

IMPLEMENTATION OF ISLAMIC SHARIAH IN SPECIAL AUTONOMY: A Case of Aceh Province

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Abstrak: Pelaksanaan Syariat Islam dalam Kerangka Otonomi Khusus: Studi Kasus di Provinsi Aceh. Mengemukakan isu pelaksanaan syariat Islam di Indonesia, muncul sejak perumusan bentuk negara Indonesia. Isu tersebut menguat kembali pada era Reformasi, setelah diberlakukannya Undang-undang Nomor 22 Tahun 1999 tentang Pemerintahan Daerah. Sejalan dengan hal itu, pelaksanaan Syariat Islam di Provinsi Aceh memiliki legalitas dan diakui oleh konstitusi Negara Republik Indonesia. Pengakuan negara terhadap pelaksanaan syariat Islam di Aceh sebagai otonomi khusus, didasarkan pada Undang-undang Nomor 44 Tahun 1999 tentang Penyelenggaraan Provinsi Daerah Istimewa Aceh dan Undang-undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh. Dari kedua Undang-undang tersebut telah disahkan sejumlah kanun bidang Syariat Islam. Tulisan ini menggambarkan permasalahan tersebut dan implikasinya pada percepatan penerapansyariat Islamserta implementasinya di Aceh.

Abstract: The emergence of the implementation of Islamic law issue in Indonesia had initially begun since the discussion of state form in post-independence Indonesian. The issue was more insistently voiced in the reform era, following the collapse of the New Order regime, especially after the enactment of Law No. 22 of 1999 on Regional Government. In line with this development, the implementation of shariah in Aceh province has been legally recognized by the Constitution of the Republic of Indonesia as well as Pancasila and the 1945 Constitution. State recognition of the implementation of Islamic law in Aceh as special autonomy, based on Law Number 44 of 1999 concerning organization of the privilege of the Special Province of Aceh and Law No. 11 of 2006 on the Government of Aceh. On the bases of the two laws, a number of *kanuns* have been introduced which consequently boost up the implementation of Islamic shariah in Aceh.

Keywords: Islamic law, shariah, kanun, autonomy, Aceh

Introduction

Reform movement has begun in Indonesia since 1998 which calls for democratization in the society, state and also in the legislation process. The most fundamental reforms in the system of government marked by the introduction of two laws governing local governments pertaining to the structure and procedures of regional government, as enshrines in Article 18 of the 1945 Constitution. Both of these laws are the Law No. 22 of 1999 and Law No. 32 of 2004 on Regional Government. The enactment of Law No. 22 of 1999 which was followed by Law No. 25 of 1999 on Financial Balance between Central and Regional Government is the total amendment of Act No. 5 of 1974 on Regional Government, in an effort to provide a fairly broad autonomy to the regions in accordance with the ideals of 1945 Constitution. Law No. 22 of 1999 came into force on May 7, 1999, was born as the implementation of MPR - RI Decree No. XV/MPR/1998 on Implementation of Regional Autonomy, and also within the framework of the 1945 Constitution. Similar to the birth of a previous Law on Local Government Act, Act No. 22 of 1999 was also impressed by a shift from one extreme to the other, in accordance with the current political situation. Law No. 22 of 1999 is shifting “*pendulum*” quite dramatically from centralized conditions toward broader decentralization.¹

In Act No. 22 of 1999, the government used the principle of decentralization to strengthen the functioning of parliament/provincial parliament in making local regulation or Qanun. However, as seen by the reformists and the expert’s regional autonomy law contains many flaws that do not fit with the demands of the reforms and thus proposed to be revised. The rise of demands of democratization in various sectors of national life in the reform era requires integration in terms of both law enforcement and in the creation of a legal product that is responsive to the dynamics and needs of the legal community nationwide. Consequently, excessive spirit of regional autonomy has an impact on some regions beginning demanding enactment of a strong Islamic Shariah implementation such regencies as Aceh, South Sulawesi, Gorontalo, Riau, Cianjur and Tasikmalaya.² In Aceh also appears as the penalty of the people being paraded the unmarried couples in North Kluet of South Aceh residents, paraded past marijuana dealer in Simpang Tiga Pidie, and four prostitutes shaved and paraded in Banda Aceh.³ This case raises confusion and legal uncertainty and further adds to the vagueness of the law, since they are not recognized by the national law of the Republic of Indonesia.

Antagonist of the legal issues in the case, showing yet accommodation of aspects of Islamic law in a comprehensive manner in the national legal system, though his position

¹B. N. Marbun, *Autonomous Region 1945 - 2005 and the Reality of the Development Process of Autonomy, Since the Colonial Era to Date* (Jakarta: Pustaka Sinar Harapan, 2005), p. 101.

²GATRA, No. 26, 19 Mei 2001.

