

**PUBLIC PARTICIPATION MODEL IN THE PREPARATION  
OF *SHARIA*-BASED ACEH *QANUN*: SPECIAL FOCUS ON  
THE ROLE OF THE *ULAMA***

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**ABSTRACT**

Public participation in preparing legal products in Indonesia is essential for national and regional legislation. Although Indonesia is considered to have “achieved” democracy, many legislations do not agree with the people’s aspirations. This situation eventually led to a judicial review at the Supreme Court. It is expected that legal products in the form of *sharia*-based Aceh *Qanun* (regional regulation) can generate legal certainty and justice for society. This research was conducted in Aceh using a legal method based on a prescriptive approach. Results show that public participation in the preparation of *sharia*-based *Qanun* is more focused on issues that can give rise to differences of opinions amongst people from multi-religious backgrounds. The views are related to the norms in the bill in terms of *fiqh* (Islamic jurisprudence), local wisdom, and exploring problems and efforts to overcome them. The *Majelis Permusyawaratan Ulama’s* (*Ulama* Consultative Assembly/MPU) role in preparing Aceh *Qanuns* is limited to providing suggestions for the currently discussed bill. Unfortunately, the Aceh *Qanun* has not accommodated the rights of MPU to provide recommendations. MPU’s proposal for the Aceh *Qanun* bill is in the form of suggestions because the *ulama’s* views do not bind the Aceh Governor and Parliament to enact the bill. The situation happens because the opinions are not in the form of a *fatwa* (legal pronouncement in Islam) but merely suggestions and recommendations.

**Keywords:** Public Participation, *Sharia*, *Qanun*, *Ulama* Consultative Assembly, Aceh Province.

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## **MODEL PENGLIBATAN AWAM DALAM PENYEDIAAN KANUN ACEH BERDASARKAN SYARIAH: FOKUS KHUSUS TERHADAP PERANAN ULAMA**

### **ABSTRAK**

Penglibatan awam dalam penyediaan produk perundangan adalah penting di Indonesia bagi undang-undang nasional dan serantau. Walaupun Indonesia dikira telah mencapai amalan demokrasi, namun terdapat banyak undang-undang yang tidak seiring dengan aspirasi rakyat. Situasi ini membawa kepada semakan kehakiman di Mahkamah Agung. Adalah dijangka bahawa produk perundangan dalam bentuk asas syariah Undang-Undang Aceh (undang-undang negeri) boleh menghasilkan undang-undang yang pasti dan adil kepada masyarakat. Kajian ini telah dijalankan di Aceh menggunakan kaedah undang-undang berdasarkan pendekatan yang preskriptif. Hasil menunjukkan bahawa penglibatan awam dalam penyediaan undang-undang berasaskan syariah lebih berfokus kepada isu-isu yang boleh memberikan pendapat yang berbeza dalam kalangan orang dari pelbagai latar belakang agama. Pandangan tersebut berkaitan kepada norma di dalam rang undang-undang bagi terma fiqh (perundangan Islam), kebijaksanaan tempatan dan penerokaan masalah serta usaha bagi menyelesaikannya. Peranan Majelis Permusyawaratan Ulama (MPU) dalam menyediakan Kanun Aceh adalah terhad dalam memberi cadangan berkenaan rang undang-undang yang dibincangkan. Malangnya, Kanun Aceh tidak memberi hak kepada MPU untuk memberi cadangan. Usul penambahbaikan MPU terhadap rang undang-undang Aceh hanya dalam bentuk cadangan sahaja kerana pandangan ulama tidak mengikat Kerajaan dan Parlimen Aceh bagi pengubalan undang-undang. Situasi ini berlaku kerana pendapat mereka bukanlah dalam bentuk fatwa tetapi hanya cadangan semata-mata.

**Kata Kunci:** Penglibatan Awam, Syariah, Kanun, Majelis Permusyawaratan Ulama, Wilayah Aceh.

## INTRODUCTION

As a majority Muslim population, Indonesia has a different perspective in realising its democracy as compared to other American or European countries.<sup>1</sup> This is because democracy in Indonesia is based on communal principles of public participation applicable within the society. Public participation has become an indicator of the realisation of democracy<sup>2</sup> and has been used to justify decision-making process in Indonesia.<sup>3</sup> Similarly, public participation has become an important feature in preparing legal products for Indonesia as well as globally.<sup>4</sup> For this nation, public involvement in developing national and regional legislation is essential, although barriers to participation still occur.<sup>5</sup> Various regulations exist as references for public participation. Specific fields, such as spatial planning and legal products at the national and regional levels have special rules on community participation. An example is the draft Aceh Qanun on family law which cannot be promulgated, even though it has been mutually agreed upon between the Aceh Government and the Aceh People's Legislative Assembly, and has been finalised at the Aceh House of Representatives session. There have been many studies on community participation concerning human rights, its implementation,<sup>6</sup> participation model, and many more. It was demonstrated that the model of public involvement varies widely, depending on the situation and condition at a given place and time.<sup>7</sup> While Indonesia is considered

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<sup>1</sup> Masdar Ilmy, "Whither Indonesia's Islamic Moderatism? A Reexamination on the Moderate Vision of Muhammadiyah and NU," *Journal of Indonesian Islam* 07, no 01 (2013) : 24-27, <https://doi.org/10.15642/JIIS.2013.7.1.24-48>.

<sup>2</sup> Heri Kusmanto, "Partisipasi Masyarakat dalam Demokasi Politik," *Jurnal Ilmu Pemerintahan dan Sosial Politik* 2, no 1 (2014): 78-90.

<sup>3</sup> Chiara Armeni, "Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms," *Journal of Environmental Law* 28, no 3 (2016): 415-416, <https://doi.org/10.1093/jel/eqw021>.

<sup>4</sup> Ayman Mohamed Nour, "Challenges and Advantages of Community Participation as an Approach for Sustainable Urban Development in Egypt," *Journal of Sustainable Development* 4, no. 1 (2011): 79-91, <https://doi.org/10.5539/jsd.v4n1p79>.

<sup>5</sup> Armeni, loc. cit.

<sup>6</sup> Nour, loc. cit.

<sup>7</sup> Iza Rumesten R.S, "Model Ideal Partisipasi Masyarakat Dalam

to have “achieved” democracy,<sup>8</sup> many legislations do not agree with community aspirations, causing them to take action for judicial review at the Supreme Court.<sup>9</sup> One issue in point is the *sharia*-based Aceh *Qanun* (regional regulation).

The government system of reform in Indonesia was marked by special the autonomy of Aceh. Consequently, the Aceh Government, consisting of the Governor of Aceh and the Aceh Parliament, can prepare two types of *Qanuns* (regional regulations).<sup>10</sup> They are general Aceh *Qanuns*, similar to the legislation in other provinces in Indonesia, and specific Aceh *Qanuns* related to the implementation of *sharia* in Aceh.<sup>11</sup> Therefore, the law differs from other regions in Indonesia.

Considering the above information, public participation in preparing legal products in Aceh has a different approach. Philosophically, the peace in Aceh, which was initiated by a Memorandum of Understanding (MoU) between the Government of the Republic of Indonesia and the Free Aceh Movement (*Gerakan Aceh Merdeka*/GAM) on August 15, 2005, has established Aceh as a special autonomous region with authority to carry out a *sharia*-based law.<sup>12</sup> The Aceh Government’s power indicates this in the positivism

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Pembentukan Peraturan Daerah (The Ideal Model of Community Participation in the Establishmnet of Regional Regulations),” *Jurnal Dinamika Hukum* 12, no 1 (2012) : 135–148. <http://dx.doi.org/10.20884/1.jdh.2012.12.1.111>.

<sup>8</sup> Lidya Christin Sinaga, “Implementation of Democracy and Human Rights Principlesin Asean: Case Study in Cambodia, Laos, Myanmar, and Vietnam,” *Jurnal Penelitian Politik* 10, no 1 (2013) : 127–142.

