IJCLS 5 (2) (2020) 149-162

IJC LS

INDONESIAN JOURNAL OF CRIMINAL LAW STUDIES
http://journal.unnes.ac.id/sju/index/php/ijcls

The Problematic Issue of Sharia Court's Absolute Authority under Indonesia Judicial System

Luthfiyah Trini Hastuti*[1], Anti Mayastuti, Diana Lukitasari
Faculty of Law, Sebelas Maret University, Surakarta, Central Java, Indonesia

Submitted November 1 2020, Accepted November 23 2020,
Published November 30 2020

Abstract

The amendment of the Sharia Court position within the Indonesia's public court jurisdiction is contained in Article 27 of Law Number 48 of 2009 concerning Judicial Powers where the existence of the Sharia Court is no longer stated to be included in the scope of the special court within this law. The amendment set different tone from what is contained in Law No. 4 of 2004 which in the elucidation of Article 15 states that, the Sharia Court is part of a special court. The problematic issue of Sharia Court's absolute authority in Aceh province under Indonesia judicial system is also the main study discussed in this article. At the end of the article, suggestions for improvement are also presented in order to strengthen the position of the Sharia Court in Indonesia judicial system.

Keyword: Absolute Authority; Islamic Sharia; Sharia Court

INTRODUCTION

As a country adopting the rule of law principle, Indonesia guarantees its citizens to receive justice equated with the existing law through judicial power with judicial intermediaries (Sulistyo & Isharyanto, 2018). This is as emphasized in Article 24 paragraph (1) of the 1945 Constitution which states that *"The judicial power is independent authority in organizing the judicature for the sake of law enforcement and justice"*. So constitutionally the right to obtain justice through judicial intermediaries is a right guaranteed to be fulfilled in the 1945 Constitution.

The enactment of Aceh Province as a special region is constitutionally legitimized through Article 18B paragraph (1) of the 1945 Constitution which stipulates that *"The state recognizes and respects units of local government that have specific*

**Email: luthfiyah_trini@staff.uns.ac.id.; antimayastuti@staff.uns.ac.id; diana_lukita@staff.uns.ac.id*
Address: Ir Sutami No. 36 A, Kentingan, Surakarta, Jawa Tengah 51276, Indonesia
Phone/Fax: (0271) 646994

or special nature, which are regulated by law". The special autonomy granted to the Province of Aceh was based on the argumentations stated in consideration dictum of Law Number 18 of 2001 concerning Special Autonomy for the Special Region of Aceh Province as the Province of Nangroe Aceh Darussalam. The dictum mentioned that one of the unique characteristics experienced in the history of Aceh People's struggle, are resilient and high fighting spirit that comes from a life perspective, social character, and community with a strong Islamic culture making Aceh as a capital area for the struggle to seize and defend Unitary Republic of Indonesia independence.

One of the specialties given by the central government for the Province of Nanggroe Aceh Darussalam is the right and opportunity to establish a Sharia Court as an Islamic Sharia Court. The establishment of sharia court is regulated in Article 25 paragraph (1) of Law Number 18 of 2001 on Special Autonomy for the Special Region of Aceh Province as the Province of Nanggroe Aceh Darussalam, which translate to Islamic Sharia Court in Nanggroe Aceh Darussalam Province as a part of the national judiciary system and are free from the influence of any party. Paragraph (2) then mentioned, The authority of the Syar'iyah Court as referred to in paragraph (1), is based on the Islamic Sharia within the national legal system, which will be further regulated by the Province of Nanggroe Aceh Darussalam Qanun.

The birth of Law Number 11 of 2006 on Aceh Governance further strengthens the existence of the Sharia Court, the court is also regulated in Article 128 paragraph (1) which states *"Islamic Sharia Courts in Aceh are part of the national judiciary system, in the scoope of religious court conducted by the Sharia Court and is free from the influence of any party "*. The authority boundaries to implement Islamic Sharia is then regulated in Article 125 paragraph (1), one of which stated that *"Islamic Sharia implemented in Aceh includes aqidah, sharia and morals"*. The next article then explain, Islamic sharia as referred to in paragraph (1) includes worship(praying), *ahwal al-syakhsiyah (family law), muamalah (civil law), jinayah (criminal law), qadha ' (judiciary), tarbiyah (education), missionary endeavor, syiar, and* safeguarging Islamic principle. Further provisions regarding the implementation of Islamic Sharia in Aceh are regulated through Qanuns issued at the provincial and district / city levels.