³Rusjdi Ali Muhammad, *Revitalisasi Syariah Islam di Aceh: Problem Solusi dan Implementasi* (Jakarta: Logos Wacana Ilmu, 2003), p. 96.

both philosophically and ideologically very strong. In the philosophy of Pancasila, for example, the spirit of the law is the law that contains the dimensions of God or does not conflict with religious teachings, cherish and uphold human values, maintaining unity, democratic character and core social justice. Meanwhile, in the 1945 article 29 paragraph (1) stated that “the state based on the divinity of God Almighty”, and paragraph (2), “the state guarantees the freedom of each citizen to embrace their religion and to worship according to their religion and belief”. So the position of Islamic law which is very strong in the national legal system, not because the majority of Indonesia’s population is Muslim, but rather based on the relationship between the state applying the law of the state and the nation is based upon belief in one supreme God.

During this time, the line of legal policy toward Islamic law legislation into national positive law format, limited to family law (*al-Aḥwâl al-Syakshīyyah*) which only applies to Muslims, specifically the implementation of Islamic law in the region. For example, with the enactment of Law No. 1 of 1974 on Marriage and Government Regulation No. 28 of 1977 on Land Owned donation. Both organic law is then reinforced in judicial container with spawn Law. 7 of 1989 on Religious Courts. Then Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, Law No. 17 of 1999 on the Implementation of Haj, the Law No. 38 of 1999 on Zakat Management, and Law No. 40 of 2004 on Waqf.

Pros and Cons of the “Jakarta Charter” is certainly related to the formalization of Islamic law issues in Indonesia. For those who agreed with the application of Islamic law in Indonesia formally, at least have a serious problem.⁴ *First*, regarding the historical problem. Historically, the idea of the formalization of Islamic law in state politics is the idea is not entirely new. The tempo of political Islam first fight seriously, as seen in the Jakarta Charter, which then became a historic milestone for the formalization of the idea of Islamic Shariah prosecutor in Indonesia. *Second*, ideological problem. Ideological discourse offered Islamic groups who want formalization of Islamic law in politics is not easy to immediately make many people believe and express their support - even by (mostly) even among scholars. *Third*, technical-practical problems. Today many questions raised relating to the layman this theme is, how will the technical implementation of Islamic law, if the state intervene? Is necessary to establish Shariah supervisory police? Shadow hassles immediately inspired many people, when the idea of the formalization of Islamic law is mentioned. As for people who clearly rejected the inclusion of explicitly “Jakarta Charter” in the constitution, there are at least three reasons;⁵ *First*, the inclusion of the Charter would open up the possibility of state intervention in the area of religion that will lead to harm both religion itself and the country as public areas. *Second*, the proposal would revive old prejudices about Islam from outside the ‘Islamic state’ in Indonesia. This prejudice if left unchecked,

⁴Kurniawan Zein, Sarifuddin HA (ed.), *Syariah Islam Yes Syariah Islam No: Dilema Piagam Jakarta dalam Amandemen UUD 1945* (Jakarta: Paramadina, 2001), pp. 94 – 96.

⁵*Ibid.*, pp. 203—204.

will be able to interfere with the relationships between the group that ultimately will lead to the threat of disintegration. *Third*, seven words of the Jakarta Charter against the vision of a national state that enforces all groups are equal in this country. If the obligation to carry out Islamic law a statute in the constitution, then it would lead to similar demands in other religious groups. In the midst of this debate, the government issued a policy enforcement of “Islamic Law” to the Special Region of Aceh through Law No. 44 of 1999 on Implementation Features special province of Aceh. National policy was later reinforced by higher regulatory hierarchy, namely Decree No. IV / MPR/1999 about Outlines of State Policy, which in one of its provisions on the Aceh region under (a) states: “Maintaining the country’s integration into the Unitary State of the Republic of Indonesia with respect equality and diversity of social and cultural life of the people of Aceh special autonomy is regulated by law”. Form of the law is Law No. 18 of 2001 on Special Autonomy in Aceh Special Region as the province “Nanggroe Aceh Darussalam” which was ratified on August 9, 2001, NAD bill after getting the approval of the parliament and the government on July 19, 2001. Act No. 18 of 2001 was repealed with the enactment of Law No. 11 of 2006 on the Governing of Aceh.

Based on this background, the problems are interesting to study, *First*, what are the implications of the policy of regional autonomy in Indonesia after the reform to the development of local regulations are perceived nuances of the Shariah?; *Second*, the types of “Shariah law” what are some that have been generated by several local governments in Indonesia which their peoples aspire to the enactment of Shariah formally through the qanun?

