A CHANCE OF A BIRTH SYARI’AH LOCAL REGULATION IN THE LEGAL SYSTEM IN INDONESIA

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ABSTRACT
In the provision of Article 18 paragraph (6) of the constitution 1945 Constitution states that local government has the right set of local regulations and other regulations to implement the autonomy and duty of assistance. Furthermore, in Law Number 12 Year 2011 on the Establishment of Legislation, local regulations as one form of legislation to be one source of legislation Indonesia and ranks fifth. Through these two rules above any local government has the right to form local regulations as the implementation of the principle of decentralization of government through a form of autonomy to administer and regulate the affairs of the household of the area. Local regulation which was formed to implement regional autonomy under the authority of any government, of course, contains the rules of law that is closely related to the content of the autonomy of the region concerned, and must not conflict with the rules of law contained in other legislation occupies a position/degrees which is above the local regulation that became an important part in the national legal system of Indonesia. A local regulation containing the rules of law relating to the implementation of Islamic law, is not becoming the content of the local autonomy, because matters of religion (especially Islam) is to be attached to the authority of the central government based on Law Number 23 Year 2014 on Regional Government junto Law Number 2 Year 2015 and Law Number 9 Year 2015 on The Second Change of Law Number 23 Year 2014 on Regional Government. Except Qanun (a kind of local regulations in Aceh Province) governing the implementation of Islamic law in accordance to the characteristics of the characteristics of special autonomy (previously called special autonomy) under Law Number. 18 of 2001 on Special Autonomy for Local Government of Aceh as Nanggro Aceh Darussalam later replaced by Law Number. 11 Year 2006 concerning Aceh Government, which is constitutionally recognized by the provisions laid down Article 18B paragraph (1) of the Constitution 1945, which the Government recognizes the unit of government with its particularity or specialty.

Keywords: local regulations, autonomous regions, Islamic law, national legal systems.

INTRODUCTION
Recently, the term of syari’ah has been so popular in the community in Indonesia. It was started, for example, with the establishment of Bank Muamalat as the first Islamic bank in Indonesia and was followed by the establishment of other syari’ah banks that began mushrooming in the country. Lately, the term syari’ah has begun reaching into the legal system of the country, especially with laws product in various areas with the number of legal substance in Islamic Syari’ah legal norms incorporated into the local legal product that is labeled Regional Regulation (Peraturan Daerah or Perda). Even by taking samples in the province of Nanggro Aceh Darussalam (NAD) no local regulations are known as the Qanun in NAD that clearly called it in the title of regulation or Qanun, for example Qanun Aceh Province Number 10 of 2002 on Judicial Syariat Islam and Qanun Aceh Province Number 11 Year 2002 on the Implementation of Islamic Syari’ah Division of Aqeedah, Worship, and Symbols of Islam.

Due to the Republic of Indonesia is not an Islamic state although inhabited by the majority of the Muslim Ummah, the problem of syari’ah local regulations become a controversial issue, because Indonesian legal system does not fully adopt the system of Islamic law as the national legal system. The national legal system is patterned with Continental European legal systems. This can be realized in the view of
Indonesia ever colonized many hundreds of years by Western countries (the Netherlands), so that not only the system of socio-economic and political as well as cultural was adopted in regulating the behavior of life of the state and society, even how religious setting of life became an inseparable part in our national legal system. So it is not surprising that even though Indonesia is a country that is predominantly Muslim in the world, it does not make the Islamic syari'ah as the backbone or spirit of national legal systems as a whole in a variety of community life settings. Because it is a coincidence in this country other than Islam there are many adherents of other religions such as Christianity (Protestant and Catholic), Hinduism, Buddhism, even after the reform acknowledged again a religion called Khong Hu Chu that is majority held by ethnic Chinese in Indonesia.

Controversial against syari'ah local regulations became so prominent, causing the pros and cons in the life of society. The debate has even been also went into the hall of parliament (the House of Representatives), so the debate was so intense that raises some supporting groups and non-supporting groups for the syari'ah regulations, and to avoid more widespread conflict into the midst of society, then the House chairman and fractions’ chairmen agreed not to proceed the dissenting opinions around the syari'ah regulations. Then how about the coming problems if taken a look from the standpoint of the National and Constitutional Legal System?. This paper tries to find the answer.