The Problematic issue of sharia court in Aceh Province under Indonesia judicial system emerged after the issuance of Law Number 4 of 2004 concerning Judicial Power which states that the Sharia Court is a special court within the sphere of religious courts and is a special court within the scope of general courts. The placement of the Sharia Court simultaneously within the scope of religious court and general court became an interesting subject to discuss and debate, substantially the issue of Sharia Court absolute authority and the problems involving it.

RESEARCH METHOD

This research is a doctrinal legal research on law, conceptualized and developed on the basis of the doctrine adhered by the conceptor and/or developer (Wignjosoebroto, 2013). In this study, the law is conceptualized as what is written in statutory regulations or as a rule act as a standard for community behavior (Efendi & Ibrahim, 2020). The nature of this prescriptive research does not start with a hypothesis to provide more arguments for the research that has been done before (Marzuki, 2014). The nature of this prescriptive research does not start with a hypothesis to provide more arguments for the research that has been done before (Marzuki, 2014). The approach used is a conceptual approach where researchers build arguments from the experts perspectives. The expert's perspective forms the basis of arguments building, and conclusions are drawn in line with the flow of thinking that is being built. The data analysis technique used is qualitative data, where the data collected from various study is not numerical but verbal words (Suteki & Taufani, 2020). Data was collected through stages, such as reduction, presentation, then conclusions (Moleong, 2015). The results of the research serve as suggestions for improvement to strengthen the position of Sharia Court in Indonesia.

.

FINDING AND DISCUSSION

Changes in Sharia Court Position within Indonesia's the Judicial Scope in

The underlying circumstanced incentivized Sharia Court birth in Aceh Province was mainly due to two things, namely an effort to reconstruct a law based on Islamic law and to revive the Aceh adage (saying), *Adat bak Poteu Meureuhom. Hukum bak Syiah Kuala, Qanun bak Putroe Phang, dan Reusam bak Laksamana* (Aripin, 2013).

It is generally accepted that, law as a social reality should be in accordance with the values adopted in society. In Indonesia, these values are crystallized in Pancasila. Thus, Indonesia's positive law is regarded as a good law, if those law in compliance with Pancasila (Rhiti, 2011). Attempt to simply transfer laws from one country to another is not the right measure, as was stated by Robert Seidman in the concept of The Law of the Non-transferability of Law. Laws should be born from the values existed in society reflected in the regulations made by the state (Ali & Heryani, 1998).

Historically the birth of special courts in Indonesia has been known since the time of the Dutch East Indies government, such as the Religious Courts which originated from Priesterraad. After Indonesia's independence, Elucidation of Article 7 paragraph (1) of Law Number 19 of 1964, recognizes the existence of three types of justice, namely the General Court, the Special Court and the State Administrative Court, in this case the religious court is considered to be included in the definition of a special court. This definition was then corrected through

Law Number 14 of 1970, making religious court a separate court alongside the general court, military court, and state administrative court. The idea of forming a special judiciary then particularly developed in the post-reform era, especially for the purpose of meeting the growing demands for justice that are increasingly complex in society (Sulistyono & Isharyanto, 2018).

The position of the Sharia Court within the scope of judicial power was previously regulated in Law Number 4 of 2004 concerning Judicial Power in particular Article 15 paragraph (2) which states that: *"The Islamic Sharia Court in Nanggroe Aceh Darrussalam Province is a special court within the scope of religious court, and is a special court within the domain of general court as long as its authority is related to the authority of the general court "*. The elucidation, stated the special court defined in this provision includes: 1) juvenile court and tax court; 2) Islamic Sharia courts in the Province of NAD consisting of the Sharia Court for the first level and the Provincial Sharia Court for the appeal level as stipulated in Law Number18 of 2001 concerning Special Autonomy for the Special Region of Aceh Province as the Province of Nanggroe Aceh Darussalam. Thus, the Sharia Court in this case is a special court that falls within the scope of this law.

In its journey, Law Number 4 of 2004 concerning Judicial Power was replaced with Law Number 48 of 2009. According to Law Number 48 of 2009 concerning Judicial Power the existence of the Sharia Court is no longer explicitly stated in separate articles as was previously regulated in Law Number 4 of 2004. The mention of a special court in Law Number 48 of 2009 is regulated in Article 27 which reads: Paragraph (1) A special court can only be established in one of the judicial circles under the Supreme Court as referred to in Article 25, paragraph (2). Provisions regarding the establishment of a special court as referred to in paragraph (1) are regulated by law. Elucidation to Article 27 difened "special courts" including juvenile courts, commercial courts, human rights courts, corruption courts, industrial relations courts and fisheries courts located within the general court, as well as tax courts located within the scope of state administrative court.

