THE IMPLEMENTATION OF SHARI'AH IN NANGGROE ACEH DARUSSALAM IN THE INDONESIAN LEGISLATION SYSTEM

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ABSTRACT

The implementation of Shari'ah in Nanggroe Aceh Darussalam (NAD) has prompted controversy among legal scholars. Even though, the implementation of Shari'ah in NAD has been legally authorized by Dewan Perwakilan Rakyat (Parliament) and President through some legislations, debate on the issue has not finished yet. The issues rooted on whether the implementation of Shari'ah in NAD is contradict to Pancasila and UUD 1945 or not. Another question arises is whether the implementation of Shari'ah in NAD in line with the legislation system or not. The research shows that basically the implementation of Shari'ah in NAD is not contradict to the principle lies in the Pancasila as fundamental norm of the state and UUD 1945 as the supreme law. In term of legislation, the DPR and President has enacted some legislation that legalized it namely NAD Special Territory Act, 1999 (Law No 44 of 1999, NAD Special Autonomy Act, 2001 (Law No 18 of 2001), NAD Government Act, 2006 (Law No 11 of 2006). By enacting these legislations, legally, the implementation of Shari'ah in NAD is clearly adopted as part of Indonesian legislation system. In this sense, the legislation system implements the principle of "*lex specialis derogat legi generali*".

Key words: shari'ah, implementation, Indonesian legislation system

I. INTRODUCTION

The development of Islamic law implementation in Indonesia, is interesting to be observed. It is signified by the legalization of Act No. 44 in the year of 1999 about Specialty of the Administration of Aceh Special Territory Province. Afterward, to follow up the Act, Act no. 18, 2001 is imposed. This Act regulates special autonomy for Aceh as Nanggroe Aceh Darussalam. Some *Qanun* (similar to Local Acts) have been enacted as the following up of both Acts, such as, *Qanun* no. 10, 2002 about Islamic Shari'ah Court, Qanun no. 11, 2002 about Islamic Shari'ah Implementation in the fields of *Aqidah, Ibadah* and *Islamic* propagation. Qanun no. 12, 2003 about Drug and the like, Qanun no. 13, 2003 about *Maisir, Qanun* no. 14, 2003 about Khalwat, Qanun No. 7 about alms (zakat) management.

The experiences of Aceh as elaborated above inspire other provinces in which the people historically and sociologically are

similar to those in Aceh like West Sumatra, West Java, East Java, Banten, and South Sulawesi.

The debate on the implementation of Islamic Shari'ah in Indonesia has been historically unfinished and it may latently appear in certain period of time. The debate leaves a kind of barriers between the pro and contra groups. An open and clear dialog, therefore, is needed to solve the problems between the pro and the contra towards the ideas of Shari'ah implementation in Indonesia.

Some historical reports mention that Islam had entered in Indonesia since the first year of Hijriyah. This is signified by the finding of Islamic cemetery in Palembang, the capital city of Sriwijaya Kingdom, a Buddhist kingdom in Sumatra. However, the more established reports mention that Islam arrived firstly in Indonesia in the mid of 12th Century. This is characterized by the establishment of Islamic Kingdom, Samudera Pasai in Sumatra. This fact was written by famous Muslim traveler, Ibnu Batutah in 1345. Islamic teachings then spread to other areas like in the Islamic Kingdom of Demak, Jepara, Kudus, Banjar, Mataram Islam, Banten, Ternate, Tidore, and so on.

Historical facts on the implementation of Islamic law in Indonesia societies all over Nusantara has been admitted by legal scholar for Netherland, L.W. Christian Van Den Berg that has popularized his theory of *'receptie in complexu'*. This theory states that the law implemented in Indonesia is the law that is in line with the law for the religions the people embrace. It means that Muslims who lived in the most Muslims Kingdoms in Nusantara had implemented Islamic law (Arifin, 1996).

But, after the Dutch colonialists realized that Islamic law was one of the strong Islamic society pillars to fight against them, they then imposed new legal politic policies in Indonesia. With adequate researches, the Dutch law scholars like C. Van Vollenhoven and Snouck Hourgronje gave advices to the Dutch colonial government to make changes in the legal political policies of the Dutch colonialists in Nusantara. Through this new theory *"receptie"* the legal scholars stated that Islamic law might be imposed if only it had been adopted in the customary law. This theory aimed at limiting the scope of Islamic law by clashing it with customary law. With the basis of this theory, the Dutch colonialists then localized the implementation of Islamic Law limited in the personal aspects such as marriage, divorce and inheritance. This theory was also strengthened by the entrance of Dutch colonial law, Indische Staatsregeling article 134: 2. In such conditions, Islamic law is like put in the prisons.