METHODOLOGY
State Law Indonesia after the Proclamation of Independence

As a new state in which just managed to liberate his people from foreign imperialism, in fact Indonesia has a vast opportunity to define national identity and his state union. However, due to the background of the people of Indonesia which consists of multi-ethnicities and religions (unity in diversity), the founding fathers when creating the order of statehood and society were aware of the condition of Indonesian society that is so complex, so as to remain be able to maintain the independence of the conditions of pluralism. This is a major concern as a basis for setting the life of the state and society.

Indeed how the opportunity and the position of the Islamic Syari'ah become a cornerstone of the social life of the state and nation of Indonesia has been created by agreement of the founding fathers (including non-Muslims) in BPUPKI with the birth of the Charter of Djakarta on June 22, 1945. However, this agreement being raw on dated August 18th, 1945 when PPKI would authorize the Constitution as the result of BPUPKI’s work in the time of the arrival of a "messenger of the eastern part of Indonesia” which requires seven (7) words in the Charter of Djakarta that reads "the obligation to carry out Islamic law for its adherents" (the same word also contained in the text of Article 29 of Constitution 1945) that abolished because it contains elements of religious discrimination, and if not accommodated their request, then they threatened to withdraw from the State Indonesia that proclaimed a day earlier. Because of this threat, then eventually to continue of foster unity in this new born country, the founding fathers also include Islamic figures who sit in PPKI like Ki Bagus Hadi Kusumo, Kasman Singodimedjo, K.H. Wahid Hasyim and Mr. Teuku M. Hasan agreed to the proposed demand by the messenger, so the text of the Charter of Djakarta was changed as stated in the Preamble of the Constitution 1945 that we know today. This is a form of big compromise from the Muslims in the community who are not Muslim other.

With regard to a question, the legal system is to be used to organize and manage the nation's nascent? Actually, according to the root of history of law in Indonesia, long before foreign nations invaded this nation, we know that the legal system is derived from ethnic communities of Indonesia, namely the system of customary law and the Islamic legal system. But because it was difficult to determine the customary law of ethnic nation which can be used as a kind of lingua franca for the national legal system to be built, and also because the Islamic legal system was going to happen some rejections particular form other ethnic and religions, then both legal systems of ethnic communities living in the Indonesia is not an option when the law will determine what the ideal style legal system built in the Republic of Indonesia.

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Why does this happen? As said Bustanul Arifin, that in Muslim countries there is a dichotomy of legal awareness, namely the dichotomy between Islamic Syari’ah and legal heritage of the western countries that ever dominated Muslim countries. This may happen due to the colonialists formerly always contrasts between the legal systems of their colonies and western legal system that they created, and always has a policy of pitting inter-ethnic and inter-religious (like the political *divide et impare* conducted by the Dutch colonial rule in Indonesia). Just a little gimmicky, further stated by Bustanul, is like the case in India, where since 1937 the Islamic Syari’ah law applies to adherents of the Muslim while the Hindu community applies the rules of Hinduism. This can happen because the British colonial administration in India do not run the politics of divide.

Finally consciously acknowledge by the founding fathers that western legal systems as the basis for establishing a national legal system of Indonesia. This is due to the legal system has been hundreds of years got closed to Indonesia although here and there to obtain legal discrimination, in addition to building a national legal system that is ideal and can continuously adjust to developments and changes in society. It is believed that the legal system will be easily to be accepted because pragmatically it can be said that the legal process will be done through the establishment of the legislative process conducted by state institutions (in this case the House of Representatives and the President) were given the authority to shape it. So, the European Continental Legal System with the characters of the European nation, in this case the Netherlands, then forwarded by the Indonesian people.