Based on the elucidation of Article 27 Law Number 48 of 2009, it appears that the existence of the Sharia Court is no longer included in the scope of special court in this law. This is different from what was contained in Law Number 4 of 2004 which in the elucidation of Article 15 mentions the Sharia Court as part of a special court. The fact that Law Number 48 of 2009 did not explicitly state the Sharia Court as part of the special court, could create uncertainty about the position of the Sharia Court within the scope of judicial court in Indonesia. The absence of recognition of the Sharia Court as one of the special courts in Law 48 of 2009 can cause problems in the future. Although Law no. 11 of 2006 concerning the Government of Aceh, states that Islamic sharia justice in Aceh is part of the national justice system within the scope of religious court conducted by the Sharia Court. However, there is still a need for recognition from Law 48 of 2009 concerning Judicial Power of Sharia Court position by incorporating in elucidation that the Sharia Court is a part of a special court. Thus it will further affirm the position of the Sharia Court in Indonesia judicial system.

Increased Authority of the Sharia Court in the Field of *Jinayah* Law

The absolute authority of the Sharia Court is specifically regulated in paragraph (3) of Law Number 11 of 2006 concerning Aceh Governance. It is stated that *"the Sharia Court has the authority to examine, judge, decide, and settle cases covering the areas of ahwal al-syakhsiyah (family law), muamalah (civil law), and jinayah (criminal law) based on Islamic sharia"*.

Nearly a decade after the implementation of Islamic Sharia and the operation of Sharia Court as a judicial institution in the Province of NAD, several problems had arisen and still unsolved. Those problems could directly or indirectly affect the capacity of the Sharia Court in carrying out its functions to examine and prosecute, especially in *jinayah* cases as a new authority for this institution, along with the implementation of the Islamic Sharia (Muazzin, 2011).

The increased authority of the Sharia Court in the field of jinayah law mentioned above referred to the addition of certain types of crimes that are not regulated in positive law. The expansion of material law can be seen from the existence of various new offenses (new rules against actions that are subject to criminal sanctions) and the expansion of offenses (expansion of criminal elements) against existing offenses, as well as the additinal new types of punishment (Dewi, 2009) Article 3 of Qanun 6 of 2014 concerning the Law of Jinayat, stated that the offenses regulated in this Qanun include: Khamar; Maisir; Seclusion; Ikhtilath; Adultery; Sexual harassment; Rape; Qadzaf; Liwath; and Musahaqah. Among the offenses forms stipulated in Qanun Jinayah, there are some that are not recognized in positive criminal law. This makes the Sharia Court have special authority in adjudicating cases that are not regulated in positive criminal law. The forms of the offense which are not regulated by the positive criminal law includes:

1. Khamar is an intoxicating drink and / or contains alcohol with a level of 2% (two percent) or more. The possible penalty in Article 15 of the Qanun Jinayah states that anyone who deliberately drinks Khamar is faced possible penalty of with 'Uqubat Hudud, flogging (whipping) 40 (forty) times. Article 16 further states that every person who deliberately produces, stores / stores, sells, or imports Khamar, each shall be threatened faced possible penalty of 'Uqubat Ta'zir, flogging a maximum of 60 (sixty) times or a maximum fine of 600 (six hundred) grams of gold. pure or imprisonment for a maximum of 60 (sixty) months.
2. Maisir is an act that contains an element of betting and / or an element of gambling which is carried out between 2 (two) or more parties, prearranged with an agreement that the winning party will receive certain payments / benefits from the losing party either directly or indirectly. Article 18 of the *Qanun Jinayah* states that anyone who deliberately commits *Jarimah (offenses) Maisir* with a maximum stake and / or profit of 2 (two) grams of pure gold, will be punished with a maximum flogging 12 (twelve) times or the maximum fine. a maximum of 120 (one hundred and twenty) grams of pure gold or a maximum imprisonment of 12 (twelve) months.