Referring to the historical facts, it can be concluded that every effort to marginalize the role and position of Islamic law have been started since the Dutch colonial administration. It was carried out because they were fully aware that Islamic law is one of the significant pillars in an Islamic society and therefore, to weaken the strength of the Islamic society, Islamic law must be set far from Islamic society. This kind of colonial politic then

became global scenario to prevent the emergence of Islamic movement in the rests of the globe.

After Indonesian independence, there were no serious attempts to regulate the above mentioned legal policies. As a newborn nation, the state leaders remained dealing much with more concrete political and economical agenda. In 1970, it was enacted Act No. 14,1970. The Act deals with Legal Authority in terms of public law, religion law, administration law, and military law. In this regard, the regulation of religious law was still very limited since there was no guideline to administer the law and consequently it could not run effectively. Some years later through Act No. 7, 1989 about Religion Law, the weaknesses of the Act No. 14 were tried to be solved by completing the jurisdiction and trial procedure in the religion law. Nevertheless, the religion law jurisdiction was confined in the issues of civil problems such as family, inheritance, *hibah, wasiat,* and endowment. Further betterment took place as Act No. 1, 1974 about marriage that accommodates Muslim Marriage that is inline with the Shari'ah.

At the beginning of 1990s Soeharto regime ran accommodative politics to Muslims as the effect of strengthening Muslims intellectual movement signified by the establishment of ICMI (Association of Muslim Intellectuals) led by Prof. Dr. BJ. Habibie. ICMI was regarded as logical consequence from what is called *intellectual booming* among the Muslim Scholars at the end of 1980s. Since then, many acts were passed implementing shari'ah in the state and nation life such as Presidential Instruction No. 1991 about the Compilation of Islamic Law (It covers Marriage law, Inheritance law, Endowment including *shadaqah, hibah, hadanah* and *baitul mal*).

The year of 1992 comprises an important year for the development of shari'ah economy because through Act No. 7 1992, the concept of bank without interest which is a part of shari'ah banking concept was accommodated. The development of shari'ah banking was then getting faster by the enactment of Act No. 10, 1998 on Banking that replaced the previous Act. In this new act, it is firmly admitted "*a dual system of bank"* in Indonesia: conventional banking system and shari'ah system.

The year of 1999 constitutes an important year in the development of shari'ah economy since in this year there were two Acts passed: Act No. 38 about Zakat and Act No. 17, 1999 about Hajj. Both Acts indicate that the state is getting more accommodative toward the interest of Muslim ummah and simultaneously as a sign of recognition of the Islamic law in the Indonesian national legal system. In this year, Act No. 14, 1999 about the Special Administration of Aceh Special Province was also ratified. The Article 4 part 1 of this Act stated that religious lives in Aceh are subjected to Islamic law. In addition, Act No. 18, 2001 about Special Autonomy of Aceh Special province as Nanggroe Aceh Darrussalam was enacted

The development of Islamic law in the national legal system keeps growing the

following years, as in the year of 2003 Shari'ah Stock Exchange was introduced in Jakarta (Satriawan and Zulhuda, 2003). The last interesting development that is worth to discern is the emergence of the local autonomy spirit. Some provinces initiated Local Regulations that are claimed by people as shari'ah Local Regulations as those in West Sumatra, South Sulawesi, East Java, West Java and Banten. The emergence of these Local Regulations with Islamic nuances generate controversies started with petition 56 of House Representative members to the President through the Chairman of the House of Representative to revoke these Local Regulation they were regarded as things that are in contradictory with Pancasila dan National Constitution, UUD 45.

Before discussing further the implementation of Islamic shari'ah in Nanggroe Aceh Darussalam in relation to Pancasila and National Constitution, UUD 45, there are things that must be noted from the previous description of the Islamic law development in Indonesian Legal system. It seems that the scope of implementation of Islamic law in private or civil areas is relatively easy to be accepted and does not prompt any controversies in Indonesia societies and even in non-Muslim ones. According to some trainers of shari'ah banking in Jakarta, the concepts of shari'ah banking draw much attention of the Chinese ethnic businessmen to learn and join training and seminars on this matter. More surprisingly, many Chinese businessmen feel more secure to save their money in a well-known shari'ah bank in Jakarta. Evidently, a testimony from a Chinese non-muslim businessman, the writer witnessed in the private TV program named "Bincang-Bincang Syari'ah" hosted by Reza Syarief 2 years ago, mentioned that he saved his money in Bank Mandiri Syari'ah. He said that he had been for long time dealing with conventional banks and from his opinion conventional banks system was unfair. Moreover, after getting acquainted with shari'ah bankings, he stated that shari'ah banking system was fairer.

Controversies and resistances seem to appear if Islamic law begins to deal with the matters in public areas like the ones that are regulated through Qanun-Qanun in Aceh and some shari'ah Local Regulations in some province and other districts/cities such those in West Sumatra, West Java, South Sulawesi and so forth.

