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Transformation and Reformation of Islamic Criminal Law; The Study on Aceh Qanun Jinayat and Its Impact To Woman and Non-Muslim¹

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Abstract

This study aims to identify the background and objectives of the implementation of the Qanun Jinayat in Aceh; types of jarimah (criminal acts) and punishment which are transformed into Qanun Jinayat; forms of transformation and reforms that have been carried out; and it's the impact to women and non-Muslims. This research is a kind of non-doctrinal normative qualitative research. This study concludes that the background of Aceh Qanun Jinayat cannot be separated from Aceh political conflict in the past and the emergence of Islamism. The purpose of implementing the Qanun Jinayat in Aceh is to bring benefit and realize Islam which is *Rahmatan lil alamin*. The types of criminal acts that are transformed into qanun are ten. This study found that the transformation carried out was normative while the reforms carried out were adaptive, not progressive, as a result, women, and non-Muslims were still vulnerable to criminalization.

Keywords: Islamic criminal law; national law; secular state; sharia

Abstrak

Penelitian ini bertujuan mengidentifikasi latar belakang dan tujuan diberlakukannya Qanun Jinayat di Aceh; jenis-jenis jarimah (perbuatan pidana) yang ditransformasikan ke dalam Qanun Jinayat; bentuk transformasi dan reformasi yang telah dilakukan; dan dampak Qanun Jinayat Aceh terhadap wanita dan non Muslim. Penelitian ini adalah jenis penelitian kualitatif normative non-doktrinal. Studi ini menyimpulkan bahwa latar belakang Aceh Qanun Jinayat tidak dapat dipisahkan dari konflik politik Aceh di masa lalu dan munculnya Islamisme. Tujuan diberlakukannya Qanun Jinayat di Aceh adalah untuk mendatangkan kemaslahatan serta mewujudkan Islam yang Rahmatan lili alamin. Jenis jarimah atau kejahatan yang ditransformasikan kedalam qanun ada sepuluh. Penelitian ini menemukan bahwa transformasi yang dilakukan bersifat normative sedangkan reformasi yang dilakukan bersifat adaptive tidak progresif, akibatnya wanita dan non Muslim masih rentan terhadap kriminalisasi.

Kata kunci: hukum pidana Islam; hukum nasional; negara sekuler; syariat.

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Introduction

As a source of ethics, morals and spiritual, religion for the people of Indonesia cannot be separated from the life of nation and state. The State of Indonesia was founded on divine values. Therefore, efforts to separate religious values from the life of the nation and state will always be in vain. On the contrary, efforts to integrate religious values into the life of a state always have wide support. For Indonesian Muslims, Islamic law is a source of ethics, moral and spiritual that also can not be separated from the life of nation and state. Therefore, if the values of Sharia are not transformed into the national legal system

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or if Muslims feel that the State ignores the religious values derived from the Sharia then such conditions can cause unrest. In the field of law, especially Islamic law, the problem is how the model of transformation that can be used to integrate Islamic law into national law, what is the problem and the extent to which *ijtihad* (individual reasoning) is necessary for Muslims so that Islamic law can be transformed and integrated fully in national law.

There are a number of facts as follows. There are 72% of Indonesian Muslims who support Islamic law as an official law for the State (Pew Research Center, 2013). There is also the fact that Indonesian Muslims approve of Indonesia as a democratic country. The problems will always arise when the attempts to formalize or transform Islamic law into national law, used only one model that is a rigid, exclusive, conservative or literalist model. The tendency of Indonesian Muslims to use a rigid model does exist. Because there are 45% of Indonesian Muslims who hold that the Islamic sharia has only one interpretation (Pew Research Center, 2013). Muslims who hold this opinion tend to abandon the interpretations that are not the same with theirs such as in the case of *rajam* case in Ambon (Nurrohman, 2012).

In order to overcome rigid, authoritarian interpretation, Muslims need to be introduced to a various interpretation of sharia as well as a various method for exploring the meaning sharia. Because, although derived from the divine source of Holy book, sharia developed by many rational methods of interpretation. The Islamic legal maxim also said: "it may not be denied that laws will change with the change of circumstances" (*la yunkar taghayyur al-ahkam bi taghayyur al-zaman wa al-ahwal*).

With the assumption that the sharia is a law that is always suitable for all places and times and the assumption that Islamic law can change according to the changing times, places, intentions, and circumstances, as well as the assumption that some degree of reform and transformation has occurred in Aceh, this study was aimed to identify 1) the background and objectives of the implementation of the *Qanun Jinayat* in Aceh. 2) types of *jarimah* (criminal acts) and punishment which are transformed into *Qanun Jinayat* 3) forms of transformation and reforms that have been carried out, and 4) the impact Aceh *Qanun Jinayat* on women and non-Muslims.

The transformation meant here is a change in the form, nature, or appearance while reformation is the action or the process of reforming. The concept of Islamic law or sharia used in this study was the concept of sharia as a paradigm or the supreme moral and legal force regulating both society and government. So, sharia in this study included jurisprudence (*fiqh*) or Islamic law.

The word *qanun* comes from the Persian language which then undergoes an Arabization process. This word means principle. Since the nineteenth century, this word was given the meaning of written law in countries that made Islam a source of legislation. (Syarif, 2016) According to article 1 verse 21 Law No. 11/2006 on Aceh Government, "Qanun is a legislation that is a kind of regional regulation that regulates the administration of government and the lives of people in Aceh Province". Even though the *qanun* is the same

as the regional regulation, in the context of Aceh, the *qanun* implies rules that have been filled with values, norms or symbols of the Sharia.

Women and non-Muslims were targeted to see the impact of the implementation of the *qanun* because they were the most vulnerable groups in the process of implementing Islamic law. Aceh was chosen because it has a special status in implementing sharia in Indonesia secular state.

This study is different from what was written by Syamsul Bahri. Bahri only explained how the implementation of Islamic Sharia in Aceh was part of the unitary territory of the Republic of Indonesia. Bahri concluded that Aceh is an area where almost all of its inhabitants are Muslim and even in their daily practice apply Islamic teachings in all aspects of life. After going through a long process, in the end, Aceh became the only area in Indonesia that had legality in the implementation of Islamic Sharia broadly, based on the Law on Aceh Government Number 11 of 2006. However, the implementation of Islamic law in Aceh is still in the process of searching for formats (Bahri, 2012). Muzakkir and his colleagues in their article entitled "Implementation of Law in Aceh After Application Qanun Jinayah" also concluded that the implementation of the Law was not yet fully effective. However, according to them, the Qanun in Aceh can run and be one of the new models both in substance and application of Islamic law (Muzakkir, 2017). This study is also different from the writings of Madiasa Ablisar whose focus is on the relevance of caning as a form of punishment in renewing criminal law (Ablisar, 2014).