As ne new born state, Indonesia had to follow Continental European Legal Systems (western legal systems) because Indonesia had not possessed law based on its tradition but still benefitting the legislation and law of the Dutch Colonial Government, even though on the basis of political situation and nationalism the Dutch law was running the nationalization process. That is why all products of the Dutch colonial law is still considered to be valid before it is made new by the authoritative state agencies that are the President together with the House of Representatives. This example can be read in the provisions of Article II of the Transitional Provisions 1945 (prior to the amendments / changes to Constitution 1945), which reads "All state agencies and direct existing regulations still in force as long as has not been held the new on the basis of this Constitution". Consequently, the State has immediately to prepare products in accordance to the national laws based on national dignity that is free and independent from foreign imperialism. However, because of an uneasy thing to create legal regulations, in addition to maintaining a legal vacuum or legislation (*rechtsvacuum* or *westvacuum*), then inevitably the legal system of the colonial still considered valid continues to wait replaced by a national legal system that will replace The Dutch colonial law. Even the State has been independent for 70 years, there are still about tens or even hundreds of pieces of colonial legislation are still valid until today. A job that will take time for the representative body to replace the Dutch Colonial law with the national legislation.

*National Legal System after the Reform and the Change of Constitution 1945*

After the reformation in 1998, In order to actualized the life of the nation after about 30 years the Indonesian people had been indoctrinated by the New Order Regime in many aspect of national life, since the Reformation Order in 1998 the New Regime has many homework to clean all authoritarian elements from the life of the nation, as well as to build a legal system that reflects justice both national and regional.

One thing that is so phenomenal after the reformation is the rising of new local autonomy policy that refresh for the community in various areas, namely with the enactment of Law Number 22 Year 1999 on Regional Government which was later replaced by Law Number 32 Year 2004 on Regional Government, and then was replaced by Law Number 23 Year 2014 junto Law Number 2 Year 2015 and Number 9 Year.

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The existence of local regulations in the national legal system of Indonesia, is due to Indonesia as a unitary state adopts a decentralized governance on the part of the territory of the country. This was followed by a decentralized system which then gave birth to the principle of autonomy as stipulated in Article 18 paragraph (2) of the Constitution 1945, every local government has the right to organize and arrange its own affairs of the autonomous regional government. In the case of this form, local government has legal authority to make its own district regulations.

Because of local regulation is part of the national legal system, the status and substance of any rule of law being regulated becomes an inseparable part of the national legal system itself. That is because the national legal system is reflected in the sources of law derived from the sort order of the legislation, then local legislation was not allowed to deviate from the sort order for the legislation (principle of the hierarchy of legislation) properly when viewed in terms of the authority of the formality and the substance of the law which regulates.

Local regulations is established by the Regional Head after approval together with the Parliament as it is stated in the Law Number 32 Year 2004 junto Law Number 2 Year 2015 and Law Number 9 Year 2015 on Regional Government. Of course the authority of the Head of Region together with Parliament to make and set local regulations derived from the regional affairs that comes from decentralized administration of the central government to local governments. With the submission of the governmental affairs to the domestic affairs, it means that the governmental policy has shifted from central government under the authority of local government. Thus, the transfer of affairs that means regional government and communities be given the trust and the opportunity to participate in the administration of the affairs in organizing the government, especially in accordance to the conditions and peculiarities of the area that became its autonomy.4

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4 Faisal Akbar Nasution, Pemerintahan daerah dan Sumber-Sumber Pendapatan Asli Daerah (PT Sofmedia, Jakarta, 2009), 11.
In fact, in this autonomous area there is freedom and independence in carrying out governmental affairs by local government which took delivery of autonomy, it can even be said that it is liberated and independent nature of the contents of autonomy.\textsuperscript{5} But the independence here does not mean as an independence in term of nation, although there is something similar between independence and autonomy there are also something different between the two. The most fundamental difference lies in the question of sovereignty. In principle, the sovereignty is belonged to the central government, and not given to the local government. If there is any local government runs the State sovereignty, it is limited to carry out the household affairs of the autonomy only which is on the last level must be a responsible of the central government. Or in other words, in the autonomy contained its own initiative to take or make decisions based on the aspirations of the people without the need to be closely monitored by the central government.