II. RESEARCH METHOD

This research is a library-based research which focused the study on the implementation of Shariah in Nanggroe Acheh Darussalam in the context of Indonesian legislation system. In line was with the nature and the objective of the study, the normative approach was used in this research. In addition, descriptive analytic approach is employed in describing the implementation of Shariah in Nanggroe Acheh Darussalam.

A. DATA COLLECTION

In terms of library research, data was collected from journals, books, newspapers and

legislation. The internet and other assorted secondary materials regarding the implementation of Shariah in Nanggroe Acheh Darussalam were also conducted.

In addition, in order to deepen the analysis, interviews was also conducted with some constitutional law experts such as Denny Indrayana, Ph.D from Gadjah Mada University, Dr. Aidul Fitriciada from Muhammadiyah University of Surakarta and Dr. Saefuddin from Indonesian Islamic University Yogyakarta.

B. DATA ANALYSIS

The collected data analyzed by descriptive qualitative means. At this stage, some activities conducted such as synchronization of legislation regarding the implementation of Shariah in Nanggroe Acheh Darusslam, implementation of constitutional law theory into the problem and found out the important elements to answer the questions.

III. RESULT OF RESEARCH AND ANALYSIS

A. THE IMPLEMENTATION OF SHARI'AH IN THE THEORETICAL PERSPECTIVE

Islamic law in terms of shari'ah basically is various provisions from Allah that regulate the lives of individual, family, society and state, in which then are developed through systematic frame of thought called it *ijtihad. Ijtihad* can cope with law pertaining to religious problems in more specific or to law problems concerning with wider public interests in general (Ka'bah, 1999).

Islamic law since the first arrival in the Nusantara land, Indonesia, comprises a living law in the society not only because the Islamic laws constitute religious entities embraced by majority of Indonesian people, but in more practical dimension, the laws in some places have also become parts of tradition (custom) of the societies, even considered sacred (Wahid and Rumadi, 2001: 80).

Socio-culturally, Islamic laws are laws that flow and root in society's culture. Such conditions happen because of the flexibility and elasticity of Islamic laws that are applicable and acceptable in the implementation.

According to Rifyal Ka'bah, Islamic laws as embraced norms in the society in some parts require the state authority to implement them, and some other parts do not require or are in between, depending on the situations (Ka'bah, 1999: 58-59). Rifyal Ka'bah referring to Hart theory (in the book entitled *the Concept of Law)* mentions that laws requiring the state authority to implement them are called primary rules of obligation or primary rules strengthened by secondary rules. The primary rules are norms embraced by the society and secondary rules which support the enforcement of certain norms become law norms that bind the members of society within a legal system (Ka'bah, 1999: 58-59).

Islamic laws entails the state authority, for instance, dealing with marriage, inheritance, waqaf, private, criminal, economy, trade, banking, international relations, health

and so on. Without any regulations in administering the norms of Islamic laws in the national legal system, they will not get reliable and effective acceptance in the society. Meanwhile, some parts of Islamic law do not need any state interference, for example, laws concerning with *akhlaq* or pure praying like *shalat* and the like. Still, some parts of Islamic laws may be accomplished with or without state authorities, such as, laws dealing with *zakat* and Hajj (Ka'bah, 1999: 60). The ideas of Rifyal Ka'bah are based on the characteristic of Islamic law i.e. *diyani and qadha'i. Diyani* demands individual obedience as the subject of the laws and all of Islamic laws basically have *diyani* characteristic due to the obedience to Islamic laws is based on the awareness of society individually to implement them. Furthermore, Islamic laws besides becoming laws with their own characteristics constitute laws deriving from God.

In the VOC era, Dutch had admitted Islamic laws in Indonesia indicated by *Regerings Reglemen* 1885. This was strengthened by Lodewijk Willem Chritian van den Berg (1845 -1927) who proposed theory of *Receptie in Complexu*. This theory stated that Muslims imposed Islamic laws. Then, under recommendation of Christian Snouck Hougronje (1857 – 1936), the Ducth colonial government enforced the theory *Receptie,* confirming that Islamic laws only could be enacted for Indonesians if they had been accepted as *adat recht* (customary laws). The terms of *adat recht* was mentioned in the book of Snouck Hougronje entitled *De Atchehers* referring to laws that controlled the lives of Acehnese, that is, *adat (custom)* that had legal consequences (in case Islamic laws)(Ka'bah, 1999: 73). The famous Article *receptie* was Article 134 Indische Staatsregeling (IS) stating that "of indigenous people, if their law wish to implement Islamic laws, the laws might be enforced as far as being accepted by customary law societies". The enforcement of Islamic Shari'ah in Aceh had been done since VI century A.D. and became the first place in Nusantara accepting Islam. Regardless of the theories established by the Dutch colonial government, Islamic laws historically had integrated with law culture of Aceh society.