3. *Khalwat* is the act of being in a closed or hidden place conducted by 2 (two) people of different gender who are not *Mahram* and is tied with marital bond with the willingness of both parties leading to adultery. Article 23 states that every person who deliberately commits *Jarimah khalwat*, is is facing possible penalty with *'Uqubat Ta'zir* with a maximum of 10 (ten) flogging or a maximum fine of 100 (one hundred) grams of pure gold or a maximum imprisonment of 10 (ten) months.
4. *Ikhtilath* is the act of intimate or affection, such as making out, touching, hugging, and kissing between men and women who are not husband and wife with the willingness of both parties, either in a closed or open place. Article 25 states that every person who deliberately commits *Jarimah Ikhtilath*, is is facing possible penalty of '*Uqubat*' whipping a maximum of 30 (thirty) times or a maximum fine of 300 (three hundred) grams of pure gold or imprisonment of 30 (thirty) months.
5. *Liwath* is the act of a man by inserting his testicles into another man's rectum with the willingness of both parties. Article 63 states that every person who deliberately commits Jarimah Liwath is facing possible penalty of *'Uqubat Ta'zir* for a maximum of 100 (one hundred) lashes (flogging) or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum imprisonment of 100 (one hundred) months.
6. *Musahaqah* is the act of two or more women by rubbing each other's limbs or *faraj* to obtain sexual stimulation (pleasure) with the willingness of both parties. Article 64 states that everyone who deliberately commits *Jarimah Musahaqah* is facing possible penalty of *'Uqubat Ta'zir* for a maximum of 100 (one hundred) lashes or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum imprisonment of 100 (one hundred) months.
7. Qadzaf is accusing someone of adultery without being able to present at least 4 (four) witnesses. Article 57 states that everyone who deliberately commits Qadzaf is facing possible penalty of *'Uqubat Hudud* 80 (eighty) times.

Article 5 of this Qanun states that the *Jinayah* Qanun applies to: 1) Every Muslim who practices *Jarimah* in Aceh; 2) Every person who is not Muslim who practices *Jarimah* in Aceh together with Muslims and chooses and submits himself voluntarily to the *Jinayat* Law; 3) Any person with a non-Muslim religion who commits *Jarimah* actions in Aceh which are not regulated in the Criminal Code (KUHP) or criminal provisions outside the KUHP, but are regulated in this Qanun; and 4) Business entities carrying out business activities in Aceh.

Judging by the type of *Jarimah* regulated in Qanun No. 6/2014 on the Law of *Jinayat*, *Jarimah* can be classified into *Jarimah Hudud* and *Jarimah Ta'zir*. *Hudud* is the plural of *hadd* which means the barrier between two things. *Hudud* is a punishment that has been determined by *syara* 'and is the right of Allah (Qadir, 2005). The definition of *sharia hudud*, is a punishment stipulated to uphold the rights of Allah, the punishment is enforced for the benefit of the people and maintains the order of society and as long as it is for the sake of upholding the rights of Allah, it cannot be canceled. The crime referred to is adultery, accusing adultery, stealing, drunkenness, being hostile to religion, apostasy, and rebellion

(Sabiq, 2008). Based on this, the categories of *Jarimah Hudud* contained in Qanun Number 6 of 2014 are drunkenness *(khamar)*, adultery and accusing adultery (*qadzaf*).

Meanwhile, *ta'zir* means a sentence imposed for committing a crime that has no *hudud* or *kafarat or* consequences. In other words *ta'zir* is a sanction determined by the government (al-Hakim) for crimes or immoral acts whose punishment is not directly determined by the Shari'a [15]. Determination of the sentence of Jarimah *ta'zir* is fully within the authority of the government. In the context of the Qanun *Jinayah* there are several Jarimah *ta'zir* including *khalwat, ikhtilat*, sexual harassment, rape, musahaqah, and *liwath.*

From the perspective of sociology of law, sociologists of Islamic political theorists have formulated several theories about the relationship between religion and the state. These theories are broadly divided into three paradigms (Wahid & Rimadi, 2001):

1. Unified Paradigm
   According to unified paradigm, religion and the state are integrated. The area of religion includes politics or the state. The state is both a political and religious institution. Therefore, according to this paradigm, the head of state is the holder of political power and authority. Its rule is administered on the basis of "divine sovereignty" because supporters of this paradigm believe that sovereignty originates and rests in the hands of God. This paradigm is adopted by the Shi'ah group. However, Shi'ah politics, replace the state (ad-dawlah) term with Imamat (leadership) (Al-Mawdudi, 1990). This unified paradigm is adoptedby Iran. As an Islamic Republic, the form of the state taken by Iran has elements that make it both Islamic and republican. However, the Islamic Republic of Iran is built on the principles of an Islamic political theory thick with the Shi'ah Islamic tradition (Helmys, 2016):
2. *Symbiotic Paradigm*
   Religion and state according to this paradigm are symbiotic, a relationship that based on reciprocal and mutually necessary. In this case, religion needs a state because with the state, religion can develop. Conversely, the state also needs religion, because state religion can develop in ethical and moral spiritual guidance (Syamsudin, 1996). In the framework of this symbiotic relationship, Ibn Taymiyyah in as-Siyasah asy-Syar'iyyah said that the existence of power that regulates human affairs is the greatest religious obligation, because without the power of the state religion cannot stand upright. Ibn Taymiyyah considered the state enforcement as a sacred duty demanded by religion as a means of bringing people closer to Allah. In this concept, syari'ah (Islamic law) occupies a central position as a source of legitimacy for political reality. The state has a big role to play in enforcing Islamic law in its right portion. Religious law still has the opportunity to color state laws, even in certain problems it does not rule out the possibility of religious law being made as state law.
3. Secularistic Paradigm
   This paradigm rejects the two paradigms above. The secularistic paradigm proposes the separation (disparity) of religion over the state and separation of

