



Judges' Acceptance of Sharia-Inspired Laws in Indonesia

Hazar Kusmayanti^{1*}, Dede Kania², Nanik Prasetyoningsih³, Zinatul Ashiqin Zainol⁴

^{1*}Faculty of Law at Padjadjaran University, Bandung
Jalan Raya Bandung-Sumedang Km. 21

² State Islamic University of Sunan Gunung Djati, Bandung
Jalan A.H Nasution No. 105, Cipadung, Cibiru, Kota Bandung

³Universitas Muhammadiyah Yogyakarta
Jl. Brawijaya, Tirtonirmolo, Kec. Kasihan, Kabupaten Bantul

⁴ Faculty of Law, Universiti Kebangsaan Malaysia
Lingkungan Ilmu, 43600 Bangi, Selangor, Malaysia

Email: ¹hazar.kusmayanti@unpad.ac.id, ²dedekania@uinsgd.ac.id, ³nanikprasetyoningsih@umy.ac.id,
⁴ashiqin@ukm.edu.my

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Abstract: It is fascinating how customary laws are accepted by judges in the Indonesian legal system. In Aceh, particularly, its customary law is inspired by sharia or Islamic law. In addition to the national law, this law also influences judges' consideration in making their decisions. According to Van Den Berg's theory of *receptio in complexu*, Islamic law has been recognized in Indonesian legal system as a customary law. This article tries to find out how judges accept sharia-inspired customary law to pass their decisions. The research used normative-legal method. Based on the research results, the author concluded the judge's acceptance of customary law could be seen from a Sharia Court decision related to customary disputes. This decision was passed by the Takengon Sharia Court under No. 269/Pdt.G/2017/Ms-Tkn dated May 2, 2018. It concerned with the division of joint property. This decision referred to Islamic law in giving each party a half of the total assets after being deducted by the joint debts. This decision strengthened the foothold of Islamic law in customary law and national law enforcement, especially in Aceh Province. However, it would be a different case if the customary law was in conflict with Islamic law. In such a case, the panel of judges would not accept the customary law. An example of this was the case of adopted children. Rather than receiving an inheritance, as in the traditional parental communities, they would only receive a mandatory will. One of such decisions was the Aceh Sharia Court's Decisions No. 125/Pdt.G/2011/MS and No.084/Pdt.P/2016/MS.Bna.

Keywords: Customary Law, Islamic Law, Judge's Acceptance

Abstrak: Kajian tentang hukum adat yang diterima oleh para hakim dalam sistem hukum Indonesia sangat menarik untuk diteliti lanjut. Di Aceh, khususnya, hukum adatnya terinspirasi oleh syariah. Selain hukum nasional, hukum ini juga mempengaruhi pertimbangan hakim dalam mengambil keputusan. Berdasarkan teori *receptio in complexu* dari Van Den Berg, hukum Islam telah diakui dalam sistem hukum Indonesia sebagai

hukum adat. Artikel ini mencoba untuk menganalisis bagaimana hakim menerima hukum adat yang terinspirasi oleh syariah dalam menjatuhkan putusannya. Penelitian ini menggunakan metode penelitian hukum normatif. Berdasarkan hasil penelitian, penulis menyimpulkan bahwa penerimaan hakim terhadap hukum adat dapat dilihat dari putusan Mahkamah Syariah terkait sengketa adat yang dijatuhkan oleh Mahkamah Syariah Takengon dengan No. 269/Pdt.G/2017/Ms-Tkn tertanggal 2 Mei 2018. Putusan ini berkaitan dengan pembagian harta Bersama dengan mengacu pada hukum Islam dengan memberikan masing-masing pihak setengah dari total harta setelah dikurangi utang bersama. Putusan ini memperkuat pijakan hukum Islam dalam hukum adat dan penegakan hukum nasional, khususnya di Provinsi Aceh. Namun, lain halnya jika hukum adat bertentangan dengan hukum Islam, dimana Majelis hakim tidak akan menerima hukum adat tersebut. Sebagai contoh kasus pada anak angkat. Alih-alih menerima warisan, seperti pada masyarakat adat orang tua, mereka hanya menerima wasiat wajibah. Salah satu putusan tersebut adalah Putusan Mahkamah Syariah Aceh No. 125/Pdt.G/2011/MS dan No. 084/Pdt.P/2016/MS.Bna.

Kata kunci: Hukum Adat, Hukum Islam, Penerimaan Hakim

Introduction

Pluralism in legal realm is no longer inevitable. This is the consequence for Indonesia as a plural country in terms of its ethnicity, cultures, languages, religions and beliefs. Even the country's constitution has explicitly recognized and respected the ideals of the Unitary State of the Republic of Indonesia (NKRI) and the unity of customary law communities along with their traditional rights as long as they are still living and could keep up with the community development and are compliant with the principles of NKRI as set forth in the national laws.¹ The fact that customary law exists is in itself an indication of legal diversity. Despite being unwritten, its binding force for indigenous peoples, especially in the past, is pretty strong. Even now, in some parts of Indonesia, some customary law communities still implement their laws, including those communities living in Aceh Province.²

As a province, Aceh has been extensively studied by both domestic and foreign researchers. Most of the time, they studied Aceh legal system³ for its close relation to sharia or Islamic law.⁴ This province also frequently serves as a model for the central government in designing policies. Some of these policies include the decisions of local courts relating to the implementation of Islamic law, the drafting of regional regulations (*qanun*), and even the election of regional leaders. Acehnese believe that order and peace in society can be maintained by upholding their customs. This can be seen in the so-called *narit maja aceh* (a verbal custom) or a proverb that has been passed down through generations and is strongly believed by the Acehnese: "*Ta pageu lampoeh ngon kawat, ta pageu nanggroe ngon adat*", which roughly means that "we must protect our garden with wire and protect our homeland with custom." This statement is further reinstated by another proverb known as *hadih maja* or the Acehnese life philosophy: "*Hukom lillah sumpah bek, hukum adat ikat bek, hukum ade pake*

¹ Sulastriyono and Sandra Dini Febri Aristya, "Penerapan Norma dan Asas-Asas Hukum Adat dalam Praktik Peradilan Perdata" [Application of Customary Legal Norms and Principles in Civil Court Practice], *Mimbar Hukum* Vol. 24, No. 1 (2012), 25-40.