The politic of Islamic laws in Indonesia after independence is very much influenced by at least three theories counteracting the theories in the colonial periods (theory of *Receptie in Complexu* by Prof. Mr. L. W. Christian van den Berg, 1845 -1927 and theory of *Receptie* by Snouck Hougronje) in implementing Islamic law. The three theories are among others: (1) *Receptie Exit theory* by Hazairin; (2) *receptie a contrario theory* by H. Sayuti Thalib; and *existence theory* by H. Ichijanta SA (Wahid and Rumadi, 2001: 83-84).

Receptie exit theory proposed by Hazairin states that *receptie* theory must *exit* from the Indonesia National Legal theory because it is in contradictory with Indonesia national constitution, UUD 45 as well as conflicting with Al Quran and *Sunnah*. Hazairin called *receptie* theory as devil theory. According to him, after independence of Indonesia, exactly after the proclamation of Indonesia Independence on 17 August 1945, all kinds of the Dutch colonial laws and Acts, based on the receptie exit theory, must be ended in

implementation (Wahid and Rumadi, 2001: 83-84).

The *receptie exit* theory is further developed by Sayuti Thalib with a name of *receptie a contrario*. In line with its name, this is in opposite to the *receptie* theory. The theory states that the laws implemented for the people are their religious laws and customary laws may be enforced as far as they are not in contrary to the religious laws (Wahid and Rumadi, 2001: 83-84). The cores of this theory are: (1) for Muslims, Islamic laws must be enforced; (2) the enforcement of Islamic laws is in line with their faith and laws ideals, spiritual aspiration and morality; (3) customary laws must be put into effects if they are not conflicting with Islam and Islamic law. The *receptie a contrario* theory determines that the laws that are enforced first should be Islamic laws and then customary laws can be enacted if they are not inconsistent with Islamic laws.

H. Ichtijanto clarifies and explicitly gives meanings of *receptie a contrario* in terms of its relationship with the national legal system. He articulates the relationship in the form of theory called *existence* theory (Wahid and Rumadi, 2001). In his opinions, Islamic laws (Ichtijanto, 1985: 262-263):

a. exist as an integral part of National legal system.
b. exist in terms of their independence and power, admitted by the national legal system, and are given status as National laws.
c. exist in Islamic legal norms that function as national legal filters; and
d. exist as main materials and main sources of National laws.

Political conditions lately have given benefits to the development of Islamic laws whether they are structurally, culturally, and formal and informal legally. However, the challenge is how to make every effort in order that the emergence of Islamic laws in Indonesian positive laws lives is not politicized to legitimate the willingness of the authority and is not also as political accessories to maintain one authoritative regime (Wahid and Rumadi, 2001).

After proclamation of Indonesian independence, August 17, 1945, Indonesian national legal system put Pancasila and Indonesian Constitution, UUD 45, as sources of all legal sources in Indonesia. However, based on the transitional provision Article II UUD 45, it is mentioned that some colonial laws are still valid i.e. customary law system, western laws system, and Islamic law systems. GBHN (National Development Guidelines) have determined the laws unification, and that in all in Indonesian Archipelago there is only one legal system, that is, National Legal System. The National Legal System that is based on Pancasila and UUD 45 obliges all parts of Indonesian laws putting Pancasila and UUD 45 as the main laws sources. Further sources as the law bases are Acts, jurisprudence, or customary laws in related laws fields.

According to Rifyal Ka'bah, Indonesian laws can be seen from some perspectives,

among others:

1. Laws that derive from customs and norms that have been passed down from the ancestors and have attached in the social awareness.
2. Laws that stem from religious teachings
3. Laws as all law regulations that are passed by the state legislators followed by certain punishment for ones who violate them and administered by the state (Ka'bah, 1999: 74-76).

Indonesian laws that were born after the Independence Proclamation of Indonesian Republic are (1) colonial-legalized products; (2) customary laws; (3) Islamic laws; and (4) national legislative products (Ka'bah, 2001: 74-76).

With the bases of the three theories above, when shari'ah is enforced in Aceh pasca laws unification, the enforcement does not disagree with existing laws since Islamic laws are integral parts of Indonesian laws. Islamic law in Aceh Nanggroe Darrussalam is laws that grow and develop in the societies in Aceh Nanggroe Darrussalam.

The implementation of Islamic shari'ah in Nanggroe Aceh Darrussalam, if seen from perspectives of *receptie a contrario* and *existence* theories, is not in contradiction with the national legal system. The *ratio legis* of this statement is as follows:

Theory of *receptie a contrario* states that the enforced laws for the people are their religious laws and customary laws that are not in contradictory to the religious laws. In this regard, the legal cultural conditions of societies in Nanggroe Aceh Darrussalam have been very much influenced by laws and have been controlled by shari'ah for long periods of times. The societies in Aceh have imposed shari'ah as manifestation of their faith to God that for Muslims Islamic laws must take place. However, to enforce Islamic laws as the norms embraced by the societies needs state authority to implement them. As a result, the societies of Nanggroe Aceh Darrussalam see the importance of legislation or Islamic law institutions under the state authority in order to implement the laws effectively in the lives of Nanggroe Aceh Darrussalam.