<sup>9</sup> Praptanugraha, “Partisipasi Masyarakat Dalam Pembentukan Peraturan Daerah (The Community Participation in the Establishment of Regional Regulations),” *Jurnal Hukum* 15, no 3 (2008): 459–473, <https://doi.org/10.24843/kp.2008.v33.i01.p01>.

<sup>10</sup> Rommy Patra, “Existence of Local Legal Products That Nuanced of Shari’a in Indonesia,” *Yustisia* 6, no 2 (2017): 270-274. <https://doi.org/10.20961/yustisia.v6i2.12384>.

<sup>11</sup> Kamaruzzaman Bustamam Ahmad, “The Application of Islamic Law in Indonesia : The Case Study of Aceh,” *Journal of Indonesian Islam* 01, no 01 (2007): 135–80. <https://doi.org/10.15642/JIIS.2007.1.1.135-180>.

<sup>12</sup> Arskal Salim, “Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism,” *Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism* 6 (2015) : 211–214, <https://doi.org/10.1080/14442213.2015.1125772>.

of Islamic teachings sourced from the *Quran* and *Hadiths* into *Qanuns*. Therefore, it differs from other regional regulations in other provinces in Indonesia.<sup>13</sup>

Currently, the positivism of *Sharia* is influenced by the modern law concept, shifting from the norm of legal positivism to the rule of law concept.<sup>14</sup> Politicians tend to use religion, especially the *sharia* implementation, as a political issue to be positive.<sup>15</sup> Thus, through participation, *Sharia* is expected to be applied following the values held by society. However, community participation needs to be broad, for if it is inadequate and does not reach all community components, it may lead to many challenges.<sup>16</sup> This situation may happen when incomplete information exists on the Aceh *Qanun* content as received by the community. The *Qanuns* may be disputed because they favoured the *ulamas* who tend to impose their will, thus, resulting in a cancellation of the *Qanun*.<sup>17</sup>

The Aceh *Qanuns* do not have a participatory nature, meaning that it does not fulfil the aspirations of all community groups.<sup>18</sup> As a result, it may be against the will of society when enforced.<sup>19</sup> Meanwhile, ample evidence, including the Aceh Qanun Number 11 of 2018 concerning Islamic Financial Institutions, suggests that better

<sup>13</sup> Jum Anggriani, “Kedudukan Qanun Dalam Sistem Pemerintahan Daerah Dan Mekanisme Pengawasannya,” *Jurnal Hukum* 18, no 3 (2011) : 320-325. <https://doi.org/10.20885/iustum.vol18.iss3.art2>.

<sup>14</sup> Ahmad Imam Mawardi and Achmad Kemal Riza, “Why Did Kompilasi Hukum Islam Succeed While Its Counter Legal Draft Failed? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia,” *Journal of Indonesian Islam* 13, no. 2 (2019): 421–453. <https://doi.org/10.15642/JIIS.2019.13.2.421-453>.

<sup>15</sup> Luthfi Assyaukanie, “Religion as a Political Tool,” *Journal of Indonesian Islam* 13, no 02 (2019): 454–456. <https://doi.org/10.15642/JIIS.2019.13.2.454-479>.

<sup>16</sup> Joko Riskiyono, “Public Participation in the Formation of Legislation to Achieve Prosperity,” *Jurnal Aspirasi* 6, no 2, (2015) : 159-160.

<sup>17</sup> Qanun Aceh Nomor 13 Tahun 2017 Tentang Tata Cara Pemberian Pertimbangan Majelis Permusyawaratan Ulama

<sup>18</sup> R.S, “Model Ideal Partisipasi Masyarakat Dalam Pembentukan Peraturan Daerah (The Ideal Model of Community Participation in the Establishmnet of Regional Regulations).” *Jurnal Dinamika Hukum* 12, No. 1, (2012) : 135-148.

<sup>19</sup> Riskiyono, loc. cit,

policy outcomes can be achieved when the policy target groups are involved in the decision-making process and the implementation of the activities.<sup>20</sup>

It is contended that the *Sharia*-based Aceh *Qanun* should be accepted by all members of the Acehnese society, both Muslims and those professing other religions. The reason is that Indonesia's law is based on Pancasila. This concept is also applicable to Aceh which is meant to accommodate diverse ethnicities, races, and beliefs in accordance with the manifestation of *Bhinneka Tunggal Ika* (Unity in Diversity). In Aceh, this concept can be found in the Aceh *Qanun*, Article 6 of Act No. 12 of 2011 regarding the Preparation of Legislation.

At present, the Aceh Government has prepared six Aceh *Qanuns* relating to Islamic law, while nine other titles have yet to be drafted. The preparation of the *Sharia*-based Aceh *Qanuns* is not based solely on the community's wishes or the Acehnese local wisdom. It must refer to the source of Islamic law, namely the Quran, *Hadiths*, *ijma* (consensus), and *qiyas* (analogical reasoning), formulated into legal norms in the *Qanun*. This research was conducted in Aceh using a normative method based on a prescriptive approach. Results show that public participation in the preparation of *sharia*-based *Qanun* is more focused on issues that can give rise to differences of opinions amongst people from multi-religious backgrounds. This is because the Aceh *Qanun* related to *sharia* only applies to those who are Muslim, and not territorial in nature as referred to in Article 125 of Law Number 11 of 2006. It is expected that legal products in the form of *Sharia*-based Aceh *Qanuns* can create legal certainty and justice for society.

## THE THINKING FRAMEWORK OF PUBLIC PARTICIPATION

Public participation is required to ensure that the formation of legislation corresponds with the community's needs, i.e., the group being affected by the regulations. Henk Addink et al. mention it as

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<sup>20</sup> Bivitri Susanti, *Catatan PSHK Tentang Kinerja Legislasi DPR* (Jakarta: Pusat Studi Hukum dan Kebijakan (PSHK), 2005) : 60.

active involvement,<sup>21</sup> based on voluntary relationships between various actors.<sup>22</sup> The purpose of community participation is to strengthen democracy and synchronise the interests of citizens and their nation.<sup>23</sup>

Public participation in the formation of the Aceh *Qanuns* is meant to maintain and advance the precept as a democratic concept<sup>24</sup> guaranteed by law.<sup>25</sup> This right is part of legal politics<sup>26</sup> to uphold justice based on society's values.<sup>27</sup> Although there are different perspectives of public participation,<sup>28</sup> in general, it is indispensable in a representative democracy system<sup>29</sup> to protect people's rights,<sup>30</sup> both in procedures and substance.<sup>31</sup>

Sociologically,<sup>32</sup> public participation is influenced by the characteristics of the participating community. Thus, public participation in the *sharia*-based Aceh *Qanuns* requires a distinct approach; because their foundation and stakeholders differ from the non-*sharia*-based Aceh *Qanuns*. The content of the regulations also influences stakeholders' focus.<sup>33</sup>

In addition to law enforcement's capacity, successful implementation requires public awareness and support of the *Qanun*

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<sup>21</sup> Henk Addink, *Sourcebook Human Rights and Good Governance (Asialink Project on Education in Good Governance and Human Rights)*, (2010) : 50.

<sup>22</sup> Nour, loc. cit.

<sup>23</sup> Juma Nyende, "Citizen Participation in Local Government Service Delivery Processes in Uganda, (Canada," *The Initiative for Social and Economic Right (ISER)*, (2018) : 4.

<sup>24</sup> Samuel Williams et al., *Global State of Democracy, Mengkaji Ketahanan Demokrasi* (Jakarta: Perjudem, 2018) : 9.

<sup>25</sup> Kusmanto, "Partisipasi Masyarakat Dalam Demokrasi Politik," *Jurnal Ilmu Pemerintahan dan Sosial Politik* 2, no 1, (2014) : 78-90.