Research Methods

This research is a kind descriptive normative research which covered some problems, policy and law reform based research. Data was collected from the books and documents, particularly from *Qanun Jinayat* in Aceh. Data be classified to see the various model of transformation that has been used in Aceh. Data will be further analyzed to see the impact of this transformation on women and non-Muslim. The analysis also aimed to see the interrelation between the structure, substance, and culture of law or what is called the legal system (Friedman, 2017).

Discussion

The Background and Objectives of the Aceh Qanun Jinayat.

Qanun Jinayat or precisely Aceh Qanun Number 6 of 2014 concerning *Jinayat* Law was mandated by Law No. 11 of 2006 concerning Aceh Government. Whereas the Law on Aceh Government is mandated by a Memorandum of Understanding between the Government and the Free Aceh Movement signed on August 15, 2005.

The MoU signed in Helsinki mandated that a new Law will be made for Aceh. The new law is based on a number of principles including Aceh will exercise authority within all sectors of public affairs, which will be administered in conjunction with the civil and judicial administration, except in the fields of foreign affairs, external defense, national security, monetary and fiscal matters, justice and freedom of religion, the policies of which

belong to the Government of the Republic of Indonesia in conformity with the Constitution. In the MoU, it was explained that matters of justice and freedom of religion were the authority of the government of the Republic of Indonesia. Long before the emergence of the Free Aceh Movement, in Aceh, there was also a rebellion led by Daud Beureuh, which demanded that Aceh be given autonomy to implement Islamic law. Through a long process, the demands of implementing Islamic law have actually been fulfilled with the enactment of Law number 44 of 1999. But for the Free Aceh Movement, it is not enough.

Therefore, although the MoU does not mandate autonomy in the field of religion, Law No. 11 of 2006 on the Government of Aceh includes articles on the implementation of Islamic law. The inclusion is likely to accommodate the provisions of the Law Number 44 of 1999 on s. Article 3 verse 2 of this law said that Aceh privileges include a. organizing religious life b. organizing customary life c. administering education d. the role of *ulama* in determining regional policies. Article 3 verse 1 said that organizing religious life in the region is manifested in the form of implementing Islamic law for its followers.

From this explanation, it can be said that the formulation and formalization of Islamic Sharia in Aceh through a number of regulations cannot be separated from the resolution of political conflicts in which broader autonomy and comprehensive application of Islamic law for all aspects of life are demanded. The demand for broader autonomy, particularly in social and economic, was voiced more by the Free Aceh Movement, while the demand for implementing Islamic law as a whole was a long-standing demand carried out by Islamism or fundamentalism group who use Islam as an ideology in order to make Indonesia an Islamic State (Nurrohman, 2002). In other words, the Islamization of politics was highly contingent on local conditions (Buehler and Muhtada, 2016). Historical background related to the Islamic State movement (*Darul Islam*) has been considered as the origin of *Qanun Jinayat* in Aceh as well as sharia bylaws in West Java and South Sulawesi (Garadian, 2016).

The phrase “implementing Islamic law for its followers” means that the implementation of Islamic law in Aceh should be in line and consistency with the principle of Islamic personality because sharia for Muslim is related to their faith. It is what Juhaya S. Praja called credo theory. This theory basically says that Muslims, wherever they are, will try to live the religious norms contained in the Islamic Sharia solely because of the demands of their beliefs (Syarif, 2016)

The foundation of regulation on Islamic law in Law No. 11 of 2006 is stated, among others, in article 20, Article 125, Article 126, Article 128 and Article 129.

Article 20 states: The implementation of the Aceh Government and the Regency/city government is guided by the general principle of governance which consists of a. Islamic principles; b. the principle of legal certainty; c. the principle of public interest; d. an orderly principle of governance; e. principle of openness; f. principle of proportionality; g. the principle of professionalism; h. a principle of accountability; i. a principle of efficiency; j. a principle of effectiveness; and k. the principle of equality.

Article 125 states: Islamic law implemented in Aceh includes *aqeedah*, *syar'iyah* and *akhlak* (verse 1). *Aqeedah*, *syar'iyah* and *akhlak* include worship, *ahwal syakhshiyah* (family law), *muamalah* (civil law), *jinayah* (criminal law), *qadla* (justice), *tarbiyah* (education), *dakwah*, *syiar*, and defense of Islam. (Verse 2). Article 126 states that: every Muslim in Aceh must obey and practice the Islamic Sharia (verse 1). And every person who resides in Aceh must respect the implementation of Islamic Sharia (verse 2). Article 128 said that Aceh has a justice system called the Mahkamah *Syar'iyah* which is intended for Muslims who are also part of the national justice system. The *Syar'iyah* Court has the authority to examine, hear, decide and settle cases that cover the fields of *ahwal al-syakhsiyah* (family law), *muamalah* (civil law), and *jinayah* (criminal law) which are based on Islamic sharia.

The sharia intended for Muslim is in line with general explanation of this law (No. 11 of 2006) which stated that the enforcement of Islamic sharia is carried out with the principle of Islamic personality towards every person in Aceh without distinguishing nationality, position and status in the area in accordance with the regional boundaries of the Aceh Province.

Although sharia is carried out on the principle of Islamic personality, in the event of criminal acts committed by two or more people jointly, of whom they are non-Muslim, the non-Muslim perpetrators may choose and submit themselves voluntarily to Islamic criminal law. (Article 129 verse 1). In the case of non-Muslims committing acts of evil which are not regulated in the National Criminal Code or criminal provisions outside the National Criminal Code, then Islamic criminal law applies to them (Article 129 verse 2)

It means that although article 129 provides options for non-Muslims to make voluntary submissions, eventually they are "forced" to submit to *Jinayat's* law because what is regulated in *Jinayat* law is not regulated in the National Criminal Code (KUHP) or the Criminal Provisions Outside the Criminal Code. So in certain cases, non-Muslims basically have no choice but to follow Islamic criminal law regulated in Aceh. This makes the principle of Islamic personality was violated and affected non-Muslim too. In other words, Law No.11/2006 of Aceh Government contained contradictory provisions.