In the perspective of *existence* theory, the reason behind the implementation of Islamic shari'ah is by considering the conformity between *das sein* (law awareness and understanding in the societies) and *das sollen* (the ideal things in laws). The *das sein* are the four values under the *existence* theory: (1) exist as an integral part of national legal system; (2) exist in terms of their independence and power, admitted by the national legal system, and are given status as National laws; (3) exist in Islamic legal norms that function as national legal filters; and (4) exist as main materials and main sources of National laws. Meanwhile, the *das sollen* is willingness and laws ideals in the Islamic lives of Nanggroe Aceh Darrussalam societies and holding the Islamic teachings in the utmost position is the basis to bring spiritual and physical prosperities of the individual, family, and societies

into realization. By taking into consideration that shari'ah has become an integral part of the national legal system, has been admitted its independence and its prominent power by the national laws, has functioned as the filter of national law materials, and has grown to be the source of national laws, the societies in Nanggroe Aceh Darussalam have got adequate reasons to impose shari'ah that is clearly not in contrary to the national legal system and in line with the legal ideals and legal cultures in Nanggroe Aceh Darussalam.

B. THE IMPLEMENTATION OF SHARI'AH IN NANGGROE ACEH DARUSSALAM AND IN CONSTITUTION

Every emergence of shari'ah regulations in the Indonesian legal system must be followed by a tendency of accusing that the regulations are not inline with Pancasila and State Constitution, UUD 45. Towards such a tendency, there are at least some arguments to refute it. *Firstly*, there is no single word in Pancasila and the State Constitution that obviously prohibit the implementation of shari'ah in Indonesia (Susila and Gunawan, 2006). It seems impossible that prohibition may exist there as even in secular countries like USA, UK, the independence to embrace certain religion is guaranteed by the government in which it is commonly called *freedom of religion*. On the other hand, with a close look, Pancasila and UUD 45 in fact provide spaces for the citizens to perform the religious worships in accordance with their own faith and belief. KH. Ma'ruf Amin stated that as the state vision, Pancasila gives guarantees to the religion existence as reflected in one of the principle of Pancasila admitting "the Oneness of God". With the value and vision of this divinity, Indonesia is not a secular country that refuses the religious roles in the state lives, but the state will guarantee the survival of the religions embraced by its citizens. This state vision is subsequently restated in the article 29, UUD 45 confirming that Indonesia is (1) a state that is based on the principle of the Oneness of God, (2) a state that guarantees the independence of its citizens to embrace and perform the religious services in accordance with their own faith and belief. In light of this article, consequently, there is no single article in UUD 45 that denies the religion as the source of laws (Amin, 2006) and it has become a public acclaim that sources of national laws are three: western laws, Islamic laws and customary laws. Hartono Marjono further affirms that Article 29, UUD 45 can means that (1). the state cannot make any acts or regulations that are in contradictory to the principle of "the Oneness of God". (2) The state is mandated to formulate suitable acts suitable for the principle of the Oneness of God. (3) The state is bound to enforce laws to prevent and punish people who violate the religious norms and principles (Ka'bah, 1999: 77). Taking the above amplifications as the bases, the accusation that *Perda Shari'ah (local regulation)* is in contradiction to Pancasila and UUD 45 is groundless. Factually, in converse, Pancasila and UUD 45 guarantee the implementation of religious obligations for the citizens.

Secondly, the rejection toward the emergence of Islamic law in the national legal system is because according to some historical observers, it was in agreement that the obligation to implement Islamic shari'ah for its followers had been erased in the first principle of Pancasila and in the Introduction of UUD 45 (Indrayana, 2006). With respect to this view, it can be clarified that historically the proclamation of Indonesia independence on 17 August 1945 was based on the Jakarta Charter within which the first principle of Pancasila stated "The Oneness of God and the obligation to implement Islamic shari'ah for the followers (Ketuhanan Yang Maha Esa dan Kewajiban menjalankan syari'at Islam bagi para pemeluknya)". The Jakarta Charter was the result of long debate and discussion in the meeting sessions of BPUPKI (Board for Indonesian Independence Preparation) and the board then came to an agreement that the text of Jakarta Charter became a part of Indonesia Independence Declaration on 17 August 1945. One day, afterwards, on 18 August 1945, 7 words after the statement of "Ketuhanan Yang Maha Esa" were erased owing to the lobby of some people to Bung Hatta (Husaini, *Mempersoalkan Perda Syari'at,* http: www.hidayatullah.com/mambots/editors/index.php