the state over religion. The concept of *Ad-dunya al-Akhirah, ad-din ad-dawlah or ad-dunya age, the age of ad-dunya* is diametrically dichotomized. In the context of Islam, this paradigm rejects the state's foundation on Islam, or rejects the Islamic determination of a particular form of state. One of the initiators of the secularistic paradigm was Aliy Abd Ar-Raziq (1887-1966 AD), a Muslim scholar from Egypt. In his book, Al-Islam wa Ushul al-Hukm, 'Abd al-Raziq said that Islam is only a religion and does not cover state affairs; Islam has no religious connection with the system of government of the caliphate, including the al-Khulafa ar-Rasyidin caliphate, is not a religious or Islamic political system, but a world system.

Based on the theory put forward by Muslim sociologists, the relationship between religion and the state in the context of Indonesia uses a symbiotic paradigm. According to this paradigm, religion and state are related symbiotically, a relationship that is reciprocal and mutually necessary. The reciprocal relationship between the state and religion within the scope of the Unitary State of the Republic of Indonesia can be seen from the recognition of laws originating from religion as part of the national legal system. In this context, one of them can be seen from the recognition given by the state as emphasized in Article 29 paragraph (1) of the 1945 Constitution which states that *"The state is based upon the belief in the One and Only God."* In this context, one of them can be seen from the recognition given by the state as emphasized in Article 29 paragraph (1) of the 1945 Constitution which states that "The state is based on the One Godhead". According to Hazairin, the meaning of this article is interpreted as in the Republic of Indonesia, laws that contradict the norms of religious law and the morality norms of the Indonesian people are prohibited, the state is obliged to implement Islamic Sharia for Muslims, Christian Sharia for Christians, and Hindu Sharia for Hindus. (Daud, 1991). Reaffirming Hazairin's views in understanding the interpretation of Article 29 paragraph (1) of the 1945 Constitution, it can be concluded that when the state carrying out its duties, including making laws, cannot conflict with religious values adhered by the Indonesian people. Or in an a contrario manner it can be understood that in compiling a legal norm, the state must pay attention to the religious norms adhered by the Indonesian people so that the legal norm does not contradict religious norms.

Article 5 of the Qanun *Jinayah* states that this Qanun applies to: a) Everyone is Muslim who practices Jarimah in Aceh; b) Every non-Muslim religious person who practices Jarimah in Aceh together with Muslims and chooses and submits voluntarily to the Jinayat Law; c) Any non-Muslim religious person who commits Jarimah actions in Aceh which are not regulated in the Criminal Code (KUHP) or criminal provisions outside the KUHP, but are regulated in this Qanun; and d) Business entities that carry out business activities in Aceh. The formulation of Article 5 can be used as the basis for the argument that the relationship between religion and the state in Indonesia takes a symbiotic paradigm where according to this paradigm, religion and state relate symbiotically, namely a relationship that is reciprocal and mutually necessary.

Jinayah for Non-Muslim

In Islamic legal terminology, there is a *zimmi* or *zimma* defined by Wehr (1976) as protection, covenant of protection, safeguard, guarantee, security of life and property. While Ahl al-zimmah is defined as a non-Muslim who is free (free non-Muslim) to live / live in Muslim countries (based on Islamic law), enjoy protection and security by paying a capital tax (Wehr, 1976). According to Abdullahi Ahmed An-Naim, the word *zimmi* refers to an agreement between the Muslim government in the country and *the ahlu al-Kitab* in order to guarantee security for themselves, property and freedom to practice their religious teachings in the private field (An-Naim, 2007). Meanwhile, Abdul Kadir Zaidan defines *zimmi* as a non-Muslim community that receive special guarantees to live under the protection of Muslims with protection and security as well as a place to live (Madjid dkk, 2004).