The provisions on non-Muslim committed criminal act repeated in article 5 of Aceh *Qanun Jinayat* that was promulgated by Aceh Governor Zaini Abdullah, on October 22, 2014. So, base on Law No. 11/2006 of Aceh Government and Aceh *Qanun Jinayat* Number 6 of 2014, a non-Muslim committed crime stipulated in *Qanun* can be punished base on *Qanun*, including whipping punishment if the following condition is fulfilled:

1. Non-Muslims committed *jarimah* together with Mulsim.
2. Non-Muslims choose and voluntarily submit themselves to *Qanun Jinayat*
3. Non-Muslim committed *Jinayat* which are not regulated in national Criminal Code or criminal provisions outside the Criminal Code.

Aceh *Qanun Jinayat* Number 6 of 2014 is based on 4 (four) principles. *First*, the criminal provisions contained in the Aceh *Qanun Jinayat* are based on the Qur'an and al-Sunnah, and some of the practices of the companion of the prophet. *Second*, the interpretation or understanding of the Qur'an and the Sunnah is related to the

circumstances and needs of local (custom) Acehese society in particular, and the world of Indonesian Malay in general, as well as the rules imposed in the Unitary Republic of Indonesia (NKRI). *Third*, the interpretation and understanding are always strived towards the future, in order to meet the needs of the developing Indonesian community in the early fifteenth century *hijriyah* or the twenty-first century AD, and be able to respond to the spirit of modern times such as the issue of human rights protection, gender equality and considering the progress of science and technology, especially legal science whose development is relatively very rapid. *Fourth*, in order to complete the three principles above, they are guided by the principles contained in a *kulliyah fiqhiyah* (legal maxim) which are widely known: *al-muhafadhah 'ala al-qadimi al-shalih wa al-akhzu bi al-jadid al-ashlah* which means to maintain and use old provisions (*mazhab*) that are still good (relevant), and try to find and formulate new provisions that are better.

All of these principles are the philosophical basis and framework for the formulation of the Aceh *Qanun Jinayat* as positive law in Aceh. Aceh *Qanun Jinayat* becomes a sub-system of the national legal system and the national justice system. The Aceh *Qanun Jinayat* remains under the auspices of the Qur'an and the Sunnah of the Prophet Muhammad and at the same time is in the frame of a long history of *fiqh* thinking and the application of Islamic law in various parts of the world. The formulation of this qanun also relies on the local culture and customs of the people of Indonesia, especially Aceh, and collaborates with the legal system that applies within the NKRI.

According to Syahrizal Abbas, the philosophy, principles, objectives contained in the Aceh *Qanun Jinayat* or *Jinayat* Procedure Law indicate the existence of a new legal paradigm in Aceh. Law enforcers and the public are expected to be able to realize a new *Fiqh* Law that is rooted and united with people's legal awareness. This construction of law is expected to be able to meet the future needs of an increasingly complex nation, and not stumble on accusations of neglecting the protection of human rights and gender violence. In the phrase of local community quoted from the Qur'an, this effort is often expressed as *ijtihad* to formulate the rule of law that is "*Rahmatan lil il alamin*" (Abbas, 2015).

Article 2 of Aceh *Qanun Jinayat* states that the enforcement of *Jinayat* law is based on the principles of Islam, legality, justice, and balance, benefit, protection of human rights, and educating the community. In the consideration of the Aceh *Qanun Jinayat*, it is said that Aceh as part of the Unitary State of the Republic of Indonesia has special privileges and autonomy, one of which is the authority to implement Islamic law, by upholding justice, benefit, and legal certainty.

As the part of sharia implementation, the enactment of *Qanun Jinayah* in Aceh is inseparable from the goal of Islamic Shari'a in general, namely the realization of justice, a benefit which leads to the realization of Islam that gives grace to all (*Rahmatan lil alamin*). Thus, substantially, justice, mercy, wisdom and good are the ideal content of sharia. When the ideal, divine idea of sharia be understood by Jurist's base on their different methodology, the result is *fiqh* or Islamic law. As the sacred law of Islam, Islamic law is an all-embracing body of religious duties, the totality of Allah's commands that regulate the

life of every Muslim in all its aspect. Although Islamic law is a 'sacred law', it is by no means essentially irrational; it was created by a rational method of interpretation, and the religious standards and moral rules provided the framework for its structural order.

As God's plan for mankind consisting of His prescriptions for human behavior, sharia is a rather abstract concept which leaves ample room for various concrete interpretations by human beings. The interpretation of sharia by human beings produced the classical sharia, historical sharia and contemporary sharia. The classical sharia is the body of Islamic rules, principles, and cases compiled by religious scholars in search of God's will during the first two centuries after Muhammad. In this sense, sharia can be found in the classical works of the religious scholars of the dominant legal schools (*madhab*) and is, therefore, more concrete.

The historical sharia includes the entire body of all principles, rules, cases, and interpretations developed and transmitted throughout the history of more than one thousand years across the entire Muslim world. Historically, sharia has been influenced by time and place. The contemporary sharia contains the full spectrum of principles, rules, cases, and interpretations that are developed and applied at present, throughout the Muslim world. All sharia in this context (classical, historical and contemporary) are plural not singular.

New technologies of information and communication have decreased the dominance of the legal schools of classical sharia. The variety of meanings of sharia has given rise to a flexible, multi-interpretable discourse about sharia and law which moves smoothly from one meaning of sharia to another. Therefore, the theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims must be dismissed on the basis of legal and empirical evidence.

Although there is a flexible, multi-interpretable discourse about sharia, it has an objective. The first objective of sharia is protecting basic human rights for all members of the community irrespective of race, religion, and culture. The second objective of sharia is establishing justice between Muslims and the rest of humanity. Equality is among the key messages of Prophet Muhammad in his Last Sermon. Quranic legislation in the field of private and public life has social justice and the building of an egalitarian community as its end. The third objective of sharia is providing benefits (*maslahah*) for human beings and removing hardships (*al-usr*) from them. Bringing about benefits and removing harm is essential in establishing a harmonious society.

All of these objectives are in line with the objectives of national law. So, actually, there is no contradiction between the objective of Aceh *Qanun Jinayat*, the objective of sharia law and the objective of national law. Because in the end, the objective of national law is to realize social justice to all Indonesian people irrespective their religious affiliation such as stipulated in the fifth principles of Pancasila, the ideology of The Unitary State of the Republic of Indonesia.