The giving away attitudes of the Islamic figures at that time towards the deletion of 7 words in the Jakarta Charter was basically based on the consideration to keep the nation interests because Indonesia had just declared its independence and the colonialists did not yet fully leave Indonesia. So the giving-in attitudes at that time did not mean that the Islamic figures accepted the deletion of "the willingness to implement shari'ah in Indonesia" because if they did so, it had been conflicting with Islamic *Aqidah*. Even, Soekarno, in the speech of his Presidential Decree repeated that the Jakarta Charter 22 June 1945 inspired and constituted one unity with the Constitution (Husaini, *Mempersoalkan Perda Syari'at,* http:www.hidayatullah.com/mambots/editors/index.php

Unfortunately in its development, there is every effort to interpret the history and the contents of Pancasila and UUD 45 that is "trapped" in secularism paradigm that reject religious interference in the state lives in which the rejection is obviously in opposite to the Pancasila and UUD 45 themselves. The secularism paradigm seems referring to Harvey Cox who wrote *desacralisation of politics* in which it gets a rid of religion and spiritual matters from political arena.

In addition, Jimly Asshiddiqie argues that the state laws with UUD 45 as the top source of law may not be in opposite to the law beliefs or religious beliefs of the Indonesian citizens as the legal subjects who are then regulated by the Indonesian legal system based on Pancasila. In accordance with the first principle of Pancasila 'The Oneness of God", automatically, there is no Indonesian state law that is in contradiction to the religious norms embraced by the Indonesian citizens themselves (Asshiddiqie, 2006).

Furthermore, Jimly discusses in details that the Article 18 B clause 1 and 2 UUD 45 admit and respect law pluralism in society. Although the national court is structural in

nature, the law materials as the bases for the judges can be developed variously. Similarly, the local autonomy policy gives space for the local administrations to formulate local regulations inline with their respective needs and even some province have special autonomy status such as Nanggroe Aceh Darussalam and Papua (Asshiddiqie, 2006).

Satjipto Raharjo also argues that the actual law characters needed by Indonesians to reach national objectives are the laws that can accommodate the nature of the nation pluralities spreading from Sabang to Merauke with various ethnics that have autonomous traditional local authorities. Therefore, according to Satjipto the main steps to do in the law development is the harmonization of laws, not unification or codification (Raharjo, 2007.: 187).

So, based on the historical facts and legal scholars' arguments above, it can be concluded that Pancasila and UUD 45 does not contain historically and substantively any single article that prohibit Islamic believers to implement shari'ah. In contrary, they accommodate the interests of any existing religious followers in Indonesia to perform their own religious belief. In other words, the enforcement of shari'ah in Nanggroe Aceh Darussalam does not constitute a contradictory to those Pancasila and UUD 45. Even if discerned deeply from the history of the birth and the texts of Pancasila and UUD 45 themselves, it can be inferred that the enforcement of special laws, *Perda Shari'ah* in Nanggroe Aceh Darussalam, is something guaranteed by the Indonesian State Constitution.

C. THE IMPLEMENTATION OF ISLAMIC SHARI'AH IN NANGGROE ACEH DARUSSALAM AND INDONESIAN LEGISLATION SYSTEM

The following debate deals with the enforcement of Islamic laws (read: Public laws like Criminal Laws) that is regarded to be in contradiction to the paradigm of public laws that have to be in unification and imposed nationally. This argument is very apparent rejecting the shari'ah models that exists the local provinces including Aceh although they have already had a law umbrella in the form of Act. Towards this rejection, some other views may be presented as follows: *firstly*, laws nationalization view sees that laws are products of nationalism that have been strengthening in line with the emergence of the concept of nations states. This view assumes that social homogeneities that happen in Europe like in Germany or the birth of secularism spirit reject the religious interventions in the state political affairs. In this respect, the nationalism spirit in a certain level is considered to be something that has to be the same so that it marginalizes the heterogeneities of a nation that constitutes sociological facts in the societies.

For Indonesian cases, nationalism discourse, unity and integrity had ever become a dominant ideology in the beginning of Indonesia independence and have ever been relatively forced under Soeharto regime. That is why the spirit of "centralization" including

in laws fields was very dominant. In Soeharto era, there had been a strong centralization and homogenization process in the law fields, for instance, the uniformity of the village concept in all over Indonesia, whereas every province has different characteristics regarding to the village social organization. Such a case became one of the disaster causes of cultural bases that actually sustain the lives of the society.

In other words, Indonesia had so far subscribed to the law centralism philosophy where the state (central government) acted as the only agent to create the laws. Any kind laws outside this mechanism were considered invalid and therefore had to be null and void. The history noted that the use of this paradigm in the era of 1950s by the central government had paralyzed the customary institutions in the local areas (Lukito, Syari'at Islam and Polisentrisitas Hukum, http://www.syari'at-islam_ACEH/syari'at/syar29/htm).