Policy Implications of Regional Autonomy and Islamic Law Development

Theoretically, to analyze the implementation of Islamic law in the context of a formal regional autonomy should be viewed from the perspective of the legislation. In this context also, it must refer to the level of legal theory (the hierarchy of legal norms/ *stufenbau* theory) of Kelsen is intended to review the aspects of legal certainty in relation to the validity of juridical law, as determined by the validity of the rule of law or legal compliance in order of hierarchy of laws.⁶ In addition, it is also intended to analyze the relationship between the rule of law, which refers to the core philosophical value on a sense of justice and truth, as well as sociological value corresponding to the cultural values prevailing in society. According to him, in General Theory of Law and State mentioned: The basic theory merely establishes a certain authority, which may well inturn vest norm-creating power in some other authorities. The norm of dynamicsystem have to be created through acts of will by those individuals who have been authorized to create norms by

⁶Hans Kelsen, *General Theory of Law and State*, transl. Anders Wedberg *et al* (New York: n.d.), pp. 112 – 115.

some higher norm. This authorization is a delegation. Norm creating power is delegated from one authority to another authority; the former is the higher, the later the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created.⁷

Stufenbau theory teaches that formal law is a composition hierarchy of normative relations. Norms relate to one another norm, the norm of the first higher rank than the norm, and so the next two tiered from top to bottom. This means, the contents of the value of a norm and the norm under the next one should not be contradictory, or should not be incompatible with the norms on it. Every legal norms approved by the legal norms on it and on the last level all legal norms approved by the basic norm.⁸

Thus, a particular law should be returned to the rule of law a higher level. In other words it can be said that the positive law rules developed in stages from above, ie from the basic norm in stages down to something that implementing these legal norms in concrete. Consequences of a particular legal rule can be evaluated for compliance with the laws that higher levels.⁹

In relation to Stufenbau's theory, then if considered carefully Indonesia has embraced the theory that can be referenced from the Law No. 10 of 2004 on the Establishment of Legislation,¹⁰ and previous regulatory Decree No. III/MPR/2000 on Law Resources and Order Legislation.¹¹ According to Article 2 of Law No. 10 of 2004, Pancasila is the source of all sources of state law (fundamental norm of the state/*staat fundamental norm*) or basic norm (*ground norm, basic norm*) the highest ranks in the top of the pyramid of legal norms, then followed by the 1945 Constitution, as well as the fundamental law or unwritten constitutional convention as a basic rule states (*staatgrundgesetz*), continued with laws/regulations (*formele gesetz*), as well as the rules and regulations implementing the autonomic (*verordnung und autonome satzung*) which starts from the Government Regulation, Presidential Regulation, and Local Regulation.¹²

The Authority of Aceh Province has introduced a number of Shariah Qanun which become the focus of this study classified as the following order Law No. 5 of 2000 on the Implementation of Islamic Law; Law No. 33 of 2001 on the Organizational Structure

⁷*Ibid.*, p. 113.

⁸Kusnu Goesniadhi, *Harmonisasi Hukum dalam Perspektif Perundang-undangan* (Surabaya: JP Books, n.d.), p. 40.

⁹Kusnu Goesniadhi, *Harmonisasi Syariah Islam No: Dilema Piagam Jakarta dalam Amandemen UUD 1945* (n.d.), p. 32.

¹⁰UU No. 10 Tahun 2004 Tentang Pembentukan Peraturan Perundang-undangan amended by UU No. 12 Tahun 2011.

¹¹Sirajuddin *et al.*, *Legislative Drafting: Pelembagaan Metode Partisipatif dalam Pembentukan Peraturan Perundang-undangan* (Jakarta: Yappika, 2006), p. 32.

¹²*Ibid.*

and Administration of the Department of Islamic Law; Aceh Qanun No. 10 of 2002 concerning Islamic Shariah in the State; Aceh Qanun No. 11 of 2002 on the Implementation of Shariah affairs on aqidah, Worship, and the symbols of Islam; Aceh Qanun No. 12 of 2003 on alcoholic drinks and the like; Aceh Qanun No. 13 of 2003 on gambling; Aceh Qanun No. 14 of 2003 on seclusion (immoral activity), and Aceh Qanun No. 10 of 2009 concerning the Baitul Mal.

Existence of legislation and Qanun above, when viewed from the system hierarchy of legal norms for the Aceh Provincial Government no legal issue because it has received assurances from both the constitution and the law on local government. Constitutional guarantees may be mentioned in Paragraph B of Article 18 (1) of the 1945 Constitution, which recognizes and respects the local government units that are special and that are regulated by law. While the guarantee of local government law, stems from the provisions of Article 22 of Law No. 22 of 1999 on Regional Government, which reads: Feature recognition based on the history of the province of Aceh national liberation struggle, while the contents of privileges such as the implementation of religious life, education, and customs as well as attention to the role of scholars in setting local policies.

On that basis, then out the Law No. 44 Year 1999 on Implementation of Privileged Aceh, which is the second part of the Act is set on the administration of religious life as the provisions of Article 4, stated that Operation of religious life in the regions (Aceh) expressed in terms of the implementation of Islamic law for followers in the community; and the area of Aceh to develop and manage the implementation of religious life as referred to in paragraph (1) by maintaining religious harmony. Meanwhile, in Article 5 also states that area to establish religious institutions and religious institutions recognize the existing, and in accordance with their respective positions; and the institution referred to in paragraph (1) is not a part of the region (Aceh).¹³ Subsequently enacted Act No. 11 of 2006 reaffirms the existence of Islamic law in Aceh special autonomy.