<sup>26</sup> Mahfud MD, *Politik Hukum Di Indonesia*, (Jakarta : LP3ES, 2001) : 1.

<sup>27</sup> Imam Syaukani and A. Ahsin Thohari, *Dasar-Dasar Politik Hukum*, (Jakarta: PT. Raja Grafindo, 2004) : 32.

<sup>28</sup> Ibid.

<sup>29</sup> Addink, loc. cit.

<sup>30</sup> Alexander Abdullah, "Desentralisasi Dan Undang-Undang Otonomi Daerah Di Era Reformasi," *Jurnal Hukum* 3, no 1 (2010) : 25.

<sup>31</sup> Riskiyono, loc. cit.

<sup>32</sup> R.S, loc. cit.

<sup>33</sup> Armeni, loc. cit.

target group from the planning to the drafting stages. Therefore, the drafting of *Qanuns* must involve the community to ensure optimal implementation. Their involvement must be carried out from the planning, legislative discussions, and dissemination stages.

The promulgation of the *Qanun* is a highly complex process. Apart from the formulation of norms into legal texts by the parliament and regional heads, in this democratic era, it extends to the struggles and interactions of socio-political forces that surround and exist in the region.<sup>34</sup> Community involvement is an effort to manifest the effectiveness of regulatory implementation and good governance.<sup>35</sup> Two aspects determine the democratic level of the regional government, i.e., the process and substance aspects. The provisions of Articles 5 and 6 of Law Number 12 of 2011 concerning the Formation of the Formation of Legislation, require that in making the laws, there must be open space for participation in every stage of the process of forming regional legal products, as well as the substance must be able to protect all the interests of the community which are bottom-line up.

In the human rights context, each community right creates a government obligation. Thus, arrangements pertaining to the local government's responsibilities and the right of community participation in the preparation of regional regulations must be precise.<sup>36</sup> From the society's perspective,<sup>37</sup> it is undeniable that distrust towards Parliamentary members regarding legislative matters still exists. Thus, people often opt for other "channels" to demonstrate their aspirations, such as rallies in front of the Parliament building to reject specific policies, or through other conventional actions. For example, where women held a demonstration in front of the Aceh House of

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<sup>34</sup> Ida Rahma, *Partisipasi Publik Dan Keterbukaan Informasi Dalam Penyusunan Kebijakan (Studi Kasus Dewan Perwakilan Rakyat Kabupaten Aceh Selatan)*, Samudra Keadilan, Vol 14, no 1, Januari-Juni (2019) : 88.

<sup>35</sup> Hasyim Asyari, "Asas Keterbukaan Dalam Pembentukan Peraturan Daerah, Refleksi Hukum," *Jurnal Ilmu Hukum* 2, no 1 (2017) : 84. <https://doi.org/10.24246/jrh.2017.v2.i1.p84-96>.

<sup>36</sup> Ibid.

<sup>37</sup> Muhammad Nasir, *Legislasi Hukum Keluarga di Aceh Pasca Otonomi Khusus*, *Jurnal Ilmu Syariah*, Januari-Juni (2008) : 97-108.

Representatives which questioned the Aceh Qanun regarding the Jinayat Law.<sup>38</sup>

The regional government is considered democratic if they provide space for public participation in preparing and criticising all regional policies.<sup>39</sup> Meanwhile, regional regulations are considered substantially democratic if the policies reflect the community's aspirations.<sup>40</sup> Public participation should not be merely words but a commitment applied by the parties responsible for preparing and implementing the *Qanun*.

## THE LEGAL BASIS FOR PUBLIC PARTICIPATION

Apart from identifying the institutions needed to be involved in the drafting of legislation, draft legislation has to comply with several principles, namely juridical (*juridische gelding*), sociological (*sociologische gelding*), and philosophical foundations (*philosophical gelding*).<sup>41</sup> These are the principles required to determine the validity of legislation. Public participation in enacting legislation is needed to ensure that the prepared regulations adhere to the sociological foundation.

As already mentioned, public participation must be institutionalised as a right guaranteed by law<sup>42</sup> both in the process and substance.<sup>43</sup> Therefore, the forum of various sources of law is provided for community participation. The first condition is the *locus standi* to participate.<sup>44</sup> Therefore, community participation must be able to realise democratic values as it wants to be realised in the fourth precept

<sup>38</sup> <https://news.detik.com/berita/d-5867388/massa-ibu-ibu-demo-desak-pasal-pemeriksaan-dicabut-dari-qanun-jinayat>

<sup>39</sup> Jazim Hamidi, "Paradigma Baru Pembentukan Dan Analisis Peraturan Daerah 1 ( Studi Atas Perda Pelayanan Publik Dan Perda Keterbukaan Informasi Publik )," *Jurnal Hukum Ius Quia Iustum* 18, no. 3 (2011): 336-363. <https://doi.org/10.20885/iustum.vol18.iss3.art3>.

<sup>40</sup> Asyari, loc. cit,

<sup>41</sup> Marhaendra Wija Atmaja, *Risalah Bahan Kuliah Hukum Perundang-Undangan*, Denpasar: Fakultas Hukum Universitas Udayana, (2016) : 1.

<sup>42</sup> Hartiwingsih, *Menelisis Pengujian Peraturan Daerah Dalam Bingkai Hukum Responsif* (Bogor: Unida-Press, n.d.), (2019) : 77.

<sup>43</sup> Riskiyono, loc. cit.,

<sup>44</sup> Nour, loc. cit,

of Pancasila. In Indonesia, public participation in every government policy is widely available at all social levels within the law.<sup>45</sup> While other countries also adhere to democratic legal system, democracy in Indonesia as a state of law has its uniqueness as a result of society's characters and is influenced by certain ideologies, particularly that of the Pancasila.<sup>46</sup> Under this concept, the principle of harmony is a priority based on the proportional functional relationship between state powers.<sup>47</sup> The existence of democracy in Indonesia is by positioning the people's voice as a source of state authority to run the government. This can be translated as people's sovereignty not only in electing the president or members of parliament but also in a broader sense, including involvement in policymaking. Specifically, the Preamble to the 1945 Constitution of the Republic of Indonesia has provided a philosophical view of the modern democratic law (*demokratische rechtsstaat*) ideal, a democracy based on the law (constitutional democracy).<sup>48</sup> This statement is clearly stated in the fourth paragraph of the Constitution Preamble: "the National Independence of Indonesia shall be structured in the form of the State of the Republic of Indonesia, with people's sovereignty." This confirms that democracy is embraced along with the principles of a constitutional state. Democracy is chosen based on human dignity and equality.

The concept of democracy is also reflected in the fourth precept of Pancasila; Democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives. Three prerequisites that characterise Pancasila democracy are as follows:

- a. Competition in gaining and maintaining power;
- b. Public participation; and
- c. The guarantee of civil and political rights.<sup>49</sup>

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<sup>45</sup> Philipus Mandiri Hadjon, *Perlindungan Hukum Bagi Rakyat Di Indonesia* (Surabaya: Bina Ilmu, 1987) : 84.

<sup>46</sup> Petrus C.K.L. Bello, *Ideologi Hukum, Refleksi Filsafat Atas Ideologi Di Balik Hukum* (Bogor: Insan Merdeka, 2013) : 5.

<sup>47</sup> Hadjon, loc. cit,

<sup>48</sup> Agussalim Andi Gadjong, *Pemerintahan Daerah Kajian Politik Dan Hukum* (Bogor: Penerbit Ghalia Indonesia, 2007) : 36.

<sup>49</sup> Kacung Marijan, *Sistem Politik Indonesia: Konsolidasi Demokrasi Pasca Orde Baru* (Jakarta: Kencana, 2010) : 83.