**DISCUSSION**

In light of the Constitutional Law, local autonomy can be said as a sub-system of the administrative system of the State as an unitary state. Therefore, talking about autonomy is certainly to be within the framework of unity as well. Just a matter of fact is how much the freedom and independence of a region can and is able to implement its autonomy and how great the trust of the central government handed its affairs over the autonomous regions is very much related to the ability of bargaining policy between the central government and local government that is implemented in the form of regulations on local government.

Based on the provisions contained in Law Number 23 Year 2014 junto Law Number 2 Year 2015, the governmental affairs submitted to regional government with its autonomy become so vast, and it can even be said that in addition to the governmental affairs under the authority of central government as stipulated in both Acts are only limited in the field of foreign policy, defense and security, justice, monetary and fiscal, as well as in the field of religion. Out of these areas can be a matter of regional autonomy. Thus, the authority of an autonomy for the region is so vast because both laws embrace the teachings of autonomous formal system, namely the division of affairs between the central government and the regional government, where the regions generally have the freedom to organize and take care of everything that is considered essential for the progress and development of the region, as long as the area does not regulate the affairs of (in this case in the form of local regulations) which has been set up and administered by the central government under the legislation of a higher rank.

From the description above, it can be concluded that the region with its regional autonomy can make settings in the affairs of government except in matters that have become central governmental affairs, including in particular in this paper in the field of religion. This means that in the field of religion, arrangements relating to the implementation of religious policy and legislation become the full authority of the central government (under both laws rule above) either in the form of legislation, governmental regulations, and other forms of regulation. Thus, the area is not allowed to set up something related to religious policy and legislation (particularly Islamic law that became the topic of discussion of this writing) because that is not a part of the authority of of regional autonomy.

So how enthusiasm of some regions make local regulations based on Islamic law? Especially for the province of Aceh, it is the problem of Islamic *syari’ah* became autonomy of its kind based on Law Number 44 of 1999 on the Special Status of the Province of Aceh and Law Number 18 of 2001 on Special Autonomy for Special Province of Aceh as Nanggroe Aceh Darussalam, and lastly by Law Number 11 Year 2006 regarding the Government of Aceh, where privileges and autonomy of the specificity of Aceh Province as stipulated in Article 16 paragraph (2) of Law Number 11 Year 2006 are included:

a. organization of religious life in the form of implementation of Islamic syari’ah to its adherents in Aceh while maintaining harmony among religious believers;
b. implementation of the custom based on Islam;
c. implementation of quality education and increase the material based on local content in accordance to the Islamic syari’ah;
d. the role of ulama (Muslim scholars) in determining policies in Aceh, and;
e. implementation and management of hajj in accordance to legislation.

Of all the above affairs of local government of Aceh province on the so-called compulsory affairs, further implementation will then be arranged in the Qanun of Aceh guided by laws and regulations (Article 16 paragraph (4) of Law Number 11 of 2006). Privileges and specificity of Aceh got autonomy backrest constitutional under the provisions of Article 18B paragraph (1) of the Constitution 1945. This constitutional provision which states that the state will recognize and respect the units of local government that is special or regulated by legislation, giving legitimacy for areas that get special status and privileged to carry out governmental affairs as long as has been arranged in advance with the form of legislation.

This is, in the theory of decentralization called asymmetric decentralization,\(^\text{6}\) which is possible in any State to adhere the governmental affairs that can vary from one region to another based on the distinctiveness or specific things of governmental affairs that may not exist in other regions which are in the same State.