According to Yusuf Qardhawithere are several rights ownes by *zimmi* clan including (Qardhawi, 1994):

1. The freedom of religion guarantee, Muslims are not allowed to force *zimmi* (non-Muslims) to embrace Islam, must respect worship and maintain houses of worship belonging to non-Muslims.
2. Insurance for poverty in old age, for those who are no longer able to work and make ends meet because they are old. So they and their families became the responsibility of Baitul Maal (state treasury).
3. Freedom of work and conduct business, non-Muslim minorities have the freedom to work and conduct business, choosing any jobs they want, and manage various kinds of economic activities just like the freedom that Muslims have. Apart from this, they also enjoy complete freedom in trade, industry and skills.
4. Guaranteed of access to governmental position, minorities also have the right to hold positions in government just like Muslims, except for religious positions, such as imam, supreme leader of the state, army commander, judge for Muslims, in charge of zakat and alms, and the like. These positions are closely related to the religion of Islam and the teachings in it that Muslims must really care for and maintain.

Abul A'la Al-Maududi added that Islam clearly guarantees the rights of non-Muslims, and Islam prohibits them from interfering in parliamentary matters. However, Islam still opens the door for them to enter the government if they are willing and accept Islam as the basis of the state. Therefore, there is no slightest authority for an Islamic state to invade the rights of non-Muslims that have been stipulated by religion, and no one has the courage to take away or reduce their rights. Even Islam is required to provide additional rights for them as long as it does not conflict with the existing principles of the state (Al-Maududi, 1993).

In the context of Islamic Sharia implementation in Aceh ,Article 129 of the Aceh Government Law states that (1) In the event that *jinayah* acts are committed by two or more people together, among whom are non-Muslim, the perpetrator who is not Muslim can choose and submit voluntarily on *Jinayah* law. (2) Every

person who is not Muslim commits *jinayah* acts which are not regulated in the Criminal Code or criminal provisions outside the Criminal Code shall apply to *jinayah* law.

Based on the provisions of the article, there are consequences, that Acehnese who are non-Muslim could subject to *jinayah* law if they commit *jinayah* acts together with Acehnese who are Muslim. If the type of *jinayah* act that is carried out is regulated in the Qanun and KUHP, then non-Muslims are given a choice of law. Meanwhile, if the Criminal Code does not regulate the types of *jinayah* acts that are violated, then for non-Muslim citizens the *jinayah* law stipulated in the *Jinayah* Qanun applies.

Discourse about whether the imposition of *jinayah* law to non-Muslims is permissible under Islamic law then arises. When referring to one of the *Jinayah* laws regulated in the Qanun *Jinayah*, namely adultery, there are different views among Islamic legal experts. Syafi'i opinioned that just like Muslims who are proven to have committed adultery, *dzimmi* and murtad kafirs are also obliged to be subject to hudud punishment, because *dzimmi kafirs* are willing to follow all applicable laws for Muslim citizens. Rasulullah saw. once throwing stones to two *muhsan* Jews who committed adultery until they died (*rajam*). Meanwhile for *apostates*, Islamic laws still apply to him. Apostasy does not detach itself from the implementation of Islamic law. Meanwhile, according to Imam Malik, dzimmi infidels are not subject to hudud punishment (Sabiq, 2008).

Based on the opinion of Imam Syafi'i that said *kafir dzimmi* can be sentenced to hudud if they commit adultery, then what is stated in Article 129 of the Aceh Governance Law is justified according to Islamic law, although there are different opinions among scholars. However, a problem related to the definition of adultery contained in article 284 of the Criminal Code which states that adultery is intercourse committed by a man or woman who is married to a woman or man who is not a wife or husband then arises. The intercourse is done on a consensual basis and is not coercion from either party. Thus, what's included in the category of adultery according to article 284 of the Criminal Code is, if one of the parties is bound by marriage, while if both parties are not married then it cannot be called adultery according to this article. The construction built in Article 284 of the Criminal Code is certainly very contrary to the Islamic concept which constructs adultery as intercourse between a man and a woman without a marriage bond, whether the man or woman is married or not married, both are still punished. The penalty for unmarried adulterers is 100 flogging and exile. Meanwhile, for adulterers who are married are thrown with stone to death (*rajam*).

Responding to the difference in the concept of adultery between the Criminal Code and Islamic law, substantially the Qanun *Jinayah* must be able to limit the scope of adultery regulated in the Qanun *Jinayah*, so that in cases of adultery, the choice of law should not apply for non-Muslim citizens who violate as oppose to what is contained in Article 129 paragraph (1) The Aceh Governance Law, where a choice of law for non-Muslim to voluntarily submit to the *Jinayah* law is available.

