



Hudud in Indonesia: In Perspective of Pancasila Justice and Islamic Justice

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Abstract. The institutional structure of the criminal justice system in Aceh is deeply rooted in the application of Islamic law, therefore, they have a *jinayah qanun* that regulates hudud crimes such as gambling, drinking alcohol, and committing adultery. The values of justice of Pancasila and Islam should be in harmony, otherwise excessive criminalization of hudud in Aceh if it is in line with Pancasila justice and Islamic justice. This study is a qualitative research, that is descriptive analysis. Introduces generic research skills by examining qualitative or quantitative methodologies relevant to all areas of legal research of through engagement. In Aceh, hudud punishment are not fully carried out in line with Pancasila justice and Islamic justice. In addition, Islamic criminal law in Indonesia still reflects the one implemented in Rasulullah era. Meanwhile, the implementation of hudud is supposed to consider the system of Islamic justice and Pancasila justice as in the context of Indonesia.

Keywords: Hudud · Pancasila Justice · Justice in Islam

1 Hudud in Indonesia

1.1 Implementation of Hudud in Aceh

One of the reasons has to do with the contemporary development of the Muslim world, where Islamic law is spreading not only in constitutions and civil codes, but in criminal matters as well. Since the 1970s, more than thirty-eight countries have introduced constitutions with clauses declaring Islamic law to be the “source” or “source” of state law. During the same period, at least a dozen countries have adopted Islamic criminal law in countries ranging from Iran, Pakistan, and Saudi Arabia to provinces in Malaysia, Northern Nigeria, Syria and Indonesia (Aceh). More recently, amid the turmoil of the Arab uprisings that began in 2010, there has been great uncertainty about the fate of democracy and the rule of law.¹

Among the problems of implementing Islamic criminal law in Indonesia or more specifically the *qanun jinayah* in Aceh is that the provisions of Aceh’s *qanun* are not so strong compared to national law. What has received the most attention in terms of the application of Islamic criminal law (*al-Hukum al-Jina-i*) in Aceh is the pros and cons

¹ Intisar A Rabb, *Doubt in Islamic law*, (New York: Cambridge University Press, 2015), hlm.6.

of implementing the qanun in society. Although this qanun in Aceh is still recognized as one of the legal provisions, in its implementation it always raises quite complicated problems when juxtaposed with the justice of Pancasila.

Studying Aceh from a criminal law perspective is important. One of the arguments for the importance of this study is because the application of criminal law in Aceh is based on the religious ideological views of the people, namely Islam. Maybe some people will deny it because of the fact that there are countries such as Iran, Saudi Arabia and other Islamic countries that also apply Islamic criminal law as a positive criminal law. However, this can be easily refuted because the application of Islamic criminal law in Aceh covers the province, not the state. This is the unique side that makes Aceh different from other regions.²

The implementation of the hudud law in Aceh only applies to gambling, adultery and drinking alcoholic beverages (Khamr). The autonomy of a province within a country has allowed to carry out its own legal sub-system. This is a reality that empirically Islamic law in Aceh has become a living value in Acehnese society (existing values) for centuries. Another strength is where the legal system in Indonesia through the 1945 Constitution explicitly states freedom of religion in the sense of being free to practice religious teachings for its adherents.

Furthermore, the disclosure of the term Islamic law is found in Law no. 44/1999 on the Privileges of Aceh Articles 3 & 4 which clearly state that what Aceh has obtained is an acknowledgment of the Central Government. Also, religious life becomes an important part of socialite society. Strictly speaking, the problem setting will be determined through a qanun. This is a state order or law that accommodates the wishes of the people.