Therefore it is not a problem for the Aceh provincial government, and district and city governments under the this province, to issue local regulations (which they call by the term Qanun) which regulates the problems of the implementation of Islamic law in their area, as well as the specificity of Papua province in the field of customs recognized in the form of legislation (Act No. 20 of 2001 on Special Autonomy for Papua) and the privilege of Yogyakarta area in terms of the appointment of the Head, a local (Governor) derived from relatives in Keraton (palace) / king of Yogyakarta, and is not bound by the provisions of tenure, terms and manner of appointment as the post of Head of the Region in the other area - area based on Law Number 3 Year 1950 on the Establishment of the Special Region of Yogyakarta which at this time has been replaced by Law Number 13 Year 2012 on the Autonomy of Yogyakarta Region. Even in terms of following-up the implementation of Islamic law through the Qanun in which Aceh Province has issued two very important pieces of Qanun related to in the implementation of Islamic law, namely Qanun Number 10 Year 2002 and Qanun Number 11 Year 2002 as has been cited in the introduction above.

Just keep in mind, because of Aceh is an area that is included in and become an integral part of the Unitary State of the Republic of Indonesia, the presence of the substance of the law contained in the Qanuns is certainly must adapt itself to the provisions of the national law as an expression of the rule of law adopted by the Republic of Indonesia.

So if there is a legal materials in the Qanuns contrary to the rules of national legislation that can be tested through the courts at the Supreme Court, and if the decision of the Supreme Court later decided the Qanuns are contrary to the higher legislation regulated in Law Number 12 Year 2011 on the Establishment of Legislation, then of course the Qanuns should be revoked or canceled by the authorities of Aceh government which issued the qanuns.

In areas other than the province of Aceh, it was suspected to have spawned local regulations filled with nuances of syari’ah, such as Tangerang City with the Regional Regulation Number 8 Year 2005 on the Prohibition of Prostitution. Seen from the format of the title of this regulation it is not the syari’ah local regulation but it is an ordinary local regulation that is governing the prohibition of prostitution problems, as well as the North Sumatra Provincial Regulation Number 6 Year 2004 on the Prevention of Trafficking on Women and Children in North Sumatra. Although in Islamic law prostitution is prohibited (even all religions teach the same thing), but it can not be said that the problem of prostitution is solely the domain of Islamic teachings, even in national legislations, the problem of prostitution is an act that is prohibited by law (Criminal Code) where the actors and whorehouses providers may be imposed with criminal law sanctions (prison sentence). Even if traced further legal norms contained in Regulation of Tangerang City there are issues that can be categorized violate human rights (HAM), that such provisions are contained in Chapter II, which regulates the prohibition, which in Article 4 paragraph (1) of its states "Any person whose attitude or behavior is suspicious, giving rise to a presumption that he/she are prostitutes are banned from public roads, public arena, home lodging, inn, hotel, people houses and lodging houses (rumah kontrakan), coffee shops, entertainment places, spectacle-angle corner of the street or the hallway or other places in the area ". The provisions of this article have ignored the principle of the presumption of innocence in a universal system of criminal law, but it can be posed the question of whether it is the wrong when a person is in those places because of something else could be expected as a prostitute or a consumer?, and whether if someone is known as a prostitute should not be located in public places as mentioned in this article although actually they're not doing prostitution transaction?, and many more that could raise questions regarding the contents of Article 4 paragraph (1) of this Regulation. Furthermore, in paragraph (2) it states "Anyone prohibited from making out, hugging and/or kissing which leads to sexual intercourse, either in public places or in places visible to the public".

Although the acts mentioned in this article, except to couples (husband and wife) prohibited by the religion of Islam according to the syari’ah, but the sanctions which can be imposed on them only religious sanctions; those actions that can lead to sin. Therefore, the act could not be subject to criminal sentence as a destination by through the birth of the local regulations, because such an act is not prohibited according to the provisions of the National Criminal Code. Anyway sanctions applied in this Tangerang City as it is regulated and provided for in Article 6 is the people concerned returned to the family or place of residence through the Village Chief to be developed (religiously trained). A sanction that is important to be asked its effectiveness, especially in families with loose rules of family based on religious teachings and customs.

When viewed from the substance of Syari’ah law which can be set in the legislation, particularly local regulations, in addition to the problems of prostitution as mentioned above, there is more that can be loaded in the form of other local regulations, a case example of a violation or crime within the category of Islamic criminal law as it is called by TGK. H. Anwar Fuadi A. Salam, first offense/crime in terms of hudud as fornication, qazaf (accusing someone else commits adultery), drinking, stealing, robbery (harbah), a security breach, apostasy, rebellion (baghyu).