Thus, (1) Enforcement of Islamic law in Aceh Provincial Government has met the formal hierarchy procedure because all the required forms juridical basis from the constitution, the laws, regulations until the bottom of the lowest level as Qanun, has been created and authorized to back up the implementation of Islamic law. However, regulation and Qanun in Aceh province, amounting to 8 pieces materially the necessary synchronization with legislation that higher material hierarchy perspective. (2) Products “Nuanced Shariah Law” in the Provincial Government, District, and State with Autonomous Status Based on Hierarchical Fair Formal and Functional As has been coined by the Provincial Government, District, and State with ordinary autonomy status which includes West Sumatra Provincial Laws No. 3 of 2007 on education of the Qur’an; Gorontalo Province Regulation No. 10 of 2003 on the prevention of sinners; South Sumatra Province Regulation No. 13 of 2002 on

¹³Kamaruzzaman Bustaman Ahmad, *Islam Historis* (Magelang: Galang-Press, 2000), p. 310.

eradication of sinners; Ciamis Regional Regulation No. 12 of 2002 on eradication of prostitution; Palembang City Regulation No. 2 of 2004 on eradication of prostitution; Tangerang City Regulation No. 8 of 2005 on the prohibition of prostitution, and Serang Regulation No. 5 of 2006 on management of social diseases.

The existence of local regulations above, the constitutional and other laws and regulations are reflected in Article 29 of the 1945 Constitution and Article 18 of the 1945 Constitution. Article 18 of the 1945 Constitution itself to comply with the policy of regional autonomy as provided for in Article 70 of Law No. 22 of 1999 which states that, the law does not explicitly include the excluded. That is, local authorities establish their own laws do not conflict with higher laws, other regulations, and the public interest.

Accommodation of a plurality of legal materials in each region in Indonesia, linked to the lack of provision confirming that the material law must be uniform throughout the territory of the Republic of Indonesia. Although the formal legal aspects within the scope of judicial power is defined as the affairs of the central government's authority. That is, in terms of judicial power must be understood in the sense of judicial institutions are structured starting from the trial court to the Supreme Court level. In another sense, coaching administration and management of the judicial system can not be decentralized. However, in relation to the matter of law and legal culture as two important components in the national judicial system and national legal system as a whole has been secured in a plurality system of laws and regulations in force in Indonesia, as affirmation of Article 18 paragraph (5) Second Amendment to the Constitution 1945, which stated: "The local government runs autonomy, except in matters of government prescribed by law as the affairs of the Central Government." Then in paragraph (6) of that article also stated: "The local government has the right set of local regulations and other regulations to implement autonomy and assistance." Even in Paragraph B of Article 18 (1) also stated: "The State shall recognize and respect the local government units that are special and that are regulated by law." Then in paragraph (2) of the article it also stated: "The State recognizes and respects the unity of indigenous people and their traditional rights all still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which is regulated by law."

Thus, both the constitution through Article 29 and Article 18 of the 1945 Constitution and the three other Act (Act No. 22 of 1999, Act No. 32 of 2004 and Act No. 10 of 2004), has provided a solid foundation for local governments to be able to establish regional rules in accordance with the uniqueness of each area in the frame of the Unitary Republic of Indonesia, and all were ordered by law in the upper level. In other words, a variety of products both in law and Qanun Aceh Provincial Government with special autonomy status, as well as in various provincial governments, districts and cities with the status of autonomy unusual presentation of data as described above, when viewed from the perspective of regional autonomy and the theory of the hierarchy of norms both legal hierarchy and the hierarchy of functional forms, has gained legitimacy that can be accounted for.

From the aspect of regional autonomy policy, regulation and Qanun products have been in accordance with the principles of constitutional decentralization (*decentralisatie*), the delegation of legislative powers of government to the autonomous regions in its environment. That is, local regulations and Qanun above, is essentially a further elaboration of legislation that are higher in this case is the Act No. 32 of 2004, as set out in Article 136 paragraph (3) of Act No. 32 of 2004.

Special to the Government of Aceh, with the enactment of Law No. 11 was in 2006 on the Governing of Aceh, “Qanun Shariah” above, is actually a further elaboration of the Law No. 11 of 2006 is as set out in Article 125 paragraph (3) which confirms that the implementation of the Shariah (*‘aqîdah, syarî’ah, and morality [verse 2]* which is then broken down by [paragraph 2] include: Worship, *Aḥwâl al-Syakhshiyah/Hukum Family, Mu’âmalah/Civil Law, Tarbiyyah/ Education, Da’wah, symbols of Islam and defense*) shall be further legislation. That is, the formulation of bylaws contained in Aceh Provincial Government was actually a command of the law.¹⁴

While the theoretical aspects of the hierarchy of legal norms; formal hierarchy in terms of the local regulations and the bylaws have been in accordance with the provisions set forth in Article 12 of Law No. 10 of 2004, and in terms of the functional hierarchy have been through the procedure of its formation, which has been set by the head of the regional after approval with parliament/provincial parliament as stipulated in Article 136 of Law No. 32 of 2004 on Regional Government. However, if viewed from the perspective of local regulations hierarchy of material is not appropriate and contrary to the laws higher.