The position of Shari'a in the Law is a manifestation of Aceh's special rights, such as the implementation of Islamic Shari'a, education and customs. The implementation of these privileges has been delayed for +40 years because of that starting again about the substance and how the concept of its application requires proper reflection and logic so as not to harm the religion of Islam itself. Since the beginning of the declaration of the implementation of Islamic law, challenges and even doubts have been accompanied by a sense of pessimism because there are no concrete examples of how to apply Islamic law in the context of the modern world. In this position it is understood that Islamic law in Aceh is an Islamic teaching that has been regulated by Qanun. The scope of the implementation of Islamic law is clearly stated in Qanun No. 5 of 2000, namely: Article 5:

- (1) In order to realize the privilege of Aceh in the field of organizing religious life, every person or legal entity domiciled in the region is obliged to uphold the implementation of Islamic law in his life.
- (2) The implementation of Islamic Sharia as referred to in paragraph (1) includes:
 - a) 'Aqidah;
 - b) Worship;
 - c) Mua'alah;

² Ridwan Nurdin, *Kedudukan Qanun Jinayat Aceh Dalam Sistem Hukum Pidana Nasional Indonesia*, Jurnal MIQOT Vol. XLII No. 2 Juli-Desember 2018, hlm. 357.

- d) Morals;
- e) Islamic education and da'wah / amar ma'ruf nahi
- f) wrong;
- g) Baitul Mal;
- h) Society;
- i) Islamic symbols;
- j) Defense of Islam;
- k) Qadha;
- l) Jinayat;
- m) Munakahat; and
- n) Mawaris.

The process of taqinization of jarimah hudud in Aceh experienced ups and downs. There are many obstacles and obstacles in its implementation. The legal-formal situation of the position of the judiciary which is still under the authority of the national judiciary as stated in Law no. 48 of 2009. More specifically, the application of the hudud law in Aceh has become legal since the enactment of Law no. 18 of 2001 concerning special autonomy for the Province of the Special Region of Aceh as the Province of Nangroe Aceh Darussalam.

Hudud law in Aceh is a legal product issued by the Aceh Government through Aceh Qanun Number 6 of 2014. Since the implementation of the Caning Punishment in Aceh, there have been many pros and cons among the community. The hudud punishment in the form of being lashed (whipped) in Aceh cannot be said to violate justice in Islam and the justice of Pancasila, because in its implementation it has been very concerned about the safety aspect for convicts of whipping, and also the caning punishment that applies in Aceh has referred to the source of Islamic law, namely Al-Qur'an and Hadith of Prophet Muhammad SAW. Then formalized through Aceh Qanun Number 6 of 2014.

When compared to imprisonment, the caning law is more humane, because confining the convict for a long time can deprive the convict of his right to resume his activities in society. In contrast to the caning punishment, which can immediately return to its normal activities, and the caning law can teach the community a lesson and prevent them from committing finger crime. Therefore, whipping is something that is allowed in Islam and also approved by the Indonesian Supreme Court, so there is no reason to say that the caning in Aceh is contrary to justice in Islam and justice of Pancasila.

The main ideas that must be developed based on the understanding of Pancasila according to Soerjanto Pespwardojo (1989) are divided into four main ideas as follows:³

1. It is necessary to make a clear distinction between the essential meaning of justice and the forms of its manifestation in the fields of public life. The more concrete the form of manifestation means the more relative the value it contains. However, the more essential the understanding put forward means the more basic the value it contains.

³ Surajiyo, *keadilan dalama system hukum Pancasila*, Ikraith-humanira Vol 2 No. 3 2018, hlm. 27.

2. The essence of justice lies in acknowledging and treating others as fellow human beings. Thus justice is an ethical value that gives meaning and can never be fully achieved. There is always a positive tension between ethical and legal norms. Thus the law does not need to face its freezing point and always requires interpretation and jurisprudence in its application.
3. Justice that reflects the relationship between humans is manifested in three forms, commutative justice insofar as it is a norm that regulates interpersonal relationships or equivalent institutions. Distributive justice is a norm that determines society's obligation to prosper individuals. Legal justice insofar as it denotes the norms that determine the obligations of the individual towards society.
4. Pancasila emphasizes social justice in the sense that justice in all three forms is realized solely because of the legal awareness of the community members, but mainly because of legal arrangements that are directed at the structure of the community process, so that the way is open for community members to actually get justice.