The above prerequisites are further elaborated below:

- a. Pancasila democracy is a democracy based on the principles of kinship and mutual cooperation aimed at the welfare of the people, which contains elements of religious awareness, which is based on truth, love, and noble character has an Indonesian personality and is sustainable.
- b. In Pancasila democracy, the system of state organisation is carried out by the people themselves or with the people's consent.
- c. In Pancasila democracy, individual freedom is not absolute but must be harmonised or adapted to social responsibility.
- d. In Pancasila democracy, the universality of democratic ideals is combined with the ideals of the Indonesian people's life, imbued with the spirit of kinship so that there is no majority or minority domination.<sup>50</sup>

In the Indonesian legal system, Pancasila is a source of all sources of law, which is a fundamental philosophy in enacting the law in Indonesia. This is explicitly provided in Article 2 of Law Number 12 of 2011 on Legislation Making. The explanation of Article 2 clearly states the position of Pancasila as the state ideology and, at the same time, the philosophical basis of the state. The position of Pancasila as a philosophical source impacts the laws that apply in Indonesia. Consequently, any law and regulation substantively must not conflict with the Pancasila values.

Article 7, paragraph (1) of Law Number 12 of 2011 emphasised that the derivatives of Pancasila must be elaborated in Article 28 of the 1945 Constitution of the Republic of Indonesia. It mentioned that every citizen has the right to associate and assemble, express his thoughts oral and written that are stipulated by law. Likewise, it is reaffirmed in Article 28E paragraph (2) that every person shall have the right to the freedom to believe in his/her faith and to express his/her views and thoughts in accordance with his/her conscience. Similarly, it is stated in paragraph (3) that every person shall have the right to the freedom to associate, assemble, and express opinions.

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<sup>50</sup> Yusdianto, "Philosophical Meaning Values Principles Fourth of Pancasila in the Democracy System of Indonesia," *Fiat Justicia* 10, no 2 (2016) : 221-412. <https://doi.org/10.25041/fiatjustisia.623>.

These constitutional provisions emphasise that although there is already a parliament at the central and regional levels in Indonesia, which results from general elections, there is still a need for a particular space for public participation in preparing a legal instrument. This is because public participation aims to find better solutions to problems in a community by opening up more opportunities for the public to contribute. Therefore, the law will operate more effectively, efficiently, and sustainably.

For the Indonesian people, public participation is a strategic feature due to the plurality nature of the people including various ethnic groups and the diversity of cultures and religions. This pluralism occurs both at the national level and the regional level. For example, in terms of religion adhered to by the Indonesian people, based on data published by the Ministry of Home Affairs in June 2021, the population of Indonesia is 272.23 million. Muslim populations are 236.53 million or 86.88% of the total Indonesian citizens, while Christians comprises 20.4 million people (7.49%), Catholics: 8.42 million (3.09%), Hindus: 74.67 million (1.71%), Buddhists: 2.04 million (0.75%), and Confucianism: 73.02 thousand people (0.03%), and other beliefs constitute 102.51 thousand people (0.04%). Especially in Aceh with a population of 5.33 million, there is also a plurality society, although the majority are Muslims: 5.24 million people (98.56%), while Protestants are 1.19% percent, Catholics 0.16 percent, Buddhists 0.18 percent, and Hindus 0.02 percent. As already highlighted, the recognition of pluralism is reflected in the symbol of the Republic of Indonesia,<sup>51</sup> namely the concept of *Bhinneka Tunggal Ika* (togetherness and ethnic unity will restore the spirit of the Indonesian nation to uphold unity in diversity).<sup>52</sup> The derivative of this national symbol is accommodated in the legislation substantially that legal norms in Indonesia must reflect the *Bhinneka Tunggal Ika*. Elucidation of Article 6 paragraph (1) letter f of Law Number 12 of 2011 clearly emphasised this concept that the

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<sup>51</sup> Nurhayati, Rini Setiyowati, Yunisca Nurmalisa, and Nurhayati, "Bhinneka Tunggal Ika As A National Consensus And A Universal Tool Of The Indonesian Nation" 6, no 2 (2021) : 254–263. <https://doi.org/10.26618/jed.v6i2.5317>.

<sup>52</sup> Leksi Otiani Putri, "Kedudukan Bhineka Tunggal Ika Untuk Memperkokoh Negara Kesatuan Republik Indonesia Di Masa Pandemi," *De Cive: Jurnal Penelitian Pendidikan Pancasila Dan Kewarganegaraan* 1, no 10 (2021) : 1–7.

content of laws and regulations must take note of the diversity of the population, religion, ethnicity and class, special conditions of the region and culture in the life of society, nation and state.

To guarantee this, the content of the laws and regulations must reflect this diversity, so the space for public participation must be planned and structured to reach a wider audience. This is emphasised in Article 5 letter g of Law Number 12 of 2011 that the legislation must be drafted based on the principle of openness. It is also stated that laws and regulations should be established based on the principles of good rulemaking. These principles include openness. This provision states that the “principle of openness” is that law and regulation-making starting from planning, preparation, discussion, ratification, or determination, and promulgation is transparent and open<sup>53</sup>. Thus, all societal levels have the broadest opportunity to participate in law-making.

Public participation in the region's law-making process can also be submitted as an initiative of parliament or a proposal from the Governor. This means that the legal need for public participation is not only through the authorities (top-down) but also through the community (bottom-up). This is in line with Article 15 paragraph (5) of the Minister of Home Affairs Regulation Number 80 of 2015 concerning the Establishment of Regional Legal Products.

In the Aceh Province, a region with special autonomy status, public participation is regulated in Article 20 and Article 236 of Law Number 11 of 2006 concerning the Government of Aceh. Article 20 paragraph (1) stated that the administration of the Aceh Government and district/city governments are guided by the general principle of openness. Furthermore, Article 236 emphasises that the formation of the Aceh *Qanun* must be based on the principle of openness. This is redefined in Aceh *Qanun* Number 5 of 2011 concerning Procedures for Establishing *Qanun*.

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<sup>53</sup> Salahuddin Tunjung Seta, “Hak Masyarakat dalam Pembentukan Peraturan Perundang-Undangan,” *Jurnal Legislasi Indonesia* 17, no 2 (2020), 154-166, <https://doi.org/10.54629/jli.v17i2.530>.

## STAGES AND PROCEDURES FOR PUBLIC PARTICIPATION

Public participation must be applied to all stages of the Aceh *Qanun* preparation.<sup>54</sup> The community participation stage should begin with the preparation of the literature review. This academic paper is a manuscript of legal studies and other research results on specific problems that can be justified scientifically. These problems are arranged in the Aceh *Qanun* draft to accommodate solutions and the community's legal needs. This is in accordance with the provisions of Article 12 of Aceh Qanun Number 5 of 2011 concerning Procedures for Establishing Aceh Qanun. Academic manuscripts that have gone through review and alignment must contain:<sup>55</sup>

- a. Background and purpose of preparation;
- b. The target to be realised;
- c. Main idea, scope, or object to be arranged; and
- d. Range and direction setting.

The authority to propose the Aceh *Qanun* draft is with the Aceh Governor or the Aceh Parliament. An academic literature must complement the proposed Aceh *Qanun* draft by each party. This article, written with academically justified research methods, is expected to capture the community aspirations regarding the regulation direction and the norms needed and to know the resistance to a particular norm in society. Generally, the public participation methods chosen are interviews, focus group discussions, public consultations, socialisation, and seminars through face-to-face meetings with the stakeholders.<sup>56</sup>

The next stage, where the Governor and the Parliament discuss the Aceh *Qanun* bill, also has room for public participation. According to the Aceh Parliament Code of Conduct, one of the public participation forums is a public hearing. This activity is regulated in Article 9 of the Aceh Parliament Regulation No. 1 of 2019 regarding The Aceh Parliament Code of Conduct. Whereas Article 132 paragraph (15)

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<sup>54</sup> Article 22 Aceh Qanun o. 5 of 2011 concerning Procedures for the Establishment of Qanun.