The second offense/crime included in the term qisas-diyyat such as murder, and persecution, and the third offense / crime included in the term ta’zir like usury, embezzling deposit, graft, corruption, cursing people and so forth.\(^7\) In addition to the examples in the field of criminal law can still be entered again the examples in the field of civil law, commercial law, and other areas of law, but because it is more prominent in the field of criminal law, then the context of the discussion in this paper is in the field the criminal law.

If the provisions of Islamic criminal law wished to be included in the form of local regulations, merely used to be able to enforce Islamic law (specifically in the field of criminal law) inside of communities in a region, then the existence or status of Islamic criminal law that has been placed in the lower position when

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\(^7\) Tgk. H. Anwar Fuadi A. Salam, Dapatkah Syariat Islam Diberlakukan di Aceh? (Banda Aceh: Amal Sejahtera, 2004), p. 82-84.
compared with if the provisions of the Islamic criminal law was published in the form of national law such as the one existed during this time. That is a crime under Islamic law it has been qualified as a criminal act violation, because the criminal law can be loaded in the form of local regulations is only in the form of a criminal act of which the penalty is imprisonment maximum for 6 (six) months, so this case be categorized as a violation. Even the punishment can be an alternative to fines of maximum amount of Rp. 50,000,000.00 (fifty million Rupiah). Then, with this problem can arise another problem, namely that syari'ah (Islamic criminal law) is of course only applied to those who are Muslims, and then if someone who is not Muslim, would it be able to be imposed and to choose sanctions provided for in the regulation of this area if he has done an act which forbidden according to Islamic law as stipulated in the local regulations of the area? When the corresponding (non-Muslims) can not be subject to the local regulations, of course, actions can be charged in accordance to the provisions of national law (in the form of laws and regulations etc.), and this means that qualification of criminal act (in this case the crime) and penalties (imprisonment in this case) will be heavier imposed against him/her. In this case it could be possible to lead to a sense of injustice law because no special treatment among the citizens of an area.

In other legal field such as civil law (marriage, inheritance, and others), the law of the economy (trade, trading, banking, insurance, and others) that are governing civil relations between citizens of societies, may not be a serious problem when the syari'ah is applied in which the society has begun to apply it in their daily life without the need to be regulated in the form of local regulations. If it must be stipulated in local regulations, the nature becomes locality, and it will be vulnerable to legal action that can be done by most people (even by people who are even Muslims) who do not want to accept the local regulations, the nature becomes locality, and it will be vulnerable to legal action that can be done by most people (even by people who are even Muslims) who do not want to accept the local regulation into a space of court by doing material testing (judicial review) to the Supreme Court as provided in Article 31 of Law Number 14 Year 1985 regarding the Supreme Court as amended by Law Number 5 Year 2004 concerning the Amendment of Law Number 14 Year 1985 regarding the Supreme Court.

One thing that must be a part of our common concern, that if the Islamic law wanted to be arranged in the form of local regulations it should certainly pay attention to the condition of the society in the area. If the local society is homogeneous in the sense that inhabited the vast majority of Muslims, then the effort of creating the local regulations will not pose a problem because it is believed that people in the region would welcome it well. However, if the society is heterogeneous like the population of North Sumatra Province and other regions, it is believed that syari'ah local regulations will cause the seeds of conflict in society. Therefore, it is no exaggeration that related community or authorities have to be careful when proposing to make syari'ah to be local regulations. It is hoped that there should not be any tendency for one region just following other region to make syari’ah to be local regulation.

In addition, also in terms of syaria'h law enforcement there should certainly established judicial institution of Syari'ah Court as it is existed in Nanggroe Aceh Darussalam (NAD) which is implemented by such a Syar’iyyah Court as stipulated under Article 128 of Constitution Number 11 Year 2006, which has the authority to bring one case to court based on syari’ah law in the national legal system as it is regulated in Qanun Aceh province. The position of this Syar’iyyah Court is as part of the national judicial system under the Supreme Court, but specifically applied only to those Muslims who live in Aceh (see Article 128 paragraph (2) of Constitution No. 11 of 2006).