² Achmad Asfi Burhanudin, "Eksistensi Hukum Adat di Era Modernisasi" [The Existence of Customary Law in Modern Era], *SALIMIYA: Jurnal Studi Ilmu Keagamaan Islam*, Vol. 2, No. 4 (2021), 96-113.

³ Junaidi Junaidi, Muhammad Rusdi Bin Muhammadiyah, and Muhazir Muhazir, "Revitalisasi Penerapan Qanun Nomor 6 Tahun 2014 Tentang Hukum Jinayat Di Kota Langsa Aceh," *Al-Manahij: Jurnal Kajian Hukum Islam* 14, no. 1 SE-ARTICLES (June 2, 2020): 147-60, <https://doi.org/10.24090/mnh.v14i1.3261>.

⁴ Nanda Amalia, Mukhlis, Yusrizal, "Model Penyelesaian Sengketa dan Peradilan Adat di Aceh" [Dispute Settlement Model and Customary Court in Aceh], *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 25, No.1 (2018): 159 - 179, DOI: 10.20885/iustum.vol 25.iss1.art8

bek, *hukom meujroh pake bek*,⁵ meaning “to rule by God’s law, there must be no swear, to be judged by customary law is not to be bound, the law must be fair, only then can peace be enforced”. In fact, their customs have been Islamized from time to time in many ways throughout the history of Aceh.

The fact that the Aceh is an autonomous province that applies Islamic law surely has consequences for the customary law there. What Aceh has experienced is almost the perfect illustration of the theory of reception of complex as put forward by Van Den Berg in July 1881. This theory states that “for indigenous people, what applies to them is their religious law,” where their customary law follows the religious law adopted by the indigenous people.⁶ Solomon Keyzer and Van Den Berg acknowledged that Islamic law shall apply to Islamic society. They stated that the law followed a person’s religion.⁷

Berg conceptualized *Staatsblad* (Official Gazette) 1882 No. 152, which sets forth that for indigenous people, their religious law shall apply in their living environment. Thus, Islamic law shall also apply to those members of society who practice Islam.⁸ In Aceh Province, judges often show uniqueness in receiving customary law. Therefore, this study focused on how the judges of the Sharia Court incorporated customary laws into their decisions.

This study used a normative juridical methodology with descriptive and analytical research requirements to evaluate how judges’ rulings on Islamic and customary laws were received. Relevant parties were interviewed to gather the primary data and literatures were reviewed to collect the secondary data by examining laws, legal theories, jurisprudence, and the religious beliefs of Islamic clerics. The data were analyzed using a qualitative juridical analysis, which looked at the data from a legal perspective.

The Islamic and Customary Law Systems in Aceh

Islamic law exists in the Indonesian legal system as result of the fact that it is the religion embraced by most Indonesians. As a religion, Islam teaches ethical and legal values that its followers can apply in their lives, either as an individual, a community or a state. As a law, Islamic law stands on an equal footing with customary and Western laws. For this reason, it can be a legal source for shaping the national law. Opportunities for Islamic law to be enforced nationally come in two channels. The first one is through the legislative process. The second one is through judges’ decisions. In the latter channel, judges could pass a decision in both religious and non-religious courts, with the Islamic law serving as the basis for making the decisions.⁹

After the country’s independence, the influence of Islamic law became even stronger and it was constitutionally recognized in Article 29 of the 1945 Constitution of the Republic of Indonesia. It is accepted as a persuasive source of law. Meanwhile, Snouck Hurgronje’s receptive theory lost

⁵ Arskal Salim, “Adat and Islamic Law in Contemporary Aceh”, *Samarah: Jurnal Hukum Keluarga dan Hukum Islam*, Vol. 5 No. 2, (2021), 529-551, 10.22373/sjhh.v5i2.11082 .

⁶ Badruzzaman, *Membangun Keistimewaan Aceh dari Sisi Adat Budaya* [Building Aceh’s Specialty from Its Customary and Cultural Facets], (Banda Aceh: Majelis Adat Aceh 2007), 39.

⁷ Edi Gunawan, “Pengaruh Teori Berlakunya Hukum Islam terhadap Pelaksanaan Peradilan Agama di Indonesia” [The Effect of Theory of Islamic Law Enforcement on Religious Trial Implementation in Indonesia], *Jurnal Ilmiah Al-Syir’ah* Vol. 15, No. 2 (2017):74–93.

⁸ Tjun Soemardjan (ed.), *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* [Islamic Law in Indonesia: Its Development and Formation], (Bandung: Remaja Rodakarya 1991), 117–118.