<sup>55</sup> Article 11 Aceh Qanun Number 5 of 2011 concerning Procedures for Establishing Qanun.

<sup>56</sup> Interview with Junaidi, Head of Legislation for the Governor of Aceh, 21<sup>th</sup> August 2021.

requires public participation in-between commission meetings, joint commissions, legislative bodies, budget bodies, special committees and individuals, groups, organisations, or private bodies. Those that would be invited to the public hearing meeting include community organisations, business entities, youth organisations, women activists, and religious organisations, both Muslim and non-Muslim. The study by Bahiej et al. stated that non-Muslim members of the societies were also invited to attend the public hearing regarding the *sharia*-based Aceh *Qanun* bill. However, not all invitees were present at the meeting.<sup>57</sup>

The Regional Islamic Law Office, an Aceh Government Agency (*Satuan Kerja Perangkat Aceh*), and the Commission six of the Aceh Parliament, as an element of the Aceh Government responsible for the preparation and discussion of *sharia*-based Aceh *Qanun* bills, admitted that community participation in the bill preparation is still limited. This situation is related to the available budget and the public participation procedure. Community involvement is still conducted in a conventional face-to-face manner; it is not yet implemented virtually<sup>58</sup>. It is suggested that a virtual approach would enable many people to participate in the drafting or discussion of the bill. This virtual model is highly likely to be implemented because society is currently accustomed to virtual talks which are supported by continuous improvement of information technology that has reached all regions of Aceh. It is also suggested that this model should be regulated in the rules of procedure for the Aceh Parliament so that public hearings could be held virtually. For this reason, public participation should not be eliminated on the grounds of a COVID-19 pandemic. The technological advancement should be an opportunity and momentum for the Aceh Parliament to change the communication pattern in public participation, from direct (conventional) meetings to hybrid meetings.

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<sup>57</sup> Ahmad Bahiej and Fatma Amilia, "Respons Minoritas Non-Muslim Terhadap Pemberlakuan Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat (The Responses of Non-Muslim Minorities to The Enforcement of Aceh Qanun Number 6 of 2014 Concerning the Jinayat Law)," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no 1 (2017) : 117–130.

<sup>58</sup> Interview with Irawan Abdullah, Chairman of Commission 6 of the Aceh People's Representative Council, 20<sup>th</sup> May 2021.

By doing so, public participation policy could align with the Industrial revolution 4.0 which is technology-oriented<sup>59</sup>.

In addition, limited access to public participation also occurs because it does not involve mosques and other places of worship.<sup>60</sup> Mosques in Aceh are important to the Muslim communities.<sup>61</sup> According to data from the Central Statistics of Aceh, in 2021 the number of villages or *gampong* are 6516 And each of the villages would have at least one mosque or *meunasah* so that public participation can reach all of Aceh. In mosques, socialisation can be carried out through sermon materials for Friday prayers, which the designer of the Aceh *Qanun* has prepared. In the same way, universities and other educational institutions have not yet become targets for this aspiration. In fact, universities and educational institutions are centres of intellectual and millennial youth whose legal needs are different from the previous generation. Besides the opportunity to capture the younger generation's aspirations, involvement of educational institutions can also be a way to socialise and provide information to this generation, generating a comprehensive response that can prevent resistance to the proposed Aceh *Qanun*.

### **The Need for Participatory Aceh *Qanun***

Public participation in the formation of the Aceh *Qanun* must be in line with Indonesia's legal politics, which follows the principles of democracy as stated in the fourth principle of Pancasila, i.e., Democracy led by wisdom in consultation/representation. Thus, the formation of legislation must uphold democracy.

Sri Soemantri M argued that the idea of democracy manifests itself in five matters. Two of them are the transparent government (*openbaarheid van bestuur*) and the possibility for interested people to

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<sup>59</sup> Interview with Mawardi Ismail, Community Leader and academic, 25<sup>th</sup> May 2021.

<sup>60</sup> Interview with Teuku Rasyidi, Expert Staff of the Aceh House of Representatives, 21<sup>th</sup> May 2021.

<sup>61</sup> Riza Aulia Putra and Saiful Hadi, "The Evaluation of Building's Structural Reliability of Masjid Tuha Indrapuri, Aceh Besar," *Elkawanie* 5, no. 1 (2019): 30. <http://dx.doi.org/10.22373/ekw.v5i1.4520>.

complain about the officials' detrimental actions.<sup>62</sup> According to Philipus M. Hadjon in Yuliandri, legislation formation must be carried out based on good legislation preparation principles (*algemene beginselen van behoorlijke regelgeving*). Although the power to prepare legislation is the highest state power due to the people's mandate,<sup>63</sup> this does not mean that they can act arbitrarily in carrying out its functions. Legislative power must also be limited<sup>64</sup> by obliging legislators to consider the community's aspirations. The essence of public participation in forming legislation is to create good governance. The nature and involvement in preparing *sharia*-based Aceh *Qanuns* are openness and transparency.<sup>65</sup>

Legislations such as *sharia*-based Aceh *Qanun* are not found in other regions in Indonesia. Therefore, its preparation was not explicitly regulated in Act No. 12 of 2011 regarding the preparation of legislation, including the issue of public participation. This condition is due to other provinces in Indonesia not having the authority to prepare *sharia*-based regional regulations.

The *sharia*-based Aceh *Qanun* is a specific regulation.<sup>66</sup> It is prepared as an implementation of Article 125 of the UUPA, which required the establishment of Aceh *Qanuns* related to *aqidah* (creed), *sharia*, and morals. *Sharia* includes worship, *ahwal al-syakshiyah* (family law), *muamalat* (civil law), *jinayah* (criminal law), *qadha* (judiciary), and *tarbiyah* (education), preaching, *syiar* (greatness), and Islamic defence.

The *sharia*-based Aceh *Qanuns* that have been established are *Jinayah* Procedural Law, *Jinayah* Law, *Sharia* Principles, Development and Protection of *Aqidah*, *Halal* Product Assurance System, *Bayt al-Mal* (financial institution responsible for the administration of taxes), *Sharia* Financial Institutions, and Family

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<sup>62</sup> Sri Soemantri M, *Bunga Rampai Hukum Tata Negara Indonesia* (Bandung, Alumni, 1992) : 29.

<sup>63</sup> Yuliandri, *Asas-Asas Pembentukan Peraturan Perundang-Undangan Yang Baik, Gagasan Terhadap Pembentukan Peraturan Perundang-Undangan Berkelanjutan* (Jakarta : Rajawali Press, 2009) : 14.

<sup>64</sup> Riskiyono, op. cit : 173.

<sup>65</sup> W. Riawan Tjandra and Kresno Budi Sudarsono, *Legislative Drafting: Teori Dan Teknik Pembuatan Peraturan Daerah* (Yogyakarta: Universitas Atmajaya, 2009) : 43-44.

<sup>66</sup> Anggriani, "Kedudukan Qanun Dalam Sistem Pemerintahan Daerah Dan Mekanisme Pengawasannya.", *Jurnal Hukum*, 18 (3), (2011) : 320-335.

Law. The Aceh *Qanun* No. 8 of 2014 regarding Principles of *Sharia* emphasised several issues that the Aceh *Qanun* must further regulate. In this case, this *Qanun* is positioned as the main *sharia*-based *Qanun*; thus, it requires other derivative *Qanuns*. The ones currently in the drafting stage relate to *aqidah*, worship, inheritance (*mawaris*), leadership and politics, *akhlaq* (morals), types and forms of Islamic *syiar* implementation, journalism and broadcasting, culture and arts, as well as conducting Islamic preaching.