Secondly, as the results of the hegemony of the above view, on behalf of law nationalism, the religious aspirations of the Muslim society tended to be put aside, and not accommodated. In contrary, the laws inherited by the Dutch colonialist and some foreign values that were in opposite to the religious foundations in Indonesia were accepted without any complaint. The Indonesian vision that is religious in nature is reconfirmed by TAP MPR No. VII/MPR/2001 about the Indonesia Vision 2020 within which the first indicator of the success of development is religious, i.e. the people have a good faith, are pious, and have a good of conduct.

In this case, democracy in practice becomes a betrayal to the majority aspiration and privilege to the minority. Meanwhile, ideally, democracy should appreciate the aspiration of the majority and simultaneously guarantee the rights of the minorities.

Thirdly, if Islamic law is rejected with the reasons of contradicting to the national laws, the question may be raised: which laws will Indonesia use? From where are the laws taken? Should our laws be taken or imported from other countries that ideologically and sociologically are different from Indonesia?

Fourthly, local autonomy actually is a new way for Indonesians to return back to the state platform "Bhinneka Tungal Ika" (Unity in Diversity). The diversities and local aspirations should be understood in the context of Indonesia as a heterogeneous country extending from Sabang to Merauke, but remains in the frame of the unitary state of Indonesian Republic. Nevertheless, it is necessary to formulate how to make a legal formulation that, in one side, appreciate local society aspirations, but in the same time, it remains in the corridor of Indonesia Republic. For this purpose, it is necessary to make more serious research to formulate this formulation.

Fifthly, in context of law sciences, it must be admitted that Nanggroe Aceh Darussalam has special characteristics compared to other provinces. These special characteristics were born from a long history of political conflicts between the central government and Aceh people that were organized by Gerakan Aceh Merdeka (GAM). The acknowledgment of

the special characteristics in the regulations of Nanggroe Aceh Darussalam can be understood from the following legal argumentations:

Legalities of the Shari'ah implementation in Nanggroe Aceh Darussalam are through a series of General Assembly meeting session, as follows:

1. Plenary meeting of General Assembly 1999 had mandated in the provision of the General Assembly No IV/MPR/1999 to give special autonomy in the Province of Aceh Special Territory.
2. Annual Meeting of General Assembly of Indonesian Republic in the year of 2000 had made second changes towards the State Constitution of Indonesian Republic.
3. Plenary Session of General Assembly in 1999 had mandated in the provision of the General Assembly of Indonesian Republic No. IV/MPR/2000 about Policy Recommendation in order that The Act on Special Autonomy for Aceh Special Province should be issued by May 2001 at the latest. The essence of Tap MPR No. IV/MPR/1999 deals with the implementation of Islamic shari'ah in Nanggroe Aceh Darussalam by paying attention to the aspiration of the Societies in Nanggroe Aceh Darussalam.
4. Article 18B UUD 45 provides opportunities towards the emergence of law pluralities in Indonesia. Article 18B verse (1) states: "State admits and respects the units of the specific or special local government that are regulated by legal Act". This view is supported by the arguments delivered by Prof. Jimly Asshiddiqie and Prof. Satjipto Raharjo. In the other words, the existence of *Perda Shari'ah* in Nanggroe Aceh Darussalam can be accommodated by legal poly-centricity proposed by Hanne Petersen and Hendrik Zahle as quoted by Ratno Lukito previously. Prof. Daud Bakar in Malaysia quoting Iqbal had also introduced terms *territorial approach* in the implementation of shari'ah in non-Islamic States but the Muslims are the majority citizens, like Indonesia and Malaysia. In terms of laws science, as introduced previously by Alija Izetbegovic, ideal laws are laws that are in a balance position between socio-political aspiration and socio-religious aspiration. Based on the above scholar arguments, *Perda Shari'ah* enacted in Aceh has strong bases in terms of scientific law theories. So it is not baseless as what has been argued by some observers who subscribe to legal centralism paradigm.
5. The enforcement of *Shari'ah* in Nanggroe Aceh Darussalam can be viewed in terms of the law principle of *"lex specialis derogate legi generalis"* meaning that special laws put aside general laws. The implementation of Shari'ah in Aceh in specific has clear law foundations i.e. Articl2 18B UUD 45, Act No. 44 in the year of 1999 about the administration of the specialty of Aceh special Province (Article 4 clause (1)), Act No. 18 in the year of 2001 about special autonomy for Aceh Special Province as Nanggroe Aceh Darrusalam Province (Article 23) and Act No. 11, 2006 about the Aceh local Government (Chapter XII and XIII).

a. Article 4 clause (1) Act No. 44, 1999 states that:

"the implementation of religious lives in local societies is realized in the form of implementation Shari'ah for the followers in the society".

b. Article 23 clause (1) Act No. 18, 2001 states that:

"Islamic Shari'ah Court in the Province of Nanggroe Aceh Darussalam as a part of National legal system is conducted by *Mahkamah Shari'ah* that is free from all kinds of influences"

In the Article 23 clause (3) also states that:

"The Authority of Mahkamah Shari'ah as mentioned in the clause (1) is based on Islamic Shari'ah in the National Legal Systems that is further regulated by Qanun in the Province of Nanggroe Aceh Darussalam.

c. Chapter XII and XIII, Act No. 11 2006 regulate the implementation of Islamic Shari'ah in Nanggroe Aceh Darussalam (NAD) and the existence of Mahkamah Syari'ah that constitutes a special legal institution in NAD.