⁹ Matta Baharuddin, “Analisis Kedudukan Hukum Islam dalam Sistem Hukum di Indonesia” [An Analysis of Islamic Law Position within the Legal System in Indonesia], *Jurnal Hukum Diktum*, Vol. 10 No. 2 (2012), 166–172.

its legal basis and did not apply. The legal system in Indonesia is still influenced by customary law. According to Von Savigny, as cited by Soepomo, customary law is a living law since it embodies the legal sentiments of the populace. Customary law will continue to expand and change just like life itself does.¹⁰ The Indonesian legal system now includes and is influenced by both Islamic and customary laws. Following the reform era, Islamic law was more and more recognized in Indonesian law, particularly after regions received their own autonomy. During this time, regions started vying with one another to manage their own affairs. Following that, local governments developed regionally-specific municipal regulations. Many regions desired sharia-based local laws with Islamic undertones. One of them was the province of Aceh. Aceh has its own solid historical foundation for the application of Islamic law.¹¹ Furthermore, the nature of the privileges outlined in the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, as then outlined in Articles 125 to 127 of Law No. 11 of 2006 on the Governing of Aceh, further strengthened the legal framework based on Islamic law in Aceh Province.

In 1999, Aceh Province enjoyed their special autonomy as they were authorized to formally implement and enforce Islamic law at the provincial level.¹² Its special status in such areas as religious affairs, education, and customary legislation was formally acknowledged as Law No. 44 Year 1999 concerning Implementation of the Specialty of the Province of the Special Region of Aceh was issued. This Law No. 44 of 1999 on Aceh was a novel concept that made it unique. Islamic sharia, according to Article 1.9 of the Law, is defined as “what Islam teaches in all aspects of life.” However, the regulation of Islamic Sharia was deemed inadequate, as it was not accompanied by instructions and the form of Islamic sharia desired by the people of Aceh.¹³

Furthermore, Law No. 18 of 2001 concerning Special Autonomy for the Province of Special Region of Aceh reinstated Aceh’s autonomy in such areas as religious affairs and regional regulations. This allowed the Acehese government and the local legislative body to develop more comprehensive sharia laws and regulations (qanun), including those that specified new institutions for upholding Islamic law.¹⁴

In Article 128 Chapter XVII of Law No. 11 of 2006 on the Governing of Aceh, which superseded Law No. 44 of 1999, it is stated that:

1. The Islamic sharia adjudication is a part of the national judicial system within the religious adjudication run by the Sharia Court which is free of any influence from any party;
2. The Sharia Court is the court for everyone who embraces Islam as their religion and lives in Aceh;
3. The Sharia Court is authorized to examine, adjudicate, decide on, resolve such cases as *Al-ahwal Syakhshiyah* (family law), *Mu’amalah* (civil law), and *Jinayah* (criminal law) based on Islamic sharia.¹⁵

¹⁰ Soepomo and Djoko Suwono, *Sejarah Politik Hukum Adat* [History of Customary Law Politics], Jakarta: Djambatan, 1955, p. 26.

¹¹ Hani Adhani, “Menakar Konstitusionalitas Syari’at Islam dan Mahkamah Syar’iyah di Provinsi Aceh” [Revisiting the Constitutionality of Islamic Sharia and Sharia Court in Aceh Province], *Jurnal Konstitusi*, Vol. 16 No. 3 (2019), 606–629.

¹² Nashihul Abror, “Eksistensi Dan Kewenangan Mahkamah Syar’iyah Dalam Mengadili Tindak Jinayah Di Provinsi Nanggroe Aceh Darussalam” [The Existence and Authority of Sharia Court in Adjudicating Crimes in the Nanggroe Aceh Darussalam Province], *al-Jināyah: Jurnal Hukum Pidana Islam* Vol. 6, No. 1, (2020), 231–256.

¹³ Ridwan Nurdin and Muhammad Ridwansyah, Aceh, “Qanun and National Law: Study on Legal Development Orientation,” *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* Vol. 4 No. 1 (2020), 107–131.

¹⁴ Juhaya S. Praja, *Filsafat Hukum Islam* [Islamic Legal Philosophy], (Bandung: LPPM UNISBA, 1995), 134

¹⁵ M. Syuib, Nadhilah Filzah, “Kewenangan Hakim Menerapkan Diskresi dalam Permohonan Dispensasi Nikah (Studi Kasus di Mahkamah Syar’iyah Jantho)” [Judge’s Authority to Exercise Discretion in Marriage Dispensation Application (A Case Study

Several connected, yet dispersed organizations currently oversee sharia law in Aceh. Based on this arrangement, the Sharia Courts, Ulema Council, and Sharia Police all collaborate with the State Sharia Agency to enforce Islamic law in Aceh. Law No. 11 of 2006, also known as Law on the Governing of Aceh (LoGA), is the Indonesian government's acknowledgement of Aceh's uniqueness and particularities as one of its autonomous territories. Aceh is a distinct territory with its own set of laws that it is governed by. These specifics include, among other things, the existence of *wali nagroe*, customary institutions, regional asset management, the separation of the state's and the region's finances, the application and enforcement of Islamic law, and the management of regional assets.

According to the laws mentioned above, the absolute authority of state courts in Aceh to examine, adjudicate, decide on, and resolve both criminal and civil cases is transferred to the Sharia Court. This applies only to those parties seeking justice who adhere to Islam and are bound by Islamic law. This limit of jurisdiction is governed by Article 128 paragraph (2) of LoGA, which stipulates that the Sharia Court is a court for everyone who embraces Islam as their religion and resides within the Aceh Province.

The provisions of Article 128 paragraph (2) of LoGA severely restrict the district courts' absolute power across Aceh. Additionally, under Article 129(1) of LoGA, non-Muslim citizens of Aceh who seek justice may move their case from the district court to the sharia court if the *jinayah* (criminal conduct) is committed jointly by two or more people, when at least one of the perpetrators is a non-Muslim. Therefore, non-Muslim criminals are provided with the choice to willingly adhere to Acehese criminal law (*jinayah*).