As part of the Indonesian legal system, the Aceh Jinayat Qanun is here to complete anything that has not been regulated in the national criminal law. Sometimes, Aceh's Jinayat Qanun even requires norms that are relatively different from the Criminal Code and other national criminal laws. The spirit of formalizing Islamic law in Aceh is undeniable indeed to make Aceh different from other provinces in Indonesia. That's why in the case of adultery (for example), Aceh has its own definition. Or in the case of khamr (liquor), Aceh also has its own measure. For sexual harassment, Aceh stipulates sanctions that are relatively heavier than the Criminal Code. Meanwhile, for behaviors such as lesbian and gay, Aceh not only prohibits it, it also imposes severe ta'zîr sanctions.

The Qanun Jinayat itself was originally a separate Qanun. Now, all types of jarimah and its 'uqûbât are codified into one Qanun, and the jarmah and 'uqubat have even increased significantly. Article 3 Paragraph 2 of Aceh's Jinayat Qanun states that this Qanun only regulates 10 types of jarîmah (delict) with their respective variants. The ten jarîmah or criminal acts are: khamr; maisir; seclusion; ikhtilâth; adultery; sexual harassment; rape; qadzaf; liwath; danmusâhaqah. Seclusion, sexual harassment, (khamr) liquor, (maisir) gambling, and rape have similarities to the Criminal Code. The difference is more in the type and form of sanctions. Meanwhile, adultery differs in definition (actions) and punishments. Homosexuality (liwâth and musâhaqah) is a recent issue that Aceh has responded to several years ago.

For the current context, Islamic criminal law is not applicable because Indonesia is based on Pancasila and the 1945 Constitution, not the Koran and Hadith. However, this law can only be applied in Nanggroe Aceh Darussalam. The ta'zîr sanctions can indeed be carried out, but the hudud and qishash sanctions cannot be carried out. From this it can be understood that the request of Amrozi or Ali Ghufron, the Bali Bombing suspects who were executed, requested that the death penalty be carried out by beheading with a sword, as practiced in Saudi Arabia, was not granted by the Indonesian Supreme Court. This is because in Indonesia there are no rules regarding executions by beheading.⁴

In regulating criminal matters in Aceh, it can refer to 2 models of hudud determination by establishing laws based on texts and submitting hudud determinations to the

⁴ Nurul Irfan, *Fiqh jinayah*, (Jakarta: Amzah, 2013) hlm. 7.

authorities (ulil amri).⁵ The formulation of Pancasila justice in Aceh is closer to the concept of *uqubah takzir*, where the strict hudud provisions make the conditions and pillars of the criminal unfulfilled. *Ta'zir* is a predetermined punishment for *jarimah ta'zir*. The forms vary, but the determination is left to the competent authority, namely the legislative body or judges. *Ta'zir* is an educational punishment for sinful acts (immorality) whose punishment has not been determined by the *syara'* set by the government because there are no clear texts in the Qur'an and Al-Hadith.⁶

The hudud provision which later became hotly debated was the provision of lashes for adultery in Aceh in accordance with the perpetrator's actions. For example the case of adultery *muhson* 1 woman and 3 men, the punishment is different. The woman was sentenced to 300 lashes while the man was sentenced to 100 lashes. In the theory of benefit, Syahrür categorizes hudud as only applicable to the punishment of adultery, which is one hundred volumes (Surat an-Nur: 2) then based on verses 3–10 of the same surah, the punishment can only be imposed on the condition that there are four witnesses or through *li' an*. Fifth, the provisions that have limits and bottom but the two limits should not be touched because touching it means that it has fallen into God's prohibition.⁷

There are three principles of social justice proposed by Suryawasita (1989), namely justice on the basis of rights, justice on the basis of services, and justice on the basis of needs. Justice on the basis of rights is justice that is calculated based on the right to be received by someone. Justice on the basis of merit is justice that is calculated based on how much service someone has given. Meanwhile, justice based on needs is justice that is calculated based on what someone needs.⁸