The Types of Crimes and Punishments in Aceh Qanun Jinayat

There are ten types of *jarimah* or crimes regulated in the Aceh *Qanun Jinayat* Number 6 of 2014, namely: *zina* (adultery), *qadzaf*, rape, sexual harassment, *khamar*, *maisir*, *khalwat*, *ikhtilath*, *liwath* dan *musahaqah*. Adultery is intercourse between a man or more with a woman or more without marriage ties with the willingness of both parties (Article 1 verse 26). *Qadzaf* is accusing someone of committing adultery without being able to submit at least 4 (four) witnesses (article 1 paragraph 31). Rape is a sexual relationship with another person's vagina or rectum as a victim with the perpetrator's penis or against the victim's vagina or penis with the mouth of the perpetrator, by force or coercion or a threat to the victim (article 1 verse 30) Sexual harassment is immoral acts or obscene acts that are intentionally carried out by someone in public or against other people as victims of both men and women without the willingness of the victim (article 1 verse 27). *Khamar* is an intoxicating drink and/or contains alcohol of 2% (two percent) or more.

Gambling (*maisir*) is an act that contains elements of betting and/or the element of chance conducted between two (2) or more parties, with an agreement that the winning party will be paid/specific advantages of the losing party, either directly or indirectly (article 1 verse 22). *Khalwat* (seclusion) is the act of being in a closed or hidden place between 2 (two) people of different sexes who are not *mahram* (families) and without marital ties with the willingness of both parties that lead to adultery (article 1 verse 23) *Ikhtilath* is an act of intimacy such as flirting, touching, hugging and kissing between men and women who are not husband and wife with the willingness of both parties, both in a closed or open place (article 1 verse 24). *Liwath* is the action of a man by inserting his penis into another male's rectum with the willingness of both parties (article 1 verse 28) *Musahaqah* is the action of two or more women by rubbing each other's limbs or vagina to get sexual pleasure with the willingness of both parties (article 1 verse 29)

The punishment (*uqubat*) regulated in the Aceh *Qanun Jinayat* is broadly divided into two; *hudud* and *ta'zir*. The *hudud* sentence that was imposed in qanun was caning (article 4 paragraph 2). *Ta'zir* penalty divided into the main *ta'zir* and additional *ta'zir*. The main *ta'zir* consists of a) whip b) fine c) prison and c) restitution. The additional *ta'zir* include: a) coaching by the state b) restitution by parents/guardians c) return to parents/guardians d) termination of marriage e) revocation of permits and revocation of rights f) seizure of certain items, and 8) social work.

Jarimah Zina was threatened with '*Uqubat Hudud* whipping 100 (one hundred) times. (article 33). *Qadzaf* was threatened with '*Uqubat Hudud* whipped 80 (eighty) times (article 57). *Jarimah* rape is threatened with '*Uqubat Ta'zir* whipping at least 125 (one hundred twenty-five) times, at most 175 (one hundred seventy-five) times or a fine of at least 1,250 (one thousand two hundred fifty) grams of pure gold (article 48). *Jarimah* sexual harassment is threatened with '*Uqubat Ta'zir* whipping at most 45 (forty-five) times or a fine of at most 450 (four hundred fifty) grams of pure gold or a maximum of 45 (forty-five) months in prison (Article 46) Every person intentionally drinking *khamar* is threatened with *Uqubat hudud* whip 40 (forty) times (Article 15).

Every person intentionally doing *jarimah maisir* was threatened with *uqubat tazir* whipping ranging from 12 (twelve) times to 45 times or fines ranging from 120 (one hundred and twenty) grams of pure gold to 450 grams or a maximum of 45 months in prison (articles 18 to 22). Anyone who intentionally did *Jarimah khalwat* was threatened 'Uqubat Ta'zir whipping at most 10 (ten) times or a maximum fine of 100 (one hundred) grams of pure gold or a maximum of 10 (ten) months imprisonment (article 23)

Anyone who intentionally performs *Jarimah Ikhtilath* is threatened with 'Uqubat whipping at most 30 (thirty) times or a maximum fine of 300 (three hundred) grams of pure gold or a maximum of 30 (thirty) months in prison (article 25). Anyone who intentionally performs *Jarimah Liwath* is threatened with 'Uqubat Ta'zir at most 100 (one hundred) lashes or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment (article 63). Everyone who intentionally did *jarimah musahaqah* was threatened with 'Uqubat Ta'zir at most 100 (one hundred) lashes or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment (article 64)

In the Aceh *Qanun Jinayat*, there is a provision that women who are pregnant out of wedlock cannot be accused of having done *Jarimah Zina* without sufficient evidence supported it (article 36). However, the person who was questioned in the *khalwat* or *Ikhtilath* case, then claimed to have committed *zina*, his or her confession was considered an application to be sentenced as an adulterer (article 37 paragraph 1).

Confession as an application to be sentenced is not in line with the spirit to encourage people to get repentance. Repentance and ask forgiveness to God from the sin of adultery committed by someone is actually a spirit taught by the Prophet. Concerning adultery or extramarital sex, there is accident occurred in the prophet Muhammad era. When the culprit coming to the prophet and confessed that he has committed adultery and asked to be punished to death, the prophet turned his face and refused to listen. Since the act had been accomplished in secret, and thus public order and morality did not suffer, the matter concerned only the culprit, who, is his soul and conscience, had simply to beg the Lord's forgiveness. The man, however earnestly renewed his confession and his request, so as to prove his sincerity toward God and to deter others from committing the same act; again, the prophet turned his face. The same thing happened a third time, but when the culprit repeated his words a fourth time, the prophet asked him if he had become insane, or had really admitted being guilty of the deed. First by refusing to listen, then by questioning the fact, the prophet promoted him to retract, but the man so insisted, that in the end, his demand had to be heard. At the moment of execution, however, he regretted his declaration and run away; the punishment squad ran after him and killed him. The prophet then pronounced his famous sentence: "would that you had left him alive: he would have repented, and God would have been merciful to him."

This story indicates that in the prophet period sinful act like adultery if conducted in secret areas, not witnessed by four witnesses were present at the accomplishment of the sexual act, can be categorized as a private matter. So it is suggested to violators to repent

and ask for God forgiveness. It can be categorized public matter if it begins to disturb public order such as if it performed in public places that can be seen by some people. It also indicates that punishment, in the case of adultery one hundred lashes for an unmarried person or stoning to death for a married person, is optional. It is conducted after the requisite from the culprit as a mean to repent and purify her or himself from the sin in this life and so to escape punishment in the hereafter. According to some scholar, repentance aborts the entire offense that is categorized into God's rights such as adultery, drinking khamar, and theft. Whereas human rights, namely property, and life do not fall due to repentance unless the guardian forgives (Abubakar, 2015).