Considering that some parties still believe that the Sharia Court is a special court within the religious and general courts, its status as a component of the religious judiciary system must be supported from the outset. Additionally, Tim Lindsey and Cate Summer believe that the Sharia Court has greater authority than the religious courts.¹⁶ Article 128 of LoGA, which reads "the Islamic sharia adjudication is a part of the national judicial system within the religious adjudication run by the Sharia Court which is free of any influence from any party," confirms the role of the sharia court in the national judicial system.

This belief is based on the wording of Article 15 paragraph (2) of Law No. 4 of 2004 on Judicial Power, which was later adopted by the Explanation of Article 3A in Law No. 3 of 2006 and then also normalized in the body of Law No. 50 of 2009 as a revision of Law No. 3 of 2006 on the Amendment to Law No. 7 of 1989 on Religious Courts. However, Law No. 48 of 2009 on Judicial Power, which revised Law No. 4 of 2004, has no clause that refers to the sharia court's "dual" position as a special court between the religious and general courts.

Reception of Sharia-Inspired Customary Law by Judges

The Islamic sharia judicial system in Aceh is a component of the national judicial system under the framework of the religious adjudication run by the sharia court, which is independent of any

in Jantho Sharia Court]], Samarah: Jurnal Hukum Keluarga dan Hukum Islam Vol. 2 No. 2. (2018), 434-464, DOI: <http://dx.doi.org/10.22373/sjhh.v2i2.4747>

¹⁶ Efa Laela Fakhriah and Yusrizal, "Kewenangan Mahkamah Syar'iyah di Aceh Dihubungkan dengan Sistem Peradilan di Indonesia" [Sharia Court's Authority in Aceh as Associated with the Judiciary System in Indonesia], Jurnal Ilmu Hukum, Vol. 3 No. 2 (2013).113-133

influence from any party. Every Muslim who resides in Aceh may go before the sharia court. The district sharia courts serve as the court of first instance, and the Aceh Sharia Court serves as the final instance. On the advice of the Chief Justice of the Supreme Court, the President shall appoint and dismiss judges of the sharia court.¹⁷ The jurisdiction of the Aceh Sharia Court includes: a) *al ahwal al syahshiyah*; b) *mu'amalah*; and c) *jinayah*. The elucidation of Article 49 of the Qanun of the Province of Nanggroe Aceh Darussalam (Qanun NAD) Number 10 of 2002 concerning Islamic Sharia Courts provides more information on this authority.

Aceh's customary sharia law was formally stipulated through LoGA. The applicable customary sharia law in Aceh Province is based on Al-Qur'an and Assunnah (sayings and practices of the Prophet Muhammad) as legal guidelines. This is in accordance with Qanun NAD Number 7 of 2000, Chapter II, Article 2. Apart from that, there is also the LoGA which explains that the Indonesian government accepts and takes part in its alignment with the people of Aceh by recognizing the many traditional institutions spread across Aceh Province. Since the first time it was implemented, the customary law in Aceh has been in force for twenty years. However, there have been numerous disputes among the populace since then. The most noticeable issue is the presence of non-Muslim groups, which is thought to lead to prejudice in Aceh. Many have criticized Aceh for putting the existence of non-Muslim groups as a legal issue under its sharia implementation. To make matters worse, many non-Muslim communities have been banned.¹⁸

The objective of any law, according to German legal expert and philosopher Gustav Radburch, is to materialize legal certainty, justice, and expediency, and when all these objectives clash, expediency is prioritized. In practice, court decisions can sometimes hurt people's sense of justice because of the imbalance in the sentences and decisions that the involved parties receive. This is possible because law enforcers only interpret the written laws without exploring the legal norms that exist and grow in the community.¹⁹ Satjipto Rahardjo said that efforts to make legal breakthroughs in the judiciary system in Indonesia could be done through the application of legal discovery (*rechtsvinding*) by judges. The term *rechtsvinding* in the regulation regarding legal discovery as a basis for judges are guided, among other things, by a clearly stated legislation in Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judiciary Power.²⁰

Article 5 paragraph (1) of Law No, 48 of 2009 reads "judges and judges of the constitution are obligated to research, observe, and comprehend the legal values and sense of justice that live in society". The law urges judges to get a grasp of the customary cultural values that exist in the community to allow them to make a fair decision. Judges should not limited themselves to written laws and regulations when examining, adjudicating, and deciding cases, especially when involving the perspective of customary law. Judges should also need to pay attention to whether or not the customary law in question is (i) still in existence and being practiced by the indigenous people

¹⁷ Nashihul Abror, "Eksistensi Dan Kewenangan Mahkamah Syar'iyah Dalam Mengadili Tindak Jinayah Di Provinsi Nanggroe Aceh Darussalam" [The Existence and Authority of Sharia Court in Adjudicating Crimes in the Nanggroe Aceh Darussalam Province], *al-Jinayah: Jurnal Hukum Pidana Islam* Vol. 6, No. 1 (2020), 230-256

¹⁸ Sarwan Saukhi Mafazi, "Pemberlakuan Hukum Adat Syariat Aceh Bagi Masyarakat Non-Muslim Aceh" [Enforcement of Aceh Sharia Customary Law for Aceh's Non-Muslim Communities], *Rawang Rencang: Jurnal Hukum Lex Generalis*, Vol. 3, No. 6, (2022), 491-492.