Formal and material laws in the fields of Ahwal al-syakhsiyah (family law) and Muamalah (civil law) has yet been established

Based on the provisions of Law Number 11 of 2006 concerning Aceh Governance, the absolute authority of the Sharia Court, which more specifically regulated in paragraph (3) states that "*the Sharia Court has the authority to examine, judge, decide, and settle cases covering the field of matters. al-syakhsiyah (family law), muamalah (civil law), and jinayah (criminal law) which is based on Islamic syari'at ".* Furthermore, Article 53 of the Aceh Provincial Qanun Number 10 of 2002 concerning Islamic Sharia Courts also restates the authority of the Sharia Court as regulated in Article 49 which states*: "The Sharia Court has the duty and authority to examine, decide and settle cases at the first level, in the areas of: a. ahwal al-syakhsiyah; b. muamalah; c.jinayah "*. Furthermore, Article 53 states that; *"The material laws that will be used in resolving cases as referred to in Article 49 are those originating from or in accordance with Islamic Sharia and will be regulated by Qanun"*. Article 54 then states*, "the formal laws to be used by the Court are those originating from or in accordance with Islamic Sharia which and be regulated by Qanun"*.

Based on the provisions of Articles 53 and 54 of the Aceh Provincial Qanun Number 10 of 2002 concerning Islamic Sharia Courts, and Article 128 of Law Number 11 of 2006 concerning Aceh Governance, material and formal laws are things related to the authority of the Sharia Court in the field of ahwal al-syakhsiyah (law family) including matters of marriage, inheritance, and will, muamalah (civil law) and *jinayah* (criminal law) will be regulated in a separate Qanun originating from or in accordance with Islamic law. The results of the researches that have been carried out, show that among the powers of the Sharia Court, only the field of *jinayah* has been regulated materially and formally in a separate Qanun. The material law in the field of *jinayah* is regulated in Qanun Number 6 of 2014 concerning *Jinayah* Law and formal law is regulated in Qanun Number 7 of 2013 concerning Law of Jinayat Procedure. Meanwhile, the authority in the fields of ahwal al-syakhsiyah (family law) and muamalah (civil law), both material and formal law, has not yet been made by a Qanun that specifically regulates these two. According to the provisions of Article 132 of the Aceh Governance Law, it is stated that (1) The procedural law applicable to the Sharia Court is the procedural law regulated in the Aceh Qanun. (2) Before the Aceh Qanun concerning procedural law in paragraph (1) is established: a. The procedural law that applies to the Sharia Court related to ahwal alsyakhsiyah and muamalah is the procedural law as it applies to courts in religious courts except it is specifically regulated in this Law.

Referring to the provisions of Article 132 of the Aceh Governance Law, as long as a Qanun has not been established in the field of family law (ahwal alsyakhsiyah) and muamalah, what applies is the procedural law applies to courts within the religious court. The impact of the absence of material and formal laws has made the process of exercising the authority of the Sharia Court in both fields not optimal. This is partly due to the special characteristics of the law that applies in Aceh Province as is the case within the scope of *jinayah* law. Therefore, the need for the formation of Qanuns in the field of family law (ahwal

alsyakhsiyah) and muamalah is something that must be met immediately to ensure legal certainty.

According to the perspective of legal effectiveness Roger Cotterell's, one of the conditions in which law can effectively influence the behavior and attitudes of citizens is if the existing law is authoritative and prestigious (Cotterrell, 2012). In the context of the application of Islam in Aceh, Qanun is a form of authoritative law where the law is made by an institution that has both formal and material authority. Materially, the Qanun that is formed must represent the principles of Islamic law, as basic sources for the application of Islamic law in Aceh. The absence of Qanuns in the fields of ahwal al-syakhsiyah (family law) and muamalah (civil law) could make the application of law in both fields ineffective. Even though, procedurally in the time Qanun has not been formed in the fields of ahwal al-syakhsiyah (family law) and muamalah (civil law), the court could refer to what applies in (general/ outside Aceh province) religious courts, this has not guaranteed legal protection to Aceh citizens as a whole.

CONCLUSION

Changes in Sharia Court position within the scope of judicial court in Indonesia are contained in Article 27 of Law Number 48 of 2009 concerning Judicial Power where the existence of the Sharia Court is no longer stated to be included in the scope of special court in this law. This is different from what was contained in Law Number 4 of 2004, which in the elucidation of Article 15 mentions the Sharia Court as part of a special court. The problematic issue of Sharia Court absolute authority in the scope of the judicial system in Indonesia include, among other things, the increasing authority of Sharia Court in the field of *Jinayah* Law. Among the offense forms stipulated in Qanun *Jinayah*, are some offenses that are not recognized in positive criminal law. This makes the Sharia Court have special authority in adjudicating cases that are not regulated in positive criminal law. Second, the implemention of *Jinayah* for non-Muslims, is based on the opinion of Imam Syafi'I, who stated that *kafir dzimmi* can be sentenced with *hudud* if they commit adultery. Thus, although there are different opinions among the cleric, what is stated in Article 129 of the Aceh Governance Law is justified according to Islamic law, Third, the material and formal law has yet been formed in the fields of *ahwal al-syakhsiyah* (family law) and *muamalah* (civil law).