In Islam criminal law literature, in classical or in contemporary sharia, crimes and punishments are divided into three categories: *had* or *hudud*; *qishas* and *diyat*; and *Ta'zir*. *Hadd* (plural: *hudud*), is a crime punishable with a fixed punishment imposed as a right of the public or known as the right of God. *Hudud* crimes and their punishments are mentioned clearly in the text of the Quran and the Sunnah. The crimes of *hudud* in Islamic criminal law are *zina* (adultery or fornication), *qazf* (false accusation of *zina*), theft, robbery, drinking intoxicants, apostasy, and rebellion. When a crime of *hadd* is established, the prescribed punishment must be imposed. It cannot be reduced nor pardoned, in other words, *hadd* punishment is mandatory.

The *hudud* are the maximum punishments. In many cases, *hudud* punishments cannot be imposed due to the very strict requirements regarding the procedure of establishing *hudud* crimes, based on the hadith of the Prophet (SAW): 'Set aside *hudud* punishments in cases of doubt'. Thus the *hadd* punishment may be set aside due to the existence of even the slightest doubt and may instead be reduced to one of *ta'zir*.

Qishas and *diyat*. *Qishas* means to inflict similar punishment on the offender as he has caused to the victim. In the case of homicide, *qisas* means death sentence whilst in the case of causing injury with intention, it means causing similar injury (if possible) to the offender as he has caused to the victim, with certain conditions. *Diyat* means is a prescribed amount of property payable to the aggrieved party in the case of homicide or bodily injury. *Diyat* often called blood money.

Qishas and Diyat is a crime affecting life i.e. homicide and causing bodily harm to others. It is a crime punishable with a fixed punishment imposed as a right of the individual. *Qishas* and *diyat* crimes and their punishments are mentioned clearly in the text of the Quran and hadith of the Prophet (Saw). The punishment of *qishas* and *diyat* is fixed and thus the judge has no right to remove or mitigate the punishment based on his own discretion. However, since this type of offense involves the right of the individual, the infliction of punishment depends on the demand of the victim or his/her relatives. The victim or his/her relatives may want to demand the infliction of *qishas* or choose to reduce it to *diyah* or to pardon the offender. It also depends on them whether or not to consider any negotiation in determining their rights (Awdah, 2003).

Ta'zir (plural: *ta'azir* or *ta'zirat*) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment

to be imposed on the offender. The crimes of *ta'zir* are unlimited. It consists of transgressions where no specific and fixed punishment is prescribed, i.e. apart from *hudud* and *qisas* and *diyah* (Awdah, 2003). The *Shari'ah* gives the ruler or the court considerable discretion in the infliction of *ta'zir* punishments, which range in gravity from a warning to death, taking into account the seriousness of the offense, the circumstances of the criminal, his/her record, and other mitigating or aggravating factors.

As for *ta'zir*, there is no specific punishment to be inflicted on an offender, any punishment which can serve the purpose of punishment may be used. *Ta'zir* punishment can be inflicted upon the offender's soul, body, property, and dignity. These penalties are graduated according to the school of law, morality, and local custom. There are various types of punishments which can be imposed as *ta'zir* punishments in Islamic criminal law as discussed by the jurists. It is agreed that the jurists do a dispute on the legality of financial punishment and imprisonment. However, as they are all *ta'zir* punishments, they are left to the discretion of the ruler or the authority concerned to legislate *ta'zir* depending upon the suitability of their application according to place and time. Any punishment can be considered a legal punishment to be imposed on an offender if the public interest necessitates it provided that it could serve its objectives and principles of sharia.

The Types of Reforms and Transformation in Aceh *Qanun Jinayat*

In the aspect of family law, Huda (2017) introduced some kinds of reforms such as progressive, pluralistic, extra doctrinal reform and adaptive, unification, inter doctrinal reform. Reform can be called progressive if the law applied dynamically which accommodate gender sensitivity. It called pluralistic if the purpose of implementing the law is for all citizens regardless of religious background and affiliation of the school. It called extra doctrinal reform if the method used in the reform is to reinterpret the text of the Qur'an and Sunna.

The reform is called adaptive if the application of raw material and regulations were carried out as a response to the development of the times while still applying the majority of provisions imposed in conventional *fiqh* material, meaning that in certain contexts there were still gender problems. The unification occurs when the purpose of enforcing the law is to unite the differences that exist in the comparison of the jurisprudence school, especially the four major Sunni schools or the unification of laws derived from Sunni and Shia law. It is called inter doctrinal reform if the method used is limited to choosing or combining existing schools through political policy without a fundamental reinterpretation of the text of the Qur'an and the Sunnah.

While the kind of reform can be simplified into two, progressive and adaptive, the kind of transformation can be simplified into three: substantive, normative and symbolic. Substantively, Islamic law has been transformed into *qanun* or national law if the substance of Islamic law has been incorporated into national law. Normatively, Islamic law has been transformed into *qanun* if the norms in classical sharia or historical sharia have

been accommodated in *qanun* or national law. Symbolically, Islamic law has been transformed into *qanun* or national law if the symbol or the attribute of sharia has been accommodated in *qanun* or national law. From the description above, it can be said that the reforms carried out in Aceh *Qanun Jinayat* are classified as adaptive reformation. Concerning the definition of zina, this *qanun*, for instance, adapts the provisions of conventional *fiqh* material. Therefore, the crime of adultery includes crimes committed by people who are married and those who are not married.

Article 1 verse 26 of *Qanun Jinayat* defines adultery (*zina*) as intercourse between a man or more with a woman or more without a marriage bond with the willingness of both parties. Article 284 of the Criminal Code (KUHP) stated that adultery is carried out by two people, one of whom or both are married and carried out on a voluntary basis and complained of by the wife or husband of the adulterer. In the Criminal Code, the adultery only occurs if the culprit, one or both, are bound in marriage. Whereas in the *Qanun Jinayat* there is no marriage-bound requirement. Therefore, intercourse carried out by non-marriage people can also be categorized as adultery. So, if the husband or wife of adultery gives permission to the partner to commit adultery, then Article 284 cannot ensnare them. While in Islamic law perspective, any sexual relations outside a valid marriage bond is categorized as adultery (Huda, 2015).