Public participation is critical in preparing *sharia*-based Aceh *Qanuns* because its substance is utterly different from the national legislation. The *Qanun*'s content is not an elaboration of the legislation at a level higher than it. This condition happens because the source of *sharia* is from the *Quran*, *Hadiths*, *ijma*, and *qiyas*.<sup>67</sup> Also, the customary law in Aceh still applies and has become the people's way of life.<sup>68</sup>

The *sharia*-based Aceh *Qanun* has formed a new norm in the Aceh society, replacing the national legal standard, a colonial legacy.<sup>69</sup> An example is the Aceh *Qanun* regarding *Jinayah*. Selling or drinking *khamr* (liquor) is classified as an act of *jinayah* or *jarimah* (crime). However, the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana/KUHP*) does not categorise it as a criminal act. Likewise, Article 10 of the Criminal Code regulates the types of punishment. However, the Aceh *Qanun*'s punishment system is different, and penalties for violations of *jinayah* law are in the form of *uqubat hudud* (whipping) or *tazir* (fines). Based on Article 15 of Act No. 12 of 2011, the criminal sanctions imposed on the violators of regional regulations are imprisonment of up to 6 (six) months or a maximum fine of Rp. 50,000,000.00 (fifty million rupiahs).

The national banking sector recognises a dual banking system, namely conventional and *sharia* banking. However, based on Aceh

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<sup>67</sup> Andi Muhammad Asrun, Abdu Rahmat Rosyadi, and Yennie K. Milono, "Mempertanyakan Legalitas Qanun Aceh: Sesuakah Dengan Sistem Peraturan Perundang-Undangan," *Kanun Jurnal Ilmu Hukum* 21, no. 2 (2019) : 273–294. <https://doi.org/10.24815/kanun.v21i2.12632>.

<sup>68</sup> Ahmad, "The Application of Islamic Law in Indonesia : The Case Study of Aceh", *Journal of Indonesian Islam*, (2007) : 135-180.

<sup>69</sup> Hasnil Basri Siregar, "Islamic Law in a National Legal System: A Study on the Implementation of Shari'ah in Aceh, Indonesia," *Asian Journal of Comparative Law*, (2008) : 1.

Qanun No. 11 of 2018, the Aceh Province only recognises one banking system, i.e., the *sharia* banking system. Consequently, conventional banks in Aceh must be closed, and all banking transactions must switch to the *sharia* system. The single system was opted for because Islam prohibits the practice of *riba* (usury).<sup>70</sup>

A national Act No. 1 of 1974 regarding Marriage and the Islamic Law Compilation is already available in family law. However, based on the Aceh Government's power, Aceh *Qanun* No. 14 of 2019 regarding Family Law has been established. The Aceh *Qanun* clearly and firmly regulates polygamy rules, whereas Act No. 1 of 1974 regarding Marriage has not yet regulated this issue clearly and firmly.

Gathering people's aspirations on the *sharia*-based Aceh *Qanun* bill is not intended to contradict the *Quran* and *Hadiths*. Public participation only concerns the *fiqh* (Islamic jurisprudence) issue, closely related to the many parties' awareness and wisdom. Islamic law can only be well-implemented if it follows society's legal understanding.<sup>71</sup> Etymologically, *fiqh* was born because of space and time, i.e., the present and future society.<sup>72</sup> The current practice of community participation in the drafting of the Qanun is based on *sharia*.

Public participation in the drafting of *sharia*-based Aceh *Qanun* focuses on issues that may potentially trigger differences about the bill from a *fiqh* perspective, local wisdom, studying problems, and efforts to overcome them. Thus, the established Aceh *Qanun* can generate legal certainty, justice, and benefit for the Aceh society.

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<sup>70</sup> Pemerintah Aceh, *Naskah Akademik Rancangan Qanun Aceh Tentang Lembaga Keuangan Syariah (The Academic Text of the Draft Aceh Qanun on Sharia Financial Institutions)*, 2017) : 26.

<sup>71</sup> Zulhamdi, "Kedudukan Fiqh Di Indonesia Pasca Kemerdekaan (The Position of Fiqh in Post-Independence Indonesia)" XI, no 1 (2018): 1–30. <https://doi.org/10.32505/at.v11i1.526>.

<sup>72</sup> M. Noor Harisudin, "Diskursus Fikih Indonesia: Dari Living Law Menjadi Positive Laws (The Discourse of Indonesian Jurisprudence: From Living Laws to Positive Laws)," *Al-Manahij* 10, no 2 (2016) : 169-70. <https://doi.org/10.24090/mnh.v10i2.932>.

The differences in *madhhabs* (schools of thought in Islam), which also occurs in Aceh, may cause differences in perspectives,<sup>73</sup> even though most Acehnese people follow the *Shafi'i madhhab*. The right to express an opinion regarding the *sharia*-based Aceh *Qanun* bill must follow the *sharia* principles, i.e., referring to the sources of the *sharia* and considering the authority limits of the Aceh Government in regulating *sharia* and acknowledging the local wisdom. The right to express opinions is recognised in the UN Human Rights Charter (Article 19) and the *Cairo Declaration on Human Rights In Islam 1990* (Article 22); however, there are different perspectives. The freedom to express views in the Cairo Declaration must not contradict the *sharia*, while in the UN Human Rights Declaration, this right is not restricted at all.<sup>74</sup>

### THE *ULAMA'S* ASPIRATION IN THE PREPARATION OF ACEH *QANUN*

Aceh is one of the provinces given special autonomy through the Aceh Administration Act. In the consideration section of the Act No.11 of 2006, it is stated that the granting of special autonomy status to Aceh is due to recognising the unique historical character of the Acehnese people. This condition suggests that the Acehnese special autonomy status was granted to carry out their daily lives according to Islamic teachings. They have wanted to conduct *sharia* in a *kaffah* (thoroughly) manner for a long time, and wish to apply the local law as a *lex specialis*,<sup>75</sup> which differs from other regional laws in Indonesia.

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<sup>73</sup> Mawardi and Riza, "Why Did Kompilasi Hukum Islam Succeed While Its Counter Legal Draft Failed? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia". *Journal of Indonesian Islam* volume 13, Number 02, December (2019) : 421.

<sup>74</sup> Sunaryo, "Studi Komparatif Antara Universal Declaration of Human Rights 1948 Dan The Cairo Declaration on Human Rights in Islam 1990 (A Comparative Study between The Universal Declaration of Human Rights in 1948 and the Cairo Declaration on Human Rights in Islam 1990)", *Fiat Justitia* 5, no 2 (2012) : 389-406. <https://doi.org/10.25041/fiatjustisia.v5no2.61>.

<sup>75</sup> Muzakkir Abubakar, Suhaimi, and Basri, "Kewenangan Pemerintah Aceh

Apart from having an autonomy status, Aceh province is also a special region regulated by Act No. 44 of 1999. Based on this legislation, privileges are provided in four areas, i.e., religion, culture, education, and the *ulama*'s role.

According to the Islamic concept of governance, there are three essential elements of a government, namely the *umara* (government), *ulama* (scientists or religious experts), and *aghniyat* (entrepreneurs).<sup>76</sup> The role of the *ulama* varies from country to country. Some countries place *ulamas* in charge of supervising and overseeing executive duties. However, some countries place *ulamas* as partners in facilitating relations and interactions between the government and society. On the other hand, some other countries do not provide specific government-related roles to *ulamas* or similar figures. In Indonesia, the *ulamas* are working partners of the government. They are not part of the government's organisational structure but merely an institution (Indonesian *Ulama* Council/Majelis Ulama Indonesia) with non-binding duties.<sup>77</sup>

The position of *ulama* in the context of governance has been provided in the *Hadith* of the Prophet. Abu Dawud and at-Tirmidhi *Hadith* narrated that the Prophet stated that "*ulama* are the heirs of the Prophets" in conveying *sharia*, teaching people, and warning them to be aware and be careful.<sup>78</sup> *Ulamas* in Aceh are called "*Teungku*" and have different levels, depending on the capacity of knowledge they master. Great *ulamas* are usually called *Teungku Chiek* or *Syekh*. Since the *ulamas* have a unique position in Aceh,<sup>79</sup> the *Majelis*

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Terhadap Pelaksanaan Fungsi Mahkamah Syar'iyah," *Kanun Jurnal Ilmu Hukum* (2011) : 53-54.