This means that if the verdict of the Syari’ah Supreme Court of Aceh did not satisfy the dispute parties in the court it can be appealed to the Supreme Court which is certainly going to apply the provisions of national law. Meanwhile, for non-Muslims who committed a criminal act of Islam (jinayah) together with Muslims, then for the none Muslims who choose the law which will be used in court (choice of law), whereas for those Muslims who commit any criminal act (jinayah) which is not regulated in the National Criminal Code (KUHP Nasional –the National Book of Criminal Code) or any criminal provisions outside
the National Criminal Code will be applied against them the law of *jinayah* (Islamic criminal law) that is applied in the territory of Aceh province.\(^8\)

Indeed, nationally there have stood Religious Court for Muslims, but this court is currently only prosecute cases among Muslims in the field of marriage (especially divorce), inheritance, wills, and grants made under the law of Islam, and the problem of *waqaf* and *shadaqah* that occurred among the Muslims. So just this Religious Court is only prosecute cases in the field of private law (*hukum keluarga* or *hukum sipil*). If the problem of crime wants to be transferred into the authority of the Religious Court, besides having to change the Act No. 7 of 1989 on the Religious Courts as amended by Law Number 3 of 2006 concerning the Amendment to Law Number 7 Year 1989, a question also can come to the service whether the presence of a local regulation can be a reason of amendment or revision of a provision that has been regulated in Constitution? This is something unusual in the establishment and enforcement of our National Legal System. Even if the problem is transferred to the State District Court that prosecute criminal cases, is it possible that the judges are required to use local regulations of *syari’ah* in resolving the legal cases at hand while on the other side there is a national law (National Criminal Code) regulates the same issues. When if it may be, how well the readiness of the judges because prosecute the cases while they have been used to run the court under the National Criminal Code).

Thus it can be taken a temporary conclusion, that the local legislative process in the formation of local *syari’ah* regulation can cause tremendous assignment not only will affect the legislative process in the region itself but also even affect the national legislative process. If so, whether it has been scheduled either by each area regionally or even by state nationally? Unlike the case with judges who served on the *Syar’iyah* Court in Aceh who are appointed and dismissed by President upon the recommendation of the Chief of the Supreme Court who has the competency to examine, adjudicate, decide and resolve cases which include the field of family law (*ahwal al-syakhisiyah*), Islamic economy of law (*muamalah*) and Islamic criminal law (*jinayah*) based on the Islamic *syari’ah* (see Article 128 paragraph (3) of Law Number 11 Year 2006).

**Contributions of Islamic Syari’ah in the Development of National Legal System**

The problem of *syari’ah* in our country is actually not a matter of debated problem in the formation of national law. Actually, it is because the teachings of Islam consciously or not have become an integral part in the rules of national law although there is no label Islamic law therein. Some examples could be said among them are: **first**, the Law Number 1 Year 1974 on Marriage in the field of national private (family) law that accommodates the *syari’ah* in it even though the manufacturing process of the Law was running very tough at the time, and also at the same case happened to Law Number 7 Year 1989 on Religious Court (Peradilan Agama).\(^9\) **Second**, the Law Number 20 Year 2003 on National Education System that is also accommodates the principles Islamic education which includes the education of creating human of faith and of obedience -*manusia beriman dan bertakwa*- (Article 3), the education to uphold the values of religion (Article 4 paragraph (1), the recognition of Madrasah Ibtidaiyah-MI (Islamic Elementary School and Madrasah Tsanawiyah-MTs (Islamic Junior High School) as a part of basic or elementary education (Article 17), and Madrasah Aliyah-MA (Islamic Senior High School) and Madrasah Aliyah Kejuruan-MAK (Islamic Vocational Senior High School) as a part of secondary education (Article 18). **Third**, the Law Number 7 Year 1992 on Banking as amended by the Law Number 10 Year 1998 in which the bank (Commercial Bank) can apply the principles of *syari’ah* in its operationalization. **Fourth**, the Compilation of Islamic Law (*Kompilasi Hukum Islam-KHI*) based on Presidential Instruction Number 1 Year 1991 which have been successfully become national legislation, and many more the teachings of Islam have been transformed into a form of national legislation such as the Law Number 38 Year 1999 on Zakat Management and the Law Number 41 Year 2004 of the *Waqf*, in which the process of transformation that

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has incorporated the principles of Islamic law without using the label of syari’ah but it have been absorbed into the national law.

