), da'wah (mission), syiar(propagation) and defense 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 the freedom, foster harmony, respect the religious values embraced by the religions' adherents and protect 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 the laws and regulations.

General explanation of the Law Number 11 Year 2006 firmly states that:

The response of the Government and the DPR (House of Representatives) gave birth to a political will towards the resolution of Aceh problem through the issuance of the Law No. 18 of 2001 which regulated on the implementation of the special autonomy for the special Province of Aceh as the Province of Nanggroe Aceh Darussalam. Apparently however, the implementation of the law was still not sufficient to accommodate the aspirations and interests for Aceh's economic development and political justice. This led to the birth of the LoGA (Law on Governing of Aceh) with a broader autonomy principle. The granting of the wide autonomy in political sphere through which Aceh has the right to administer its regional government following the principles of good governance, which bears transparency, accountability, professionalism, efficiency and effectiveness, is intended to maximize the prosperity of the people in Aceh. In carrying out the wide autonomy, the Aceh community has a participatory role in formulating, establishing, implementing and evaluating its regional government policies. Natural disasters particularly the earthquakes and tsunamis that occurred in Aceh have generated the solidarity of all the state's potentials to rebuild the people and the region of Aceh. Similarly, they also have raised strong awareness of the Government and the Free Aceh Movement to resolve

conflicts in a peaceful, comprehensive, sustainable and dignified manners to manifest a permanent peace within the framework of the Unitary State of the Republic of Indonesia. Such framework is an absolute requirement.

A Memorandum of Understanding between the Government of Indonesia and the Free Aceh Movement signed on August 15, 2005 marked a new page to the history of the Aceh Province and to the lives of its people towards a peaceful, secured, fair, prosperous, and dignified life. It should be understood that the Memorandum of Understanding is a form of dignified reconciliation towards sustainable social, economic and political development in Aceh.

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

- (1) To administer the Regional Autonomy and Assistantship Tasks, the Autonomous Region legislate 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 the 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) the Regional Regulation may contain local content material in accordance with the provisions of the legislation.

Furthermore, Article 237 stipulates that the principle of legislation and the material content of the Regional Regulation follow the provisions of law and the legal principles that grow and develop in the community as long as they do not in conflict with the principles of the Unitary State of the Republic of Indonesia.

Aceh Province as a special autonomy region based on the Law Number 11 of 2006 concerning the Governing of Aceh has a legal order in legal system 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 on the government administration and the life of Acehnese people.

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

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

- (1) Islamic Shari'a implemented in Aceh includes the matters of aqeedah (theology), syar'iyah (tenets) and akhlak (ethics).
- (2) Islamic Shari'a as referred to in paragraph (1) includes the matters of worship, ahwal al-syakhshiyah (family law), muamalah (civil law), jinayat (criminal law), qadha '(justice), tarbiyah (education), dakwah (mission), syiar (propagation), and defense 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 (*attributie van bevoegheid*) which was created or manifested by the legislators (DPR). Such authority was previously not existent, but later it was specifically created as an attribution.³⁴ 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

³⁴ Faisal A. Rani. "The Position of Qanun in Legislative System, Paper, Presented in a Consultative Discussion at MPU (the Muslim Scholars Assembly)" Aceh, Thursday, 03 December Banda Aceh, (2009), 9

application is specific or local. Although the qanun is enacted in a certain region, but the enforcement of the qanun still involves the institutions of the national justice system.³⁵

The implementation of legislation through Regional Regulations or other kind of regulations has occurred in Indonesia previously. Hence, the authority of the Qanun as the executor of the Law is neither something 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. It 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 (authorized) by the Law.³⁶

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 as that it can carry out development in its region. The central government can no longer interfere with the administration of matters that have been delegated to the region, except for the purpose of guiding, coordinating 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.³⁷

Therefore, there is no contradiction between the regulations concerning Islamic Shari'a which have been enacted in Aceh Province and other legislations in

³⁵ *Ibid.*

³⁶ See Husni Jalil, Position of Qanun in Indonesia Indonesia's Legislative System, *Paper*, Presented in the activity of Political Education for Societal Organization / NGO, Community Leaders, Islamic Schools' Leaders across Nanggroe Aceh Darussalam Province, Banda Aceh, 13-14 September (2005), 3

³⁷ see Haposan Siallagan, *Supra.*, 2

Indonesia, for Aceh is a special autonomous region. Hence, so as that a normative system of legislation does not cause a contradiction in itself, it should create the principles that prevent the emersion of contradictions.³⁸ This leads to emergence of the principles of conflict resolution (preference principles); they are:³⁹

- a. *Lex specialis derogat legi generali*; special legislation comes over general legislation.
- b. *Lex posterior derogat legi priori*; subsequently existing legislation defeats the previously existing legislation.
- c. *Lex superior derogat legi inferiori*; higher degree legislation overcomes the lower degree legislation.

The afore stated principles become crucial and very functional in a legal system (law order) to create a harmonization and synchronization of the (national) legal system. In case of the emergence of conflicts among one certain sector and another in the legislation system both vertically and horizontally, these principles should be functioned. It worth noting that there should not be any overlapping or conflict between one regulation and another in the legal system.

The enactment of the Aceh Jinayat Qanun is in line with the Aceh Government's specific authority on Islamic Shari'a. This authority is legally valid as an attributive authority (*attributie van bevoegheid*) which was legislated or manifested by the legislators (DPR / National House of Representatives). Such attribution was previously not existent, but later it was created as a special authority. Qanun is a part of the national legislative system, and therefore the norms or legal conditions that are regulated in 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

³⁸ Faisal A. Rani. *Supra*, 8

³⁹ Ahmad Rifai., *Legal Discovery of Judges in the Perspective of Progressive Law*, Sinar Grafika, Jakarta, (2010), 90

institutions of the national justice system. Therefore, there is no contradiction between the regulations on Islamic Shari'a which have been implemented in the Province of Aceh and those of other laws and legislations in Indonesia because Aceh is a special autonomous region.

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