Based on the above legal provisions, it can be inferred that the existence of *Perda Shari'ah* in NAD has already had clear juridical foundations because the above Acts have given authorities to NAD to create its own Perda called Qanun of the Province of Nanggroe Aceh Darussalam. The objections by some parties towards term *Qanun* (the same level as *Perda*) used in NAD judicially can be explained by referring the provision in Article 7 point 4 Act No. 10, 2004 about the Formulation of Legal Act which states that:

"The types of legal acts other than mentioned in the clause (1) are admitted their existence have legal power to be imposed as long as authorized by higher level legal acts".

Based on the above legal bases, in terms of state administration laws in general and law sciences in specific, the implementation of shari'ah in NAD has very strong judicial foundations.

D. ALTERNATIVE SOLUTIONS TO THE IMPLEMENTATION OF ISLAMIC SHARI'AH IN INDONESIAN LEGAL SYSTEM

Alija Izetbegovic, a legal scholar who had ever been a president of Bosnia Herzegovina, in his book "*Building a Midway"* argues that laws are mature cultural phenomena. Ideal laws are laws that are in accordance with the socio-political and religious aspirations of the societies. In regard with this theory, the emergence of *Perda Shari'ah* in NAD is natural, not fabricated, because the *Perda* are religious and socio-political aspirations of the societies in NAD that have been approved by The House of Representatives and President through the existing Acts. This proves that the formulation of those *Perda* has gone through legislation processes valid in NAD.

Empirically, the implementation of *Perda Shari'ah* has endowed with positive contributions in the lives of the societies in NAD. Mustafa mentions that by the implementation of *Perda Shari'ah* in Bireun, the violence towards the Islamic shari'ah reduces up to 50%. Bulukumba, a District in South Sulawesi, can also be an example in the success of *Perda Shari'ah* in reducing the criminality numbers. The ex-regent of Bulukumba states that after the enforcement of *Perda Shari'ah* in 2001 the criminality number declined drastically (85%) because there was no store selling drug and liquor and there was no more student fights. He adds that after imposing *Perda Shari'ah,* the rate of murder and rape declined drastically as well. Because of that, according to him, non-muslim groups also support the implementation of those *Perda*. Similarly, it had happened in Kelantan State, Malaysia. Groups of Non-Muslim Chinese visited the parliament of Kelantan State delivering petition to support *Hudud* in Kelantan. This was based on their experiences that under the existing laws they felt unsecured with regard to their properties. They believed that *Hudud* would be able to make them secure in their businesses and their belongings.

The implementation of Islamic laws through *territorial approach* as what happens in Kelantan and at present in Aceh, Indonesia is a formula that has ever been proposed by Prof. Dr. Mohammad Daud Bakar in a lecture at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia. He states that the implementation of Islamic laws in non-Islamic state can be conducted through territorial approach, especially dealing with public laws like criminal law, as in respect to the private laws area there seems no significant resistance. This thing may bridge the trap of Islamic State or secular state discourse.

CONCLUSION

The implementation of Shari'ah in NAD if seen from constitutional perspective and positive law principles is not in contradiction to the existing laws. In the constitutional legitimacy, the implementation of Islamic Shari'ah in NAD can be firmly stated in the Article 18B that is follow up by a series of organic legal acts that legalize the implementation of *Shari'ah* in NAD, among others: Act No. 44, 1999; Act No. 18, 1999; and Act No. 11, 2006. Meanwhile, in light of the theoretical perspectives, referring to *receptie a contrario* and *existence* theories, the existence of shari'ah that has become an integral part of the social lives in NAD meaning that has become *primary rules of obligation* where the societies in NAD have been very much influenced and controlled by Shari'ah for a long period of time, is ancestry traditions and derives for Islamic teaching and also has law consequences, it is very important then to fulfill the constitutional rights aspirations of the societies in NAD to unearth shari'ah in NAD through the state authority (*secondary rules*).

National and Local Legislation Programs should be able to synergize in order not to generate law problems in formulating law products in national level by creating law

products in local level first, for instance, the tolerance in the implementation of personification principle in the local legal acts. In this matter, it is necessary to make technical policies in formulating law products whether they are in central or local level, so that the law harmonization can be brought into realization well.

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