In classical *fiqh*, adultery is a sexual relationship between men and women without a legitimate marriage bond and is carried out consciously and without any element of doubt (*syubhat*). The crime of adultery is affirmed in the Qur'an and Sunnah. Punishment for unmarried adulterers (*ghairu muhsan*) based on the verses of the Qur'an, was whipped a hundred times. While for *muhsan* adultery is subject to *rajam* sanctions. *Rajam* in terms of language means throwing stones. *Rajam* is pelting *muhsan* adulterers until he or she met his or her death (Sabiq, 1996).

So, compared to the Criminal Code, the formulation of the *Qanun Jinayat* on adultery more accommodates the formulation of *fiqh* which includes those who are married and those who are not married. In *fiqh* sanctions for *muhsan* adulterers are threatened with stoning while *ghairu muhsan* adulterers are threatened with 100 lashes. Efforts to include two forms of sanctions (stoning and whipping) into *qanun* have been carried out in Aceh. Before the Aceh *Qanun on Jinayah* was passed in 2014, Aceh had a draft of *qanun jinayah* which allowed stoning to be applied to adulterers, especially *muhsan* adulterers. But this draft drew a lot of criticism and caused controversy in society.

The criticism of stoning is based on at least three reasons. First, it is true that stoning sanctions or the death penalty are mentioned in classical sharia, but it is not mentioned in the Qur'an. Secondly, as long as adultery is not carried out openly, adultery tends to be a private matter. Thirdly, provisions regarding sanctions for adultery are included in the human relation (*mu'amalah*) category in a broad sense that can change in line with changes in time and place in accordance with the rules of *fiqh* (Nurrohman, 2013).

After getting a lot of criticism, the Aceh *Qanun Jinayat* passed in 2014 no longer provided room for *rajam*. In Aceh *Qanun Jinayat* 2014, the punishment for *zina* is whipped

100 (one hundred) times

The Aceh *Qanun Jinayat* follows the pattern in classical *fiqh* which divides crime and punishment into three parts: *jarimah hudud*, *jarimah qishas* and *diyat*, and *jarimah ta'zir*. However, the Aceh *Qanun Jinayat* developed new types of *ta'zir* punishments, such as fine penalties in the form of pure gold. This kind of reform (adaptive reform) is not enough for human rights activists who considered Aceh *Qanun Jinayat* still legalizing torture as a punishment. The whip sentence was criticized because it was considered as a form of torture that was not allowed by the convention ratified by Indonesia.

Aceh Qanun Jinayat: Problems, Impact And Solution

The Aceh *Qanun Jinayat* base on the principle of Islamic personality, therefore, the application of Islamic law in Aceh is basically not intended for non-Muslims. Similarly, the application of Islamic law in Aceh, including its *Jinayat* aspects, is intended to respond to the issue of human rights protection and gender equality.

The conflicting provision within the law number 11 of 2006 is morally unacceptable because it violated the principles of the morality of law. There are some standards of morality of law such as the clarity of law and the absence of contradictions in laws. Rules that its formula is not clear or contained contradictions between one and another are immoral rules. The conflict between laws horizontally or vertically in some case has caused a negative impact on women and non-Muslim in Indonesia (Fanani, 2017). Gender-based sexual violence, usually, meant to be all criminal acts that are related to sexuality where both men or women can become the object. But, in reality, this kind of crime more often positions, women as victims (Nur, 2013).

Experience of other countries that apply Islamic law through political power, not through a cultural approach, has caused women and non-Muslims to become victims because of the discriminatory elements that are still attached to the classical sharia. Therefore, one of the important questions regarding the implementation of the Aceh *Qanun Jinayat* is whether this qanun has succeeded in providing justice and protect the rights of women and non-Muslims? In other words, has this qanun given them justice and blessings (*rahmat*)?

Aceh *Qanun Jinayat*, according to some scholar has paid attention to human rights issues and the convention against torture and other cruel, inhuman or degrading treatment or punishment (Ablisar, 2014). However, according to the Institute for Criminal Justice Reform (ICJR), caning punishment has damaged the face of human rights in Indonesia.

According to ICJR records, *Qanun Jinayat* has great potential and tends to discriminate against women. Apart from the chaotic provisions of rape, articles such as *khalwat* and *ikhtilath* are arranged in a very rubbery manner so it is very easy to target women as perpetrators. This condition is confirmed by findings that show that of 32 female convicts, 12 convicts were subjected to articles of *khalwat* and *zina*, 19 convicts were charged with the article *ikhtilath* and only one was charged with another article namely

maisir or gambling. By stating that confession was considered an application to be sentenced as an adulterer (article 37 verse 1) although there aren't four witnesses who directly witnessed the act of sexual intercourse, the state actually allows *qadzaf jarimah* to occur in the community without legal action for violators.

The caning sentence in the *Qanun Jinayat* has strengthened the legitimacy of the use of Corporal Punishment in Indonesia. Caning is torture, cruel, inhuman and degrading punishment. This sentence violates international law regarding torture, and other cruel, inhuman or non-dignified treatment.

In the ICJR record, there were several whip executions which resulted in psychological and physical injuries, in addition to inhuman and degrading treatment because the whip was carried out openly and in public. An example can be seen when on February 2, 2017, in Kutaraja, a convict LD (21 years old) suffered a psychological shock, so the whip must be stopped. On February 27, 2017, Z (25 years) was only whipped 4 times because of the deteriorating health condition. H (19 years old) on July 14, 2017, fainted twice in a row because he was whipped 50 times. This shows that whip punishment which was once considered to be able to show social sanctions to embarrass and can cause deterrent effects is now shifting not only to shame but also to psychological and physical harm, which is clearly prohibited in Indonesian national law and human rights law.

In 2017, caning was also imposed on convicts who were not Muslims. On March 10, 2017, this sentence was carried out against 2 (two) prisoners who were Buddhists. If the incident is left unchecked, then this is in addition to contradicting the original intention of applying the personality principle of Islamic law also potentially causing pressure on other minority religious populations in Aceh.