<sup>76</sup> Abd. Wahid, "Peran Ulama Dalam Negara Di Aceh," *Madania* XVII, no 1 (2013): 85–92. <https://core.ac.uk/download/pdf/287227872.pdf>.

<sup>77</sup> Ibid.

<sup>78</sup> M Erfan Riadi, "KEDUDUKAN FATWA DITINJAU DARI HUKUM ISLAM DAN HUKUM POSITIF ( ANALISIS YURIDIS NORMATIF )" VI (2010) : 468–472.

<sup>79</sup> Gazali, "Hubungan Umara Dan Ulama Dalam Membentuk Kehidupan Sosio-Relijius Di Aceh Darussalam Masa Sultan Iskandar Muda (The Relation of Umara and Ulama in Shaping Socio-Religious Life in Aceh Darussalam under Sultan Iskandar Muda's Period)," *Jurnal Penelitian Hukum De Jure* 16, no 2 (2016) : 173-179. <http://dx.doi.org/10.30641/dejure.2016.V16.173-185>.

*Permusyawaratan Ulama* (*Ulama* Consultative Council/MPU) was established. This institution is a meeting point for all the *ulamas* in Aceh. Its members consist of *ulamas* and Muslim scholars who understand Islamic science, are independent, and the management is elected through *ulama* meetings (Article 138 of Law Number 11 of 2006 concerning Aceh Governance). This institution provides recommendations for the Aceh Government policies, including Aceh *Qanun* bills, currently being discussed at the Aceh Parliament.

The recommendations are given following the MPU's problem-solving role, including religious problems in society.<sup>80</sup> Therefore, considering the *sharia*-based Aceh *Qanun* bill content, public aspirations gathered by the MPU are not limited to the *ulama* groups but also from other communities, including non-governmental organisations.

Historically, the *ulama*'s role in establishing *sharia* in Aceh has existed since the Aceh kingdom era. When the royal fortress of Aceh fell into Dutch hands in 1873,<sup>81</sup> it was the *ulamas* who mobilised resistance to the Dutch.<sup>82</sup> During that era, *sharia* was the authority applied by the *ulamas*. This situation happened because only the *ulamas* can perform *ijtihad* (independent reasoning).<sup>83</sup> At present, the role of *ulamas* in the Acehnese culture is expressed by the following proverb (*hadih maja*):<sup>84</sup> “*adat like Po Teumeureuhom, hukom like Sjah Kuala, meudjeulih kanun like Putroe Phang, resam like Bentara*”. It means that power rests with the King, law with the great

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<sup>80</sup> Aar Anarwati, “Kedudukan Dan Peran Ulama Dalam Perspektif Al-Quran (Studi Komparatif Tafsir Al-Quran Dan Al’Azim Dan Tafsir Fi Zilal Al-Qur’an) (A Comparative Study of Tafsir Al-Qur’an Al’Azim Dan Tafsir FiZ Ilal Al-Qur’an),” *Jurnal Al-Fath* 11, no 01 (2017) : 12.

<sup>81</sup> Osman Raliby, *Aceh, Sejarah, Dan Kebudayaan* (Jakarta: Bhatara, 1980) : 37.

<sup>82</sup> Christiaan Snouck Hurgronje, *The Acehnese Vol. 1* (Leiden: E.J. Brill, 1906) : 188.

<sup>83</sup> Husaini, “Metode Ijtihad Kontemporer Menurut Yusuf Al-Qardawi (The Contemporary Ijtihad According to Yusuf Al-Qardawi),” *Sulesana* 13, no 2 (2019): 145-147.

<sup>84</sup> Fakhri, “Pesan-Pesan Dakwah Dalam Hadist Maja (Da’wah Messages in Maja Hadith),” *Jurnal Al-Bayan* 23, no 2 (2017) : 263–295.

imam of Syiah Kuala, tradition with the Princess of Pahang, and regulations with the Bentara.<sup>85</sup>

As the Indonesian government system shifted, the Aceh Governor and Parliament were authorised to form the Aceh *Qanun*. The MPU is the only institution with the capacity to provide recommendations on the Aceh *Qanun* bill. This capacity is regulated in Aceh *Qanun* No. 13 of 2017 regarding the MPU's Procedures for Providing Recommendations. An example is the Decree of the MPU Chairman No. 5 of 2019 regarding MPU's Recommendations and Considerations on the Family Law *Qanun* Bill. Despite its importance, the MPU's right to provide suggestions has not yet been accommodated in the Aceh *Qanun* that specifically regulates Aceh *Qanun* preparation procedures, i.e., Aceh *Qanun* No. 5 of 2011. While this *Qanun* stated that the joint discussion at the Aceh Parliament is immediately followed by level II speakers, i.e., for plenary and enactment of *Qanuns*; it does not include any MPU review process.

Nevertheless, the Aceh *Qanun* No. 5 of 2011 still places the MPU together with other elements as public hearing participants. It has the function of providing suggestions through forums outside public hearing meetings at the Aceh Parliament. This MPU role is similar to that provided in the Aceh Parliament Code of Conduct, established in 2019. The Parliament's Code of Conduct is guided by Aceh *Qanun* No. 13 of 2017, which put the MPU's recommendation as to the basis for decision making on the *sharia*-based Aceh *Qanun* bill.

Examination of the Aceh Parliament Code of Conduct and the Aceh *Qanun* No. 5 of 2011 have shown that these two documents do not put the *ulamas* as the authorities to carry out *ijtihad* as a critical component in the preparation of *sharia*-based Aceh *Qanuns*. This study is of the view that the *ulama* should be considered a vital component of governance. This is because the existence of *ulama* is associated with the sovereignty theory, which is closely related to theo-democracy

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<sup>85</sup> Erwina Gusti and Siti Aisah Ginting, "The Fading of Hadith Maja in the Vernacular Language Among Acehnese Teenagers in Banda Aceh," *Proceeding of the 1st English Education International Conference (EEIC) Inconjunction with the 2nd Reciprocal Graduate Research Symposium (RGRS) of the Consortium of Asia-Pacific Educataion Universities (CAPEU) between Sultan Idris Education University An*, (2016) : 457-461.

or theological democracy theory. This theory believes that all Muslims who meet the requirements are given the right to interpret God's law.<sup>86</sup> Decisions by a majority of the population must be made in accordance with God's law.<sup>87</sup> Therefore, the aspirations of the *ulamas* are essential because they are the ones who carry out *ijtihad* on specific Islamic issues to adapt to the condition of society.

The MPU's recommendations on the Aceh *Qanun* bills are treated as suggestions in the legislative preparation system which does not bind the Aceh Governor and Parliament to enact the bill. This condition happens because the recommendation is not in the form of a *fatwa* (legal pronouncement in Islam) but merely suggestions. Thus, in enacting the bill into a *Qanun*, the Governor of Aceh and Parliament not only depend on the *ulama*'s aspirations but also to consider suggestions from other stakeholders, which are communicated through various *Qanun* preparation stages. In Islam, people's majority opinion does not become the law or truth if it is against God's law. Thus, the law of God is placed above popular belief. Decisions made by the majority must follow God's law.<sup>88</sup> This is where the *ulama*'s aspirations become essential. Therefore, the model for discussing and enacting a *sharia*-based Aceh *Qanun* should be different from the Aceh *Qanun* material, unrelated to Islamic *Sharia*.