According to Gustav Radburg, the presence of law must be able to realize 3 (three) basic values, namely: (i) the value of justice (justice), (ii) certainty (certainty), and (iii) the value of benefit (utility). The synergistic application of the three is certainly not easy, however, ideally in every preparation of legal products (*qonun hudud*) and law enforcement, the presence of the three must get a balanced proportion. In addition to the balanced fulfillment of the three basic elements. Sudharto P. Hadi, states that a good law (good norm) is a law that contains the principles of sustainability, justice and democracy. Meanwhile FX. Adji Samekto, defines justice as a permanent and continuous will to give to everyone, what should be received.⁹

Pancasila justice based on ideology is indeed seen from all aspects of life in Acehese society. So that justice is everything that is aspired to and what is called justice is related to the theoretical basis according to Aristotle, namely the theory is contained in the meaning of Pancasila contained in the contents of Pancasila so that Pancasila justice is

⁵ Lathoif Ghozali, *Hudud Takzir dan Qowad dalam Kajian Hukum Pidana Islam*, (Surabaya: Intiyaz, 2014).

⁶ Ahmad Syarbaini, *Teori Ta'zir dalam hukum pidana Islam*, *Jurnal Ius Civile*, hlm.10.

⁷ Achmad Musyahid, *Sejarah Kodifikasi Hukum Islam dna Pengembangan Teori Hukum Modern*, *Jurnal Hukum Diktum*, volume 10 Nomor 1 Tahun 2012, hlm. 19.

⁸ Christian Siregar, *Pancasila, keadilan sosial, dan persatuan Indonesia*, *Humaniora* Vol.5 No.1 tahun 2014, hlm.109.

⁹ Purwanto, *Perwujudan Keadilan dan Keadilan Sosial dalam negara Hukum Indonesia*, *Jurnal Hukum Media Bhakti*, 2017, Pontianak, hlm. 2.

the basis of ideology. The basis of Pancasila justice is contained in points 2 and 5 where it reads the second principle of just and civilized humanity and the fourth principle of justice for all Indonesian people. Fair and civilized human values, that awareness of attitudes and behavior in accordance with moral values in living together on the basis of the demands of conscience by treating things as they should. Humans need to be treated according to their dignity, as creatures of God who are equal in degree and have the same rights and basic obligations. Based on this value, there is absolutely recognition of human rights. The value of social justice for all Indonesian people, contains the meaning as the basis as well as the goal, namely the achievement of a just and prosperous Indonesian society both physically and mentally. Based on this value, justice is a very basic value that is expected by all nations. The expected Indonesian state is a just Indonesia. Justice is described basically by Aristotle, namely to know about justice and injustice, three main things must be discussed, namely what actions are related to the term, what is the meaning of justice.¹⁰

Hudud in Indonesia can be reflected in the implementation of the Aceh Jinayat Qonun with regard to criminal acts (Jarimah) of adultery and drinking alcoholic beverages (Syurb al Khamr). Of the several types of jarimah in hudud, Aceh can only apply 2, and even then in Jarimah Zina muhsan the punishment is only 100 lashes even though if it refers to several hadiths the punishment must be stoning. The submission of Aceh Qanun number 6 of 2014 to the constitution and the Criminal Code is the strongest reason why Aceh does not implement hudud in a kaffah manner. In the context of Pancasila justice, hudud in Aceh needs continuous renewal in accordance with the legal needs of the Acehnese people. In the context of Islamic justice, the implementation of hudud in Aceh is still in accordance with the Shari'a because Indonesia or Aceh are not under Islamic rule so that it is returned to Ulil amri (Government). In the context of the implementation of hudud in Indonesia, the justice of Pancasila and Islamic justice lies in the imperfection of proof of had zina and shurb khamr so that they are categorized as jarimah (criminal acts) ta'zir or returned to the provisions of the Criminal Code and the Act.

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