The Types of “Qanun and Islamic Law”

Based on the description “Qanun and Islamic Shariah” in the presentation of the above data, if viewed from the aspect of the substance contained in the respective regulations and qanun can be classified in two ways, namely: (1) Qanun related to morality society in general, which is represented by the Anti-Prostitution and Adultery law or regulation Anti-Immorality, Qanun Seclusion (Immoral), Disease Prevention and Community Legislation, such as that found in Gorontalo province, South Sumatra Province, Ciamis Regency, the city of Palembang, Tangerang, and Serang regency, (2) categories or types of regulation and Qanun related to public order, represented by Liquor Qanun (Khamr) and Qanun Gambling, as contained in the NAD, and (3) categories or types of regulation and Qanun associated with obedience in worship, which is represented by the Qanun ‘Aqîdah, Worship, and the symbols of Islam, Al-Qur’an Education regulations, and Qanun Zakat, as found in the province of Aceh and West Sumatra Province.

¹⁴See, Jimly Asshiddiqie, *Pokok-pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta: Bhuana Ilmu Populer, 2007), p. 275.

Substance of the law and the Qanun as mentioned above are the rules, which generally can be regarded as regulations governing public order, which in fact is a concern all religions legally recognized in Indonesia. From this perspective, the bylaws can not be said to be “Qanun and Islamic Shariah”, as seen from the perspective of the theory of the hierarchy of shariah, fiqh, and qanun, local regulations and bylaws has been through the legislative process done by the legislature with the executive. That is, it is more of a Shariah pengelaborasi through *ijtihad* in the process of establishing the rule of law. Therefore, local regulations and the perceived nuances Qanun Shariah it should be understood as a form of qanun, not Islamic law. We must differentiate between qanun and Islamic law. Qanun is the most obvious aspect of formalization, while the Shariah is the most obvious aspect of the teachings of God. If God rules promulgated by the state, then it is called qanun, which is relative (*zhanni*).¹⁵

To the above, it can be proved by the occurrence of a misunderstanding of the meaning of Islamic law itself, and the disparity in the application of sanctions against the same case. For example, the application of criminal sanctions that have been applied in the Qanun Aceh province consists of four (4) types of sentences, namely: (1) the whip; (2) imprisonment or confinement, (3) penalties, and (4) the revocation or cancellation of license. The fourth type of punishment is based on the opinion of three modern Islamic criminal law expert ‘Abdul Qâdir ‘Awdah, Amir ‘Abdul ‘Azîz and Ahmad Fathi Bahnasi, they argued that the types and forms of punishment that can be meted out to the perpetrators of acts *ta’zir*,¹⁶ provisions as contained in the texts is:¹⁷(1) suicide law, if the crime could only be stopped with the death of the perpetrator, such as spies and recidivists;(2) flogging punishment, for those who often commit crimes *ta’zir*;(3) imprisonment for a limited time and are not limited to, if, according to the judge that the most appropriate punishment;(4) the penalty of exile, for those who disturb public tranquility;(5) cross punishment, but it should not be killed and still being fed and the opportunity to worship;(6) a stern warning;(7) exclusion from society;(8) disapproval; defamation (verdict), and (9) to a penalty.

Ta’zîr penalties associated with the formulation in the Qanun, there are at least three (3) things that need improvement so that there is no gap between theory and practice¹⁸ sorted, *first*, the problem formulation pattern. Initial pattern is applied in the formulation of these punishments is the pattern of balance, meaning some kind of punishment as an alternative, so no penalties are the primary and subsidiary penalties that can be chosen

¹⁵Khamami Zada, “Perda Syariah: Proyek Syariahisasi yang Sedang Berlangsung,” in *Tashwirul Afkar: Jurnal Refleksi Keagamaan dan Kebudayaan*, Edisi No. 20 Tahun 2006, p. 15.

¹⁶The act of *ta’zîr* is a punishable act included in *qishâshdiyât* dan *hudûd*, the standard of which is in accordance with the judge’s consideration. See the explanation of Article 26 clause (4) Qanun No. 12 of 2003 on alcoholic drinks and of its types.

¹⁷See Al Yasa’ Abubakar and Sulaiman M. Yasin, *Perbuatan Pidana dan Hukumannyadalam Qanun Provinsi NAD* (Banda Aceh: Dinas Syariah Islam Provinsi NAD, 2006), p. 6.

¹⁸*Ibid.*, p. 7 – 9.

by the inmate.¹⁹ *Secondly*, a criminal act, in terms of the sentence imposed on convicted criminal penalty includes imprisonment of 6 (six) months or a fine of Rp. 50. 000. 000, - (fifty million dollars), and (3) regulation may contain criminal sanctions or fines in addition referred to in paragraph (2), in accordance with the rules set out in other legislation.