¹⁹ Faisal, *Menerobos Positivism Hukum* [Breaking through Law Positivism], (Yogyakarta:Rangrang Education, 2012), 84.

²⁰ Muh. Ridha Hakim, "The Implementation of *Rechtsvinding* Based On Progressive Law," *Jurnal Hukum dan Peradilan*, Vol.5 No. 2, (2016), 227-248, <http://dx.doi.org/10.25216/jhp.5.2.2016.227-248>

concerned, (ii) still appropriate to be used as a basis for consideration, (iii) still in the public sense of justice and legal awareness, and (iv) still in possession of substantive authority.

The consequence of incorporating customary law into court decisions is that it must be recognized by a solid legal basis, such as the case of a living law. According to Lilik Mulyadi, as another consequence, court decisions will assign judges heavier tasks, responsibilities, and burdens to better comprehend and explore the legal values and norms that exist and develop in the society. They need to understand the society, and its state of affairs, especially in the case of pluralistic society like in Indonesia with a variety of their customs, traditions, and diverse cultures that they are still practicing as a living law.²¹

The jurisprudence concerning customary law takes the form of a permanent court decision in determining customary law in all fields. It also serves to develop customary law with legal ideals. Furthermore, it allows us to trace the development of various aspects of customary law and figure out whether it applies locally or nationally. Using jurisprudence to trace the development of customary law will provide information about its change and growth, its weakening or strengthening which could then be applied nationally and have legal binding power.²²

Ter Haar argues that if no jurisprudence exists, or the existing jurisprudence is no longer applicable and appropriate, then judges must decide according to his or her belief if it applies to the state and development of the society. From the perspective of customary law, in deciding on a legal case, a judge must consider not only the applicable laws and regulations within the legal system but also the social reality, as well as humanitarian principles.²³ In practice, the court may sometimes find that the applicable customary law (*gelded adatrecht*) can no longer keep up with the development, legal needs, and progress made in the community.

The authors agreed with Van Vollenhoven (1952) who suggested that if a rule decides to maintain customary law, yet the law has receded, then the decision is meaningless. On the contrary, if the ruler has determined that the customary law must be replaced while the people still adhere to it, then no law enforcer will be able to change that. The customary law materials need to be reviewed in such a way that they will not conflict with the applicable laws. In turn, this may cause a change in the customary law itself.²⁴

The authors were of the opinion that the reception of a judge's decisions regarding customary disputes about the religious law adhered to by the indigenous people in question is something that must be paid close attention to. In regard to customary law, Van Den Berg's theory of *receptio in complexu* states that as long as it cannot be proven otherwise, indigenous people can follow their religious law as their law. This is because if they adhere to a religion, they must also follow the religious law faithfully. According to this theory, if a community adheres to a certain religion, then their customary law will be the religious law that they adhere to. Therefore, this is considered an exception or deviation from religious law which has been in *complexeu gerecipeerd* (has been accepted as a whole).²⁵

²¹ Interview with Sarafi, Head of District Court Class IA of Lhokseumawe, Aceh, 25 December 2020, at 15.00 WIB

²² Interview with Lilik Mulyadi, Deputy Chief Justice of the West Nusa Tenggara High Court, 23 March 2020, at 10.00 WIB.

²³ Marco Manarisip, "Eksistensi Pidana Adat Dalam Hukum Nasional" [The Existence of Customary Criminal Law in National Law], *Lex Crimen*, Vol. 1, No. 4, (2012), 24–40, <https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/900/715>.

²⁴ Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia* [Introduction to Indonesian Customary Law Sciences], (Bandung: Mandar Maju, 2014), 252-253.

²⁵ Rachmat Trijono, *Sistem Hukum Nasional: Teori dan Praktik* [National Legal System: Theory and Practice], (Depok: Papas Sinar Sinanti, 2020), 81.

For this reason, Lodewijk Willem Christiaan Van den Berg (1845-1927 AD/1261-1346 AH) concluded that Indonesian Muslims accepted and enforced Islamic sharia as a whole. This conclusion became known as the *Receptio In Complexu* theory. In 1889 AD/1306 AH, Christiaan Snouck Hurgronje (1857-1936 AD/1273-1355 AH) gave birth to the *Receptie* theory. It was deliberately blown up to disrupt the legal system that had been adhered to by the community at that time, namely clashing Islamic law with Western law, and clashing Islamic law with customary law, thus weakening Islamic law. He did so by arguing that Islamic Law was a customary law, namely the customs of the Arabs practiced by the Indonesian people. As a result, the authority of the Religious Courts in Java and Madura was minimized, and limited to marriage only, while inheritance cases were revoked and transferred to the *Landraad* (Native Court). Likewise, in South Kalimantan, *Kerapatan Qadhi* and *Kerapatan Qadhi Besar* were established through *Staatsblad* (State Gazette) 1937 No. 638-639. Later in 1854 AD/1270 AH, the authority of the religious courts was limited by the Dutch colonizers. Through article 78 of the 1854 *Regerings Reglement* (RR: Rule Amendment) (*Staatsblad* 1855 No. 2), it was decided that religious courts should (i) had no jurisdiction over criminal cases, and (2) only had jurisdiction if, according to religious laws or old customs, a case had to be decided by a religious court.²⁶ Thus, the authorities that the religious courts enjoyed during the colonial period mostly regulated family law (*al-ahwal al-syakhshiyah*) and were completely prohibited from regulating public affairs, such as criminal law.