REFERENCES

Ahmed An-Naim, Abdullahi. (2007). *Islam dan Negara Sekuler: Menegosiasikan Masa Depan Syariah*. Bandung: Mizan.

Al-Qadir Audah, Abd dalam Ahmad Wardi Muslich. (2005). *Hukum Pidana Islam*. Jakarta: Sinar Grafika.

Al-'Ala Al-Mawdudi, Abu. *Khilafah dan Kerajaan*. (1990). alih bahasa Muhammad Al-Baqir. Mizan: Bandung.

Al A'la Al-Maududi, Abu. (1993). *Hak-hak Minoritas dalam Negara Islam*. Terj. Syatibi Abdullah. Bandung: Sinar Baru.

Ali, Achmad & Heryani, Wiwie. (1998) *Menjelajahi Kajian Empiris terhadap Hukum*. Jakarta: Kencana.

Aripin, Jaenal. (2013). *Jejak Langkah Peradilan Agama di Indonesia*. Jakarta: Kencana.

Cotterrell, Roger. (2012). *Sosiologi Hukum The Sosiology of Law*. Bandung: Nusa Media.

Daud Ali, Mohammad. (1991). *Hukum Islam*. Jakarta: Raja Grafindo.

Dewi, Gemala. (2009). Kewenangan Pengadilan Agama (Mahkamah Sharia) di NAD dalam Melakukan Eksekusi Sanksi Pidana Islam (Hukum Jinayat) Menurut Ketentuan Hukum dan Sistem Peradilan di Indonesia. *Jurnal Hukum dan Pembangunan Edisi Khusus Dies Natalis 85 Tahun FHUI.*

Dien Syamsudin, M. (1996). *Usaha Pencarian.* Cirebon; Jilli.

Efendi, Jonaedi & Ibrahim, Johnny. (2020) *Metode Penelitian Hukum Normatif dan Empiris*. Jakarta: Kencana.

Helmys, Naldo. (2016). Ekspor Revolusi Islam dan Identitas Republik Islam Iran. *Andalas Journal of International Studies*, *5 (2)*.

J. Moleong, Lexy. (2015). *Metode Penelitian Kualitatif*. Bandung: P.T Remaja Rosdakarya.

Madjid, Nurcholis dkk. (2004). *Fiqih Lintas Agama: Membangun Masyarakat Inklusif Pluralis*. Jakarta: Yayasan Wakaf Paramadina dan The Asia Foundation.

Mahmud Marzuki, Peter. (2014). *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group.

Muazzin. (2011). Hambatan Eksekusi Putusan Hakim dalam Perkara. *Jinayah Kanun Jurnal Ilmu Hukum*, *53*.

Qardhawi, Yusuf. (1994). *Minoritas Non-Muslim di dalam Masyarakat Islam*. Diterjemahkan oleh Muhammad al-Baqir. Bandung: Karisma. Cet. Ke-3.

Rhiti, Hyronimus. (2011) *Filsafat Hukum Edisi Lengkap (dari Klasik sampai Postmodernisme)*. Yogyakarta: Atma Jaya.

Sabiq, Sayyid. (2008). *Fiqih Sunnah jilid 2*. Jakarta: Al I'tishom.

Sulistyono, Adi & Isharyanto. (2018) *Sistem Peradilan di Indonesia dalam Teori dan Praktik*. Depok: Kencana.

Suteki & Galang Taufani. (2020). *Metodologi Penelitian Hukum Filsafat, Teori, dan Praktik*. Jakarta: Rajawali Press.

Wahid, Marzuki & Rumadi. (2001). *Fiqh Madzab Negara.* Yogyakarta: LKIS.

Wehr, Hans. (1976). *English Arabic Language Dictionaries*. Itacha New York: Spoken Language Service, Inc.

Wignjosoebroto, Soetandyo. (2013). *Hukum Konsep dan Metode*. Malang: Setara Press.

Criminal Justice Quotes

"Criminal justice" is what happens after a complicated series of events has gone bad. It is the end result of failure--the failure of a group of people that sometimes includes, but is never limited to, the accused person."

Paul Delano Butler, Let's Get Free: A Hip-Hop Theory of Justice