Under the provisions of Article 143 paragraph (1) of Law No. 32 of 2004 on Regional Government, the offender law violation, in addition to criminal sanctions (imprisonment or criminal fines) can also be penalized in the form of a charge of coercion. Sanctions in the form of charging coercion or also known as *dwangsom* is one of the types of administrative sanctions.²⁰ Therefore, both Qanun on the application of Islamic law in Aceh special autonomy and local regulations of Islamic law in some areas above the ordinary autonomy, there is no significant conflict with the provisions of the applicable legislation. Due in accordance with Article 14 of Law No. 10 of 2004 which states that matter-charge of the criminal provisions can only be loaded in the Act and Regulation. Then, can be said for the case of Aceh province in addition based on Law No. 32 of 2004 is also based on Article 16, paragraph (4) of Law No. 11 of 2006 on the Governing of Aceh, which can be seen in the application of criminal sanctions contained in the Qanun as mentioned above, in addition to using the standard according to the provisions of the Islamic penal standards also sync with the penal provisions contained in Article 143 of Law No. 32 of 2004. Thus, both qanun on the application of Shariah in Aceh special autonomy and local regulations Shariah in some areas as ordinary autonomous status in the presentation of the above data, it can be justified in accordance with the provisions of applicable law by the constitution, Act, Regulation, or Qanun.

For the case of Aceh province than basing it on 1945 Constitution, also to the Law No. 10 of 2004, Act No. 32 of 2004, Act No. 11 of 2006, Aceh Province Regulation No. 5 of 2000, and the Qanun of the implementation of Shariah itself. As for the case of local regulations Shariah in other areas of the autonomy status as usual, in addition to basing the 1945 Constitution, Act No. 10 of 2004, Act No. 32 of 2004, as well as to local regulations perceived nuanced Shariah 'at itself.

Based on the above data analysis, legal-formal local regulations or simply known Shariah Qanun in Aceh province. Whereas in other areas in Indonesia, both at the provincial and district/city not known for any local regulations shariah, it's just by chance that local regulations intersect with religious arrangements for the Muslim community to be perceived as local regulations that bernuansakan Islamic law. Therefore, both local regulations or legally Qanun formal Shariah explicitly naming like it, bylaws and perceived shades of Shariah is actually a normal legislative process commonly known as the *al-Siyâsah Syar'iyah*

¹⁹Khamami Zada, "Perda Syariah: Proyek Syariahisasi yang Sedang Berlangsung," p. 15.

²⁰Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta:Gadjah Mada University Press, 1993), p. 241.

qawânîn (legislation) made by competent authorities in the country in line or does not conflict with the Shariah (religion).

The Need of Interpreting Islamic Law

Many problems were encountered in the implementation of Islamic law, as it pertains to the issue of women's rights, Human Rights (HAM) and others. However, this paper focuses only on two aspects, namely related to the constitutional crisis and conflict between communities.

Formalization of Law and Constitutional Crisis

The formalization of shariah also cannot be separated from the question of the constitutional crisis in various countries that apply Islamic law. In addition, also in Indonesia, special autonomy to Aceh to impose Islamic law formally. Therefore, it needs to get the attention of all parties with respect to the application of shariah in Aceh. Constitutional crisis also often arise due to the formalization of Islamic law, as seen from the case of the implementation of hudud in Kelantan and Terengganu, Malaysia and the states in Nigeria that implements Islamic law. In these states, the federal government has stated that the legislation at the state level against the constitution, because according to the constitution of criminal law is part of Federal jurisdiction.

In Indonesia, special autonomy of Aceh to include formally impose Islamic law, can also lead to a constitutional crisis, because of various laws and regulations are published in the area opposite the other laws, even if there is a mandate that comes from the Law Aceh's special autonomy. While a number of local regulations promulgated several shades shariah local governments in Indonesia are also deemed contrary to law higher. The central government, in this case, has issued a directive that local regulations are revoked by the local government and local legislative councils if not, the central government threatened to cancel it.²¹

The above explanations show that the formalization of law in a democracy would be an obstacle to the realization of a peaceful social order, fair, equitable and civilized. At least as a character from the formalization of Shariah. *First*, anti-pluralism. The meaning of the religion of exclusive and blame others, will be a challenge for pluralism. Support groups formalization of Shariah still dreams of territorial division between Muslim territory (*dar al-Islam*) and the region of infidels (*dar al-harb*), in addition to the tendency to interpret Islam exclusively. They revive identity of Muslims and infidels, only the most right religion,

²¹Al Yasa Abu Bakar, "Pelaksanaan Syariat Islam di Aceh (Sejarah dan Prospek)," in Fairus M. Nur Ibr (ed.), *Syariat di Wilayah Syariat: Pernik-pernik Islam di Nanggroe Aceh Darussalam* (Banda Aceh: Dinas Syariat Islam Provinsi Nanggroe Aceh Darussalam, 2002). p. 26-46.

the religion while others considered infidels, Zionists and others. In many ways, siding addressed only in matters pertaining to law normative, whereas the problems of humanity are not as concerned with matters relating to the law, such as the formalization of Shariah. Because of this, the group considered the formalization of shariah being an obstacle to interreligious dialogue, due to the tendency to war and *jihad*.²²