According to Amnesty International (AI) monitoring, the government failed to protect transvestites. Because of discriminatory policies, a number of transgender in Banda Aceh claimed to be in fear. The government really failed to protect male (transgender) women who were arbitrarily treated and humiliated after being arrested by police in North Aceh, January 27, 2018, so someone had to hide for fear of their safety, said Amnesty International (AI) Indonesia. However, the Aceh Government stated that what the North Aceh Police Chief did to the 12 transvestites was "one of the efforts to develop morality in which a man is prohibited from behaving like a woman and vice versa"

In a statement released on Wednesday, February 14, 2018, AI said it had interviewed several transvestites in secret locations near Aceh after they fled and lost temporary jobs, also suffered physical and verbal abuse from family members and the community after "being nurtured to become a man". According to AI, they talked in detail about the horrific experience when heavily armed police raided the salons where they worked, publicly humiliated and cut their hair as an attempt to "get rid of transgender from Aceh". "These transgender women were not only arrested and ill-treated by the police, without reasons other than being themselves, some of them also suffered from losing their jobs and had to leave home. This is the government's total failure to protect their human rights," said AI Executive Director of Indonesia, Usman Hamid.

But the Head of the Aceh Government's Public Relations and Protocol Bureau, Mulyadi Nurdin, when confirmed said that Aceh as an area that implements Islamic Sharia requires residents and immigrants to respect the values of Islamic law. "For foreign institutions that take part in conducting studies and observations on the enforcement of Islamic law in Aceh, they should be objective in conducting assessments, not just defending victims unilaterally, but also having to respect law, social and cultural enforcement in Aceh," he said. "Certainly each region has different specialties and cultures from other regions. "The LGBT(Lesbian, Gay, Bisexual, Transgender) issue has a strong rejection from the Acehnese people." According to Mulyadi, "coaching" towards 12 transvestites carried out by the North Aceh Police Chief, "is in line with the legal norms in force in Aceh." For Aceh, LGBT is not in accordance with the culture and Islamic law, so if there are people who do it, prevention and guidance will be carried out, according to the applicable rules," he added.

Nurrohman in his article entitled "Shari'at Islam and National Law: Problems in Transformation and Integration of Islamic Law into National Law" mention a number of problems that arise in transformation, among others are the problem is related to human rights issues and the problems related to the way Islamic law is explored, practiced or transformed (Nurrohman, 2009). Generally, there are three methods that can be used by Muslims in exploring the meaning and contents of sharia, *Bayani*, *Burhani*, and *Irfani*.

Bayani approach that is widely used by *Fuqaha* emphasizes on how to understand sharia seen from the aspects and rules of language. *Burhani* approach that is used by *mutakallimin*, especially rationalist groups like the *Mu'tazilah*, emphasizes on the way of understanding the teachings of religion seen from the aspect of ratio and logical arguments. *Irfani* approach which more emphasizes on the inner or spiritual meaning and wisdom behind the texts of religious teachings is widely used by the Sufis. In *the irfani* method, the truth was obtained through a psycho-gnostic approach that produced intersubjective truth. The source of truth is intuition and the method is the illumination. Gnosis refers to knowledge based on personal experience or perception. In a religious context, gnosis is mystical or esoteric knowledge based on direct participation with the divine.

In *burhani* method, the truth was obtained through a logical approach that produced coherence or consistency truth. The source of truth is ratio and the method is analytical discourse. While these three methods actually had been used in the Muslim world, the *burhani* method which put forward the way of demonstrative-philosophical thinking not developed optimally by Muslim thinkers and scientists (Widodo, 2007)

At least, there are three models of Muslims in applying sharia 1) exclusive textual model 2) inclusive substantial and 3) combination. The first model usually tries to implement the Islamic sharia as mentioned in the text of the Qur'an, al-Sunnah or in the text of the major books (*mu'tabar*) which its authority recognized in explaining Islamic law. This model is based on the assumption that sharia has perfectly set all aspects of life. The sharia after the prophet Muhammad is no longer experiencing the process of

evolution. Therefore, what Muslims need to do is apply if the provisions are clear in the text of the Qur'an or *al-Sunnah* (written prophet tradition). If the provisions are not clear, then they can use an analogy (*qiyas*) or *ijtihad* (individual reasoning). Muslims do not need to take other legal systems outside of Islam. Sharia is a law of God that can not be known its intent and its content properly except by the experts, ie *faqih* or *mujtahid*. Therefore, any law made by the legislature must be approved by the sharia experts who have the right to veto any laws deemed inconsistent with the sharia. The second model, trying to practice the sharia by looking at the concepts or ideas that exist behind the text. If the main idea has been captured, then its application can be implemented flexibly in accordance with the existing circumstances. This model is based on the assumption that every legal provision in Islamic law has its reasoning and its purpose. Therefore Islamic law undergoes evolution. Any legal system can be accepted as long as it is aimed to uphold justice and benefit for the human being. They can accept a legal system that can protect basic human rights. Sharia is openly and inclusively applied, in the sense that sharia is applied while accepting "external elements" such as local customs and thoughts coming from outside Islamic tradition. Sharia can be called open because it can be interpreted by anyone. There is no monopoly in the interpretation of sharia, and therefore there is no need for "sharia supervisory" institutions that monopolize the interpretation of sharia. The third model, the combination, meaning that in implementing sharia, they divided sharia into *ta'abbudi* (cannot be understood its reason) and *ta'aqquli* (able to be understood its reason). In this context, they sometimes sort out, between private or personal sharia and public sharia. In private sharia or personal law, they tend to be textually exclusive because they consider it part of *ta'abudi*, but in public law, they tend to be substantially inclusive, because they considered it part of *ta'aqquli*.

In reforming public law Sharia, al-Na'im, as quoted by Abdillah, start criticizing epistemology historical sharia: sources, methods, and applications, ie with inverted *nasakh* theory initiated to revive passages deleted by the theory of traditional manuscripts. (Abdillah,2014). Throughout the renewal of the theory in the *fiqh*, the theory of contemporary punishment in *jinayah* can be developed by applying Islamic penalization theory. Then Islamic Criminal Law will be more down to be applied in Indonesia (Abdillah, 2017). All that explanation shows that in Indonesia, the model of implementing Islamic law is not single but plural. The plurality of sharia enables Muslims to choose what kind of norms that were suitable to be transformed into qanun or national law.

The diversity of sharia emerges from the fact although the Qur'an and Sunna are the original sources of Islamic law, the Islamic legal system has evolved many other sources, methodologies, and perspectives. Like any other legal system, the Islamic legal system has developed over many centuries in various Muslim societies, incorporating local culture and customs as well as some limited state decrees and particularly the work of Muslim jurists. It was created and developed by private specialists; legal science and not the state, plays the part of the legislator, and scholarly handbooks have the force of law. Islamic law is, therefore, neither common or civil law, but is juristic law (Black, 2013). The jurist has a

significant role in the process of Islamic law reform. Islamic theories of the purpose of sharia evolved over the centuries, especially in the twentieth century. Contemporary jurists emphasized justice and freedom as the basic values of sharia.