In the past, Islamic law began to enter the legal system adhered to by indigenous people in Indonesia, among others, through the law enforcement by Islamic kingdoms and sultanates that made up the archipelago that is now Indonesia. People's daily behavior is regulated by a social norm, i.e., a set of rules or life guidelines. These guidelines are usually unwritten, yet they will continue to apply in people's lives.²⁷ As mentioned earlier, the *reception in complexu* theory suggests that Islamic law applies fully to Muslims or the followers of Islam because they have embraced and devoted themselves to Islam, despite some deviations in implementing Islamic law in practice.²⁸ Likewise, Hindu law applies fully to Hindus because they have devoted themselves to Hinduism. Customary law can only be recognized by the community if it has been cleaned or purified from those elements that are not consistent with the interests of the country, in this case Indonesia as a nation and its people. Applicable customary law must be completely in line with national interests. Hence, any regional characteristics that interfere with national interests must be eliminated.²⁹ Thus, the legal position of customary law is assessed as a living law in society as required by law to be used as a guide for judges in making legal discoveries.³⁰ Aceh's customary law is still developing and continues to receive a variety of interpretations from various parties. For Acehnese people, customs is seen as a unity of sacred values, traditions, and symbols embodied in rituals and ceremonies.³¹

²⁶ Interview with Ismail Aliudin, Reje Kampung Paya Tumpi I, 18 February 2019

²⁷ Hazar Kusmayanti et al., "The Settlement of Disputes Regarding Division of Joint Property After A Divorce In The Central Aceh Regency", *Jurnal Ilmiah Islam Futura*, Vol. 21. No. 2, (2021), 170-182, <http://dx.doi.org/10.22373/jiif.v21i2.6599>.

²⁸ A. Rahmat Rosyadi and M. Rais Ahmad, *Formalisasi Syariat Islam dalam Perspektif Tata Hukum Indonesia* [Formalizing Islamic Sharia in the Perspective of Indonesian Legal System] (Bogor: Ghalia, 2016), 74.

²⁹ Juhaya S. Praja, *Teori Hukum dan Aplikasinya* [Legal Theories and Their Applications], (Bandung: Pustaka Setia, 2011), 81.

³⁰ Putu Dyatmika, *Kedudukan Hukum Suami Istri dalam Perkawinan Gelahang Menurut Hukum Adat Bali* [The Position of Husband and Wife in *Gelahang* Marriage According to Balinese Customary Law], Skripsi [Final Project], (Jember, Fakultas Hukum Universitas Jember, 2018), 56.

³¹ M. Ridha, *Peumat Jaroe: Proses Mediasi Menuju Harmoni dalam Masyarakat Aceh* [Peumat Jaroe: A Mediation Process Towards Harmony in Acehnese Society] (Aceh: Lhee Sagoe Press dan CV. Meuseuraya, 2017), 26

In addition to judges' reasonings, court decisions must also contain specific articles of relevant legislation such as laws and regulations, as well as unwritten legal sources.³² An interview with Sarafi, the Head of District Court Class IA of Lhokseumawe, Aceh, revealed that not all cases were resolved by referring to written, codified laws. In fact, some certain cases must be resolved by seeking legal norms that existed and grew in the society. According to Sarafi, some judges explored the values that lived in the community in Aceh in resolving cases of customary disputes related to *langgeh* rights (Syuf'ah). Within this *langgeh* right, a part of it was *muamalah* issue. The *langgeh* rights was tightly related to Qanun, in which the *langgeh* rights of some Acehnese customs were based on and governed by Qanun.³³

The decision of the Supreme Court of the Republic of Indonesia No. 298 K/Sip./1973 dated March 31, 1977 defines *langgeh* rights as the rights in Acehnese customary law that give priority to certain people to purchase land. These rights are given to relatives, fellow community members, and neighboring landowners. *Langgeh* rights are sourced and derived from Islamic law. As every Muslim believes that Islam was brought upon this world as a blessing from God to save humanity, they also believe that every Islamic teaching has undoubted truth. *Langgeh* rights aim to make the Acehnese people prosperous. In addition to providing the definition of *langgeh* rights, this decision also reaffirms further its existence.

The link between customary and religious laws adopted by certain indigenous peoples can also be found in Aceh Province. According to the Acehnese people, Islamic law is their custom, and their custom is Islamic law.³⁴ Some decisions that combine customary and Islamic laws could be found in, for example, marriage, inheritance, and land disputes in Aceh. In these cases, judges may seek a balance between the values and norms of customary law and the teachings of Islamic law.

The first case was the division of joint property between Mr. DA, a self-employed person, and Mrs. MP, a civil servant. They were married in 2010 in the presence of the Marriage Registration Officer of the Religious Affairs Office of Pegasing Sub-district, Central Aceh District. During their marriage, they lived together in Jurusen Village, Pegasing Sub-district, Central Aceh District. From the marriage, they had two children. In addition, they have joint assets in the form of:

1. The 9.5 x 16 m house located in Jurusen Village, Pegasing Sub-District, Central Aceh District.
 2. A plot of land of ± 1 (one) ha wide, as per AJB Number: 1173/PGS/2014, located in Kampung Kung, Pegasing Subdistrict, Central Aceh District, with the following boundaries:
 - 1) To the north, it was bordered to Arjuna's land
 - 2) To the south, it was bordered to the road
 - 3) To the east, it was bordered to Dailani Aci/Asan AW, and
 - 4) To the west, it was bordered to PT. Nosapan
 3. One unit of "Vario" motorcycle with Vehicle Registration Number BL 3908 GR;
- In addition, they also had joint debts, consisting of:

³² Erlina Maria Christin Sinaga, "Politik Legalisasi Hukum Tidak Tertulis Dalam Pembangunan Hukum Nasional" [The Legalization of Unwritten Laws in the National Law Development], *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional*, Vol. 8 No. 1, (2019), 1-17, <http://dx.doi.org/10.33331/rechtsvinding.v8i1.306>

³³ Nila Trisna, Ilka Sandela, and Adam Sani, "Tinjauan Yuridis Konsepsi Hak Langgeh Dalam Masyarakat Tradisional Hukum Adat Aceh" [Juridical Review of *Langgeh* Right Conception in Aceh Customary Law Traditional Society], Vol. 5 No. 2, (2021), *Ius Civile: Refleksi Penegakan Hukum dan Keadilan*, 50-59, <https://doi.org/10.35308/jic.v5i2.4421>

³⁴ Interview with Lilik Mulyadi, 23 September 2020 at 13.00 WIB

- 1) Outstanding debt to Bank Aceh amounting to Rp. 80,000,000, - (eighty million rupiah);
- 2) Jointly owned 75 grams of gold pawned at Pegadaian Syar'iyah Takengon;

In their married lives, Mr. DA and Mrs. MP jointly earned income to support their family. They lived in harmony until problems arose in their household in 2013, and the peak occurred in January 2017. The household problems between Mr. DA and Mrs. MP had been repeatedly resolved by family deliberation, but no way out seemed to be found. Finally, in July 2017, Mr. DA and Mrs. Siti decided to end their marriage. In regard to the divorce, they finalized it at the Sharia Court, and the joint property was divided at the Sharia Court as well.

Based on the decision in the Takengon Sharia Court on their case number 269/Pdt.G/2017/Ms-Tkn dated May 2, 2018, the Panel of Judges decided that in terms of the division of joint property, the parties (Mr. DA and Mrs. MP) were entitled respectively to $\frac{1}{2}$ (one-half) of the total property after it was deducted by their entire joint debt.

When a disagreement between a husband and wife regarding their joint property arises, the judge turns to the theories on application of Islamic law, which is Article 88 of the Compilation of Islamic Law, and the resolution of the disagreement is presented to the Religious Court. The Marriage Law, the Compilation of Islamic Law, and the Religious Courts in general serve as guidelines for how issues regarding the division of joint property are resolved in the Takengon Sharia Court. According to Article 97 of the Compilation of Islamic Law, divorced widows or widowers are each entitled to one-half of the joint property as long as the marriage contract does not provide otherwise. One example of this was the aforementioned case of division of joint property between Mr. DA and Mrs. MP. As explained earlier, it was decided by the Takengon Sharia Court that each of them received one half of their joint property after being deducted with their joint debts. This was because during their marriage, Mr. DA and Mrs. MP not only had joint property but also joint debts.

It has been widely known that the division of joint property refers to the practice of the community in Aceh in particular and the Malay Archipelago in general. Before the formalization of Islamic law in Indonesia, the issue of the division of inheritance, joint property, and other property in these communities was widely resolved using this method. The customs practiced by the community are actually based on Islamic teachings such as those found in Aceh, Minangkabau, Banjar, Bugis, and Makassar.³⁵

Article 97 of the Compilation of Islamic Law determines that the one-half division of joint property for each party. It aims to provide protection and strengthen the existence of women financially. Based on several cases from both the literature and interviews, in Aceh, the division of joint property follows that of inheritance. Generally speaking, the joint property is divided following a one-third pattern.³⁶ However, in some cases, the division followed a one-half pattern. This was the case in families where both the husband and wife worked.

³⁵ Abidin Nurdin, Pembagian Harta Bersama dan Pemenuhan Hak-Hak Perempuan Di Aceh Menurut Hukum Islam [The Division of Joint Property and Fulfillment of Women's Rights in Aceh According to Islamic Law], *El-Ussrah: Jurnal Hukum Keluarga*, Vol. 2 No. 2, (2019), 139–152, 10.22373/ujhk.v2i2.7652.

³⁶ Zaiyad Zubaidi, Tanggapan Ulama Dayah Terhadap Pembagian Harta Bersama Menurut Pasal 97 KHI [Dayah Ulema's Response to Division of Joint Property as per Article 97 of KHI], *Media Syariah*, Vol 22, No 1 (2020), <http://dx.doi.org/10.22373/jms.v22i1.6615>

Generally, in Aceh, the joint property cases are resolved based on *urf*, a custom that has become law in the communities. One of the *fiqh* (rules) states that a custom can be used as a source of law, provided that it (i) is generally applicable, (ii) does not conflict with sharia, has been in effect for a long time, and (iii) does not conflict with *tashrih*. In this joint property division issue, if an agreement cannot be reached, it must be consulted with the community whether there is a custom (*urf*) regarding the distribution of joint property. *Qadha* is a decision made by a local judge on a matter presented to him. It is the last possible system to be used if *sulh* and *urf* is not possible to be utilized or do not result in resolution. Under these circumstances, the presiding judge must pay close attention to the condition of the husband and the wife, before determining the distribution of the joint property. Judges may use the civil law applicable in the judiciary, as long as it does not conflict with any Islamic law. Back to the case mentioned above, the Panel of Judges generally referred to Article 97 of the Islamic Law Compilation which stated that a divorced woman or widower was entitled respectively to one-half of the joint property as long as it was not specified otherwise in the marriage agreement.