Second, anti-human rights.²³ This relates to the criminal laws of Islam are at odds with human rights, such as the cutting off of hands, stoning, hanging law and others. Group considers that the formalization of Shariah criminal law of Islam (*al-hudud*) is the law of God. Therefore, the Islamic criminal law is no bargain for emancipatory interpret the law.²⁴

Third, anti-gender equality. The formalization of Shariah will be guided by religious doctrines that indicate the scope of women's limitations. On the basis of law and nature, women are only a limited life in the walls. The case of the Taliban, Saudi Arabia and some Gulf States to justify the existence of the marginalization of women's role in the public sphere. The reality, Shariah extrapolated to oppress women, both structurally and culturally. Literal understanding of the religious texts legitimize domestic violence, as occurred in traditional societies. In any modern society, the texts become a tool to legitimize the oppression and exploitation of women in the project capitalization. The oppression of the workers, in which there is automatic as the majority of women. Religious texts are not gender sensitive will be a serious obstacle to the realization of gender equality.

The above explanation can be given for making the effort desecration law, that the institutionalization of Shariah is not followed by an emancipatory paradigm, and liberals will only create new problems as opposed to the reality of society and culture. The formalization of the Shariah will be a stumbling block to the formation of anthropocentric reasoning and emancipatory who want liberation and uphold human dignity. Formalization of Shariah will be confirming reasoning theocentric, because her character seeking authenticity and originality of his thinking on the underlying texts exclusively. Consequences can not be avoided, namely the emergence of political movements that want to formalize the Shariah and fundamentalist actions.

Formalization of Law and Religious Conflicts

Another crucial question is also related to the formalization of the shariah is a conflict

²²Jan A. Henningsson, "Contemporary Understandings of Human Rights in Islam," in *LWF Studies*, 1998/3, p. 274. See also Haryatmoko, *Etika Politik dan Kekuasaan* (Jakarta: Penerbit Buku Kompas, 2003), p. 237.

²³Shalahuddin Hamid, *Hak Asasi Manusia dalam Perspektif Islam* (Jakarta: Amisco, 2000), pp. vii-viii and 195-196.

²⁴Zuhairi Misrawi, "Dekonstruksi Syariat: Jalan Menuju Desakralisasi, Reinterpretasi dan Depolitisasi," in *Tashwirul Afkar: Jurnal Refleksi Pemikiran Keagamaan & Kebudayaan Tema Deformalisasi Syariat Islam*, No. 12 of 2002, p. 13.

between religious communities. The application of Islamic law in some Muslim countries also triggers conflicts between religious communities. Sudan and Nigeria is a good illustration for this case. When Ja'far Numeiri regime (1969-1985) came to power after a military coup in Sudan in 1972 achieved a breakthrough on the issue of North-South conflict through Addis Ababa agreement is famous for. This agreement provides regional autonomy to Southern Sudan, with a stronger body of Islamic revivalism, its political potential and the desire to control and co-opt Numeiri the force in Sudan, is the background for policy changes Numeiri. September 1983, through a presidential decree, Numeiri impose Islamic Shariah as the only law in Sudan. Non - Muslim minorities such as Christians, for example, explicitly rejects Islamization Numeiri, and North and South conflict in Sudan was again in turmoil.²⁵

While the formalization of Shariah in Nigeria has led to more severe problems between Muslims and non-Muslims, and it is not uncommon to explode in the form of conflict and communal riots. According to a calculation is estimated, more than six thousand people killed in inter-religious riots between 1999 and 2002 in this country because the formalization of Islamic law.²⁶

Opportunities and Challenges

The study of the implementation of Islamic law in Aceh, cannot be separated from the struggle of the people in the long span of time. The struggle and the desire to impose Islamic law in Aceh, almost never stopped, either post-independence period the old order, the new order, as well as the reform era. This effort is done in a planned and systemic through continuous process.

As the spirit of regional autonomy, with the change of government in the Indonesian system of centralization to decentralization, democratization has emerged various demands in various sectors of life, one of which demands the strengthening of the implementation of Islamic law as occurred in Aceh province. The implementation of Islamic law in Aceh have a place and are recognized in the constitution and Pancasila State juridical legality gets stronger as stipulated in Law No. 44 Year 1999 on Implementation Features Special Province of Aceh, and Law No. 11 Year 2006 on the Governing of Aceh.

²⁵See for example, Human Rights Watch, Sudan, "In the Name of God," (Human Rights Watch Publication, November 1994, vol. 6 no. 9); Human Rights Watch/Africa, Behind the Red Line: Political Repression in Sudan (Human Rights Watch, 1996); Lawyers Committee for Human Rights, "Beset by Contradictions: Islamization, Legal Reform and Human Rights in Sudan," (Lawyers Committee for Human Rights, December 1996), See also, "Amnesty International Report 2002-Africa – Sudan," etc.