## **SOCIOLOGICAL AND JURIDICAL CONSEQUENCES OF LESS PARTICIPATORY LEGAL PRODUCTS**

Statutory regulation is formed to be followed by the community. The strength of statutory regulation is determined not only by the magnitude of the institution's authority but also by the institution's ability to implement the rule. Thus, the regulation benefits the welfare of the community. Article 6 of Law Number 12 of 2011 mentions the

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<sup>86</sup> Jaenudin, "Hubungan Antara Agama Dan Negara Dalam Pemikiran Kontemporer Menurut Abul A'la Al-Maududi (The Relationship between the Religion and Country in A Contemporray Thinking According to Abul A'la Al-Maududi)," *Al Mashlahah Jurnal Hukum Dan Pranata Sosial Islam* 02, no 03 (2014) : 227-232.

<sup>87</sup> Sri Wahyuni, "Demokrasi Dan Negara Hukum Dalam Islam (Democracy and The State of Law in Islam)," *Jurnal Review Politik* 02, no 02 (2012) : 153-162.

<sup>88</sup> *Ibid.*

benefits that the draft legislation must be enforceable, efficient, and effective. A statutory regulation cannot be implemented efficiently and effectively if the community does not follow it. One of the causes of community disobedience could be the lack of space for public participation in the regulation or policymaking process. Sociologically, a statutory regulation will be opposed by the community if the regulation is not in accordance with the community's aspirations. Otherwise, the community will fully support its implementation if it is in accordance with the expectations or needs of the community.<sup>89</sup>

The space for public participation is therefore essential in accommodating the community's aspirations and the conceptual paper or text of statutory regulation must be presented on sociological, philosophical and juridical basis. This shows that such sociological foundation, together with the philosophical and juridical foundations, becomes the material for the consideration of statutory regulation.

One example of a non-aspirational legislation is Law Number 11 of 2020 concerning Job Creation or the so-called Omnibus Law. Although this law focuses on simplifying the regulations, it revises and revokes many laws at once because of its nature. This law has received massive resistance from many community groups, which has led to massive demonstrations in Indonesia. Despite many rejections, the President ratified this draft law after a joint approval process in the House of Representatives of the Republic of Indonesia. In this case, the sociological consequences are reinforced by juridical consequences, namely the cancellation by the Constitutional Court of Law Number 11 of 2020, which was stated in the decision of the Constitutional Court of the Republic of Indonesia Number 91/PUU-XVIII/2020. The Constitutional Court of Justice affirmed that Law Number 11 of 2020 concerning job creation (*UU Cipta Kerja*) is formally flawed. To that end, the Court declared that the job creation Act was conditionally unconstitutional. The Constitutional Court of the Republic of Indonesia considered that the formation of the job creation law procedure was not based on definite, standard methods and the systematic formation of laws.

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<sup>89</sup> Arabiyani, "Kepastian Hukum Qanun Aceh Nomor 3 Tahun 2013 tentang Bendera dan Lambang Aceh", *Jurnal Hukum dan Peradilan* 7, no 2 (2018) : 195- 212, <http://dx.doi.org/10.25216/jhp.7.2.2018.195-212>.

Similarly, establishing the employment creation law is contrary to the laws and regulation-making principles. Therefore, the Constitutional Court believes that the process of establishing Law no. 11 of 2020 does not meet the conditions imposed by the 1945 Constitution, so it must be declared unenforceable.

The Constitutional Court's declaration shows that the Court also functions as the guardian of democracy, the protector of the citizen's constitutional rights<sup>90</sup> and the protector of human rights. In that context, the Court needs to be placed as a state institution that can protect the constitution from various temporary interests and be given legislative authority to formulate legal texts that are more in line with constitutional values. This is in line with the philosophical foundation of Pancasila, and the 1945 Constitution of the Republic of Indonesia, which emphasises that the essence of the formation of laws and regulations is to prosper all Indonesian people.

Two Aceh *Qanuns* also experienced the same challenges. Although they were not annulled by the Constitutional Court of the Republic of Indonesia and the Supreme Court of Indonesia, they could not be implemented because they did not pass the Ministry of Home Affairs evaluation. One of the cancellation reasons was the public participation issue. The Aceh *Qanuns* are Aceh *Qanun* Number 3 of 2013 concerning the Aceh Flag and Emblem and Aceh *Qanun* Number 14 of 2019 concerning Family Law. Although these *Qanuns* have been ratified by the Aceh Parliament (DPRA) through a plenary session, these two *qanuns* have not received a registration number from the Ministry of Home Affairs of the Republic of Indonesia. As a result, these two *Qanuns* could not be ratified and promulgated in the regional gazettes in Aceh. Ideally, these two *Qanuns* should be re-discussed by the DPRA and the Aceh government by involving the wider community, especially community groups who reject them.

It is the Ministry of Home Affairs' authority to evaluate the Aceh *Qanun*. According to the Minister of Home Affairs Regulation Number 80 of 2015, evaluation to assess the *Qanun* draft is regulated by the Law on Regional Government and other statutory regulations to determine if it is contrary to the public interest and/or higher laws and regulations. The evaluation authority of the Ministry of Home Affairs

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<sup>90</sup> Jimly Asshidiqie, *Menuju Negara Hukum Demokratis* (Jakarta : Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi RI, 2008) : 39.

is regulated by the provisions of Article 91 paragraph (1) of the Regulation of the Minister of Home Affairs Number 80 of 2015. In addition, Article 98 paragraph (1) emphasises that the Minister of Home Affairs has the power to declare the evaluation results. If the Regional Regulation draft is found to be in accordance with the provisions of higher legislation and/or the public interest, it will proceed with the administration of the registration number. Another power conferred to the Ministry is in Article 251, paragraph (1) of Law Number 23 of 2014, which gives him the authority to cancel this non-participatory Aceh *Qanun*.

In contrast with the cancellation by the Constitutional Court case, the consequences of an Aceh *Qanun* that are not participatory are similar to the Job Creation Law, which can be cancelled by the judiciary. However, this authority lies with the Supreme Court of the Republic of Indonesia, as confirmed in Article 9 paragraph (2) of Law Number 12 of 2011, concerning the formation of legislation through judicial review. Nevertheless, this judicial review process is a space for the public to raise objections to the Aceh *Qanun*, which the Aceh Government has ratified. Normatively, the room for cancellation is open, although so far, the people of Aceh have never submitted it to the Supreme Court of the Republic of Indonesia.

## CONCLUSION

Community participation in the process of forming the Aceh *Qanun* based on Islamic law focuses on things that allow the creation of different views from the community towards the norms contained in the draft *Qanun* both in terms of *fiqh*, and as an effort to explore local wisdom. In addition, it is also to explore problems in the application of Islamic law and efforts to overcome them. Community participation, from a formal juridical perspective, has been accommodated in Law Number 12 of 2011 concerning the Formation of Laws and in Aceh *Qanun* Number 5 of 2011 concerning Procedures for Establishing *Qanun*. This community participation must begin when the academic manuscript which is drafted for discussion in the Aceh People's Representative Council.

Community participation must be able to accommodate all the interests of the people in Aceh, so that the opinions of Aceh residents who are not Muslim are also part of the legal politics in forming the Aceh *Qanuns* in the field of *sharia*. Institutionally, community participation

is also strengthened by the existence of an *ulama* institution in Aceh, namely the *Ulema* Consultative Council.

However, the participation provided by the MPU in the formation of the Aceh *Qanun* has a limited space. The MPU's consideration of the draft Aceh *qanun* is positioned as an aspiration, because the *ulama*'s considerations do not bind the Aceh Governor and the Aceh People's Representative Council (DPRA) in ratifying the draft Aceh *qanun/perda*. This is because the consideration of the DPRA is not in the form of a *fatwa*, but only suggestions and input.