Therefore, the issue of how to keep the entire teachings of Islamic law become an important part in the national legal system depending on how the role of political forces in the supra-political structure (of state institutions such as the Parliament, the Government, Regional House of Representatives –Dewan Perwakilan Rakyat Daerah) make every legal product in the form of legislation and Regional Legislation by entering the teachings of Islamic law as much as possible into the body of the legislation. With this condition is presumably expected so that all elements of supra-political structure were ruled constitutionally by a majority of the legislators who came and have background of strong religious understandings of Islam, and they, in the legislative forum, together struggled to incorporate the elements Islamic law to be the spirit of each substance of the national legislation, as stated by Moh. Mahfud MD that the effort of applying Islamic Law must be through the canal of the policy of law so that the Islamic values can colour, and even can be the product of national law, especially in the Private Law.¹⁰ Thus constitutionally, the rules of law that are running in Indonesia has its values of Islamic law without the need to label it with Islamic syari’ah.

Although supra political structure as a vital political machine in producing the birth of legal rules which is irradiated with the spirit of Islamic law, but nor should forget the contribution of various elements of society (infra political structure) in the process of legislation, both national and regional in weighing every formulated and defined legal rules. Because based on Law Number 12 Year 2011 on the Establishment of Legislation, and Law Number 23 Year 2014 as amended twice, and the last by Law Number 9 Year 201, the participation of community at this time is set properly to contribute their thoughts and opinions in the process of national and local legislation. Even in this era of reformation it is not impossible that a draft of constitution and of local regulation come from the initiatives of various elements of society, but the drafts that must be only processed through one of the elements of supra-political structures (Parliament or Government). Through this processes the aspirations of the Muslims can be articulated correctly and appropriately by the representatives of the people that later inaugurated or constitutionalized in various national legislations.

CONCLUSION
The establishment of legislation according to the science of law must be consistent, especially against the principle of national legislation hierarchy which become an important part in the process of law and regulation making in Indonesia, besides the principles of other legislation. Therefore, of the establishment of a regional regulation is certainly bound to the application of the principle of the national legislation hierarchy. Moreover, if it seen that the establishment of a regional regulation is simply a manifestation of the implementation of the regional autonomy of local government authority to issue the local regulation. Thus a local regulation should not regulate the basis of rules of law that not be owned by the authority of the local government concerned.

A local regulation governing the implementation of Islamic syari’ah formed by an autonomous local region is nothing but a manifestation of the desire of local government concerned to govern its society (especially the Muslims) to be obedient and submissive to the teachings of Islam itself. It is a usual thing done by the local authorities, let alone if the majority of its society are Muslims. However, when viewed from the side of the national legal system of Indonesia that has issued various rules of laws and regulations (both constitution and governmental regulation, and other legislation) which do not put syari’ah as the sole source of law, (in addition to that there is a customary law/adat law), of course, the birth of syari’ah local regulation becomes contradictory with the national legal system, especially with the enforcement of local regulations within the framework of the syari’ah in the national legal systems, especially related to the enforcement of sanctions to any people who offended the local regulation. Its

implication can result the weakness of the local regulation in the process of law enforcement in the life of the local society when viewed from the principle of hierarchy of legislation (according the basis of *lex superior derogat lex inferior*) that can question the existence of local regulation if there is any conflict with the provisions stipulated in the legislation thereon especially the National Constitution, particularly the constitution governing the enforcement of criminal sanctions as adopted in the National System of Criminal Law.

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