²⁶Nigeria's Muslim-Christian Riots: Religion or Realpolitik," in *The Economist*, January 17, 2003, and on the implication of Islamic law application in Zamfara, see "Tension rise over Islamic Law in Northern Nigeria."

Formalization of Islamic law in Aceh, as the formulation of positive law jurisprudence in written form supported by both the government and the central and local political elites. This argument is evidenced by the passing of several laws of the Republic of Indonesia, as mentioned above, as well as passage of the Qanun Aceh shariah areas like Aceh Qanun No. 12 Year 2003 on Khamar; Aceh Qanun No. 13 of 2003 on Gambling; Aceh Qanun No. 14 of 2003 about Seclusion.

However, despite continuous effort to apply Islamic law in Aceh, many obstacles and challenges have been encountered both internally and externally, among others are:

First, cultural aspects. Acehnese people's understanding about the formalization of Islamic law, particularly the field *jinayah* as cultural aspects of the theory of the legal system is still minimal represented in low level of legal awareness and participation in support of the *jinayah* qanun. In addition, political will and commitment of both the provincial government of Aceh and district/city government even village was "half-hearted" and not yet fully support the formalization of Islamic law.

Second, aspects of the substance, of legal theory regarding the formalization of shariah in Aceh as follows: (1) *Jinayah* Qanun Aceh, have formal juridical legality, recognized the constitution and have a place in the hierarchy of laws and regulations of Indonesia, and in line with the theory of Hans Kelsen Stufenbau. However, in practice there still occurs controversy on the substance which include the Qanun of *jinayah*, namely Qanun No. 12 of 2003 concerning Khamar, Qanun No. 13 of 2003 on Gambling and Qanun No. 14 of 2003, concerning Seclusion, originally created by the draft "team 11", the authors refer to it as "Ar-Raniry Madhhab". The material of Qanun Aceh shariah field, must not conflict with higher laws. Actual material Qanun Aceh shariah field may be different from other legislation, because in addition to Shariah Qanun apply the principle of *lex specialis*, also expressly provided for in Article 241 paragraph (4) of Law No. 11 of 2006, which states that *jinayah* qanun (Islamic criminal law) can load material/sanction different from other legislation;

Third, structural aspects. Structural implementation of Islamic law through the legal system, as in theory, still encountering obstacles. The barriers associated with implementing agencies and law enforcement officials, namely: (1). Police, as law enforcement officers, are given the authority to conduct the investigation of violations of shariah in Aceh Qanun. In performing its duties, the police through difficulties, such as: (a) In general, the police are specifically trained to handle criminal cases generally, and are not prepared to handle cases *jinayah* (Islamic criminal law), (b) Due to the background of secular education, less police understand *jinayah* law (Islamic criminal), so the effect on the performance pattern permissivisme; (c) in the process of investigation and examination, the police are also experiencing difficulties cannot hold a suspect, because existing qanun *jinayah* not organize the material about the "detention"; (2). Attorney, as well as police, prosecutors as public prosecutor (prosecutor), also experienced the same thing in the process of shariah

qanun infringement case to be submitted to the Court. Among the difficulties the prosecutor is, in addition to unfamiliar *jinâyah* case, also the difficulty of obtaining data and evidence such as witnesses, especially in cases of seclusion; (3). Wilâyatul *hisbah* (*shariah police*). initially under the coordination department of Islamic law, and after the enactment of Law No. 11 of 2006, changing their status to municipal police, so the guidance and supervision of Islamic law in the field is reduced, even almost nothing else; (4). The budget allocation for the provincial and district/city sorely lacking, and insufficient, so the direct effect of institutional strengthening activities in the department, especially the WH operations and law enforcement in particular the execution of a whip; (5) Court Syar'iyah. Syar'iyah Court as a judicial institution that specifically in Aceh was given the authority to examine and decide cases better *jinâyah* alcohol, gambling and seclusion, still having trouble. Because not legalization "*jinâyah* law" and "law *jinâyah* event."

Conclusions

Based on the above it can be concluded that, first, the implications of the policy of regional autonomy in Indonesia after the reform, either through Act No. 22 of 1999 which was later replaced by Act No. 32 of 2004, some areas in the territory of the Republic of Indonesia (Republic of Indonesia) which socio-historical society Islamic norms thick with a crowd demanding a formal enactment of Islamic law, on the grounds conducive community and regional autonomy. Second, the implications of a zoning "special" and "special autonomy" in the province, based on Law No. 44 of 1999, Act No. 18 of 2001, which was subsequently replaced by Law No. 11 of 2006, in which the province has a different specificity with other provinces in Indonesia. Besides Aceh has a strong legal basis to implement Shariah law enforcement *kaffah* well. As a follow up of the Act, will be established in the field of Shariah some Qanun to backup their implementation on the *Terrace of Makkah*. At the same next Aceh, which is already applicable family law (*al-ahwâl al-syakhsiyyah*), the law in mu'amalah also given permission to run a particular public law of *jinâyah* Islamic criminal law.

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