Furthermore, another interesting case arose regarding the position of adopted children against an inheritance. The case was solved in the Decision of the Aceh Sharia Court No. 125/Pdt.G/2011/MS Aceh. The decision established that Nursiah bint Abd. Roni as the adopted daughter of the late Umar bin M. Ali would obtain the right of will and testament of 1/10 of the inheritance of the late Umar bin M. Ali Ali. This decision was unique, because even though the Compilation of Islamic Law set forth that the adopted child was not an heir of the adoptive parents, she was still given a way to enjoy the inheritance of her adoptive parent by means of a mandatory will, in this case 1/3 of her adoptive parent's inheritance.

In another place, it was also found that Banda Aceh Sharia Court actually passed a decision that the adopted child was determined to be an heir of their in the Decision Number 084/Pdt.P/2016/MS.Bna. The problem with this decision was the fact that the adopted child was determined as the heir. Previously, the adopted child and his six younger siblings filed a petition to Banda Aceh Sharia Court. To some, the decision was not correct. This was because no provision had been set for adopted children to be heirs. The Panel of Judges of the Banda Aceh Sharia Court determined that the adopted child could be an heir because he had cared for and looked after his adoptive parents. In order to repay the child's services to his adoptive parents, the Panel of Judges provided legal certainty to the adopted child for his welfare.³⁷

In the authors' opinion, however, the decision was the most appropriate. Even though the Acehese community is a parental kinship society, when the customary law is contrary to Islamic Sharia, it would not be Acehese custom. For the people of Aceh, Islamic Sharia is the standard norm that regulates all life behavior, including child adoption, because customary law for the people of Aceh is sourced from Islamic Sharia. Acehese people adopt children in order to realize the principle of *ta'awun*, or helping fellow Muslims. This is evidenced by the use of the Acehese term "*aneuk geutung*," which has a closer meaning to compassion or mercy. According to the Compilation of Islamic Law, an heir is someone who is declared to have a relationship of kinship either by blood (*nasab*) or marriage, is Muslim, and is not prevented from inheriting, as mentioned in Article 173 of

³⁷ Ridha Syahfutra, Khairuddin, Pemenuhan Hak Anak Kandung Dan Anak Angkat Melalui Putusan Pengadilan (Analisis Putusan Mahkamah Syar'iyah Banda Aceh) [Fulfillment of Biological and Adopted Children's Rights through Court Decision (An Analysis of Banda Aceh Sharia Court's Decision)], AHKAMUL USRAH: Jurnal Hukum Keluarga Dan Peradilan Islam, Vol. 1 No. 1 (2021), 27-46, <https://doi.org/10.22373/ahkamulusrah.v1i1.1417>

the Compilation of Islamic Law.³⁸ Furthermore, the criteria for heirs are listed. Article 171 letter c of the Presidential Instruction on the Compilation of Islamic Law states: “An heir is a person who, at the time of the testator’s death, has a relationship by blood or marriage to the testator, is Muslim, and is not prohibited by law from becoming an heir.”³⁹

Inheritance for adopted children is by a compulsory will, as mentioned in Article 209 of the Compilation of Islamic Law, “ adopted children shall not receive any right nor property, unless by a mandatory will, amounting to 1/3 of the property of the adoptive parents.” The general rule of testamentary law that applies to compulsory will is the provision of the stages that must be passed before the distribution of the will, as stipulated in the Qur’an Surah An-Nisa verse 11. The tradition of adopting children is still alive in the society, including among the people of Aceh. Child adoption in Acehese society is more dominantly influenced by Islamic sharia than by customary law. And the provision of mandatory wills, since the enactment of the Compilation of Islamic Law in Indonesia gained its legal force and juridical form to be used as a reference for judges in practice in the Religious Courts, has been recognized in the positive law in Indonesia.

From this fact, it should be clear by now that the position of customary law is strategic in Indonesian law, including in the formation of legal jurisprudence by judges in court. In addition to being a court decision that has become permanent in the field of customary law, jurisprudence based on the values of customary law is also a means of fostering customary law.⁴⁰

Conclusion

How customary law was accepted by judges in courts in Aceh Province required a theory on the relationship between customary and religious laws in Indonesia, especially Islamic law. The culture and customs in Aceh Province is one of Indonesia’s invaluable assets, as well as what binds the people of Aceh, apart from the fact that the people of Aceh are a religious society. Therefore, in the authors’ opinion, Hazairin’s theory can still be used when it deals with the decision of the panel of judges at the Aceh Sharia Court. This aims at preventing conflict between the three legal systems (customary, religious, and national). However, if the customary law is contrary to Islamic Sharia, the panel of judges will not accept the customary law. For example, adopted children would not receive inheritance as in the parental kinship society. They can only receive a mandatory will. Thus, for the people of Aceh, Islamic Sharia is the norm standard that regulates all life behavior including child adoption because customary law for the people of Aceh is sourced from Islamic Sharia.

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³⁸ Abdul Rokhim, Jurnal: Harta Waris Pada Anak Angkat Menurut Kompilasi Hukum Islam Di Pengadilan Agama Samarinda [Inheritance in Adopted Children as per Islamic Law Compilation in Religious Court of Samarinda], Jurnal Legalitas Vol. 5 No. 2, (2020), 1–25, <https://doi.org/10.31293/lg.v5i2.5032>

³⁹ Op.cit, Ridha Syahfutra, Khairuddin

⁴⁰ Zaka Firma Aditya and Rizkisyaba Yulistiyaputri, “Romantisme Sistem Hukum di Indonesia: Kajian Atas Kontribusi Hukum Adat dan Hukum Islam terhadap Pembangunan Hukum di Indonesia” [The Romantism of Legal System in Indonesia: A Review of Customary and Islamic Laws’ Contribution to Development of Law in Indonesia]. Jurnal Rechtsvinding Vol. 8 No. 1 (2019), 37–54.

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