All that explanation also shows that there is no fixed and permanent model in practicing and transforming sharia, including what is practiced in Aceh. The model for implementing sharia should be adjusted to the dynamics of society. In the context of Indonesia, it should be adjusted to the Pancasila as the philosophy and ideology of the state. So, like other religious norms, sharia also experienced a process of making. Sharia as a religious norm also experienced a process of development or evolution. In the context of Indonesia, the supreme court has a significant role in developing and reforming sharia through its jurisprudence (Suadi, 2018). In matters of transformation, the substantive transformation is the most suitable for Aceh and Indonesia because it is the most flexible to be adapted into structural or cultural needs. Ambivalence arises if there is a gap or contradiction between the elements of the legal system; structure, substance, and culture.

The various provisions of sharia that not suitable to the principle of contained in the higher law in Aceh or Indonesia should be kept in the private domain, and cannot be forced by the state institution. Because it potentially endangered the rights of others, particularly women and non-Muslims for they are not able to enjoy their rights. If people cannot enjoy their basic right, the punishment in the Sharia cannot be carried out fairly. Without putting an end to poverty, ignorance and the injustice of the rulers and the injustices of the strong against the weak, the *hudud* (penalties) will remain exposed to doubt. And, the Prophetic hadith says, 'Avoid the *hudud* when in doubt.' In order to achieve the purposes of sharia, sharia law, particularly which related to the public aspect, should be continuously reformed. The formation of national law should be processed through an eclectic choice process in legislative institutions by preserving the objective of sharia which includes public benefit and justice.

The ideal concept of justice for Indonesia is justice for all proposed by John Rawls which was well known as shared justice. This concept should be used by citizens to regulate their political affairs and interpret the constitution. Rawls believes that, in modern conditions, a conception of justice can achieve stability only if it can be the object of an overlapping consensus, that is, only if it can be morally endorsed by citizens who are also committed to diverse and partially conflicting moral, religious, and philosophical worldviews (Pogge, 2007).

Rawls theory of justice needs to be accompanied with the pure theory of law introduced by Hans Kelsen. In order to overcome the problem aroused from dualism that dominates legal theory, Kelsen introduced the pure theory of law as the theory for positive law. This theory attempts to answer the questions of what the law is and how the law is made, not the questions of what the law ought to be or how out to be made. The pure theory aims to free legal science of all foreign elements. The pure theory of law refused the assumption of dualism which said that above the state system of positive law, there is a legal system that is superior, divine, based on reason or natural law (Kelsen,1992).

So, even though the Aceh *Qanun Jinayat* is formulated based on the Qur'an and Sunnah, it can still be tested to what extent its consistency with higher laws in Indonesia. When the higher law says that sharia applied in Aceh is based on the principle of Islamic personality, non-Muslims should not be subject to criminal sanctions through the Aceh *Qanun Jinayat*.

What is going on in legal policy in Indonesia is a mixed legal system, a legal system that combines civil law, common law, customary law, and Islamic law. Under these conditions, all legal systems have an opportunity to contribute although indirectly through various models of transformation. This means that even though Aceh *Qanun Jinayat* was revised or canceled, this does not mean that the Acehnese cannot fully implement the Islamic sharia, because the practice of Islamic sharia for Muslims can be done in various ways not merely through the legislative process. As juristic law, Islamic law actually more close to common law rather than the civil law system.

In history, although the Qur'an and Sunna are the original sources of Islamic law, the Islamic legal system has evolved many other sources, methodologies, and perspectives. Like any other legal system, the Islamic legal system has developed over many centuries in various Muslim societies, incorporating local cultures and customs as well as some limited state decrees and particularly the work of Muslim jurists. Islamic law is not identical with a common law or civil law but is the world's third major legal system called juristic law. As juristic law, Islamic law can be transformed into national law, as long as the jurists able to make some reforms, although the state is secular. Indonesia is like Turkey in choosing a secular state for a Muslim-majority society. The possibility of Islamic law being practiced without the existence of a legislative process is proven in history by Lubna Alam (Alam, 2007).

If compared to other Muslim countries in placing Islamic law in their constitution, Indonesia can be paced in the third grade because its constitution does not refer to Islam as the state religion and also does not mention sharia as the main source of legislation. Egypt can be grouped in the first grade because its constitution said that sharia is the primary source of legislation and Islam is the state religion. Malaysia can be placed second grade because its constitution said Islam is a state religion. However, there is no correlation between the degree of state in placing the sharia formally in the constitution with the degree of the state in practicing sharia. For instance, although Indonesia placed only in the third grade, the values of sharia which are practiced in Indonesia are better than Iran. Base on Islamicity index made by Rehman and Askari, Indonesia ranked at 140, higher than Pakistan that ranked at 147, Egypt 153, and Iran at 163 (Rehman, 2010). Because Islamic law in Indonesia has entered into the life of the state through structural and cultural processes by transforming its values, norms or symbols.

Qanun Jinayah reaps a lot of debate because of its position as a regional regulation (bylaw) but has the material content of criminal Islam (jinayah) which has not been regulated at all at the national level. In 2015, Qanun Jinayah was subjected to a judicial review by the Supreme Court by the Society for Criminal Justice Reform (ICJR), but the

petition for judicial review was declared not acceptable on premature grounds. Juridical analysis from the perspective of constitutional law is important for this qanun because the legality of a statutory regulation determines the validity and strength of its enactment (Endri, 2018).

So, Aceh *Qanun Jinayat*, like other sharia bylaws in other regions of Indonesia, faced at least three problems. The problem of discriminatory, the problem of quality and the problem of implementation (Muhtada, 2014). In the Reformation era, the a democratic atmosphere has opened a wider space for the efforts of *taqin* as long as Muslim able to overcome three problems of qanun or sharia bylaw (Harisudin, 2015). In democratic atmosphere, it is the substantial approach of Islam that need to be highlighted to shed further light on our endeavors to create a viable synthesis between Islam and democracy (Effendi, 1995). If Muslims ready to adopt a substantial approach of Islam, the debatable issue on sharia law which, according to Mukrimin (2012) becomes the core problem of the relation between Islam and the state, can be resolved. It also means that there is no problem with human rights demands mandated by the constitution of Indonesia (Salim, 2008).

If the Acehnese culture is not ready to accept *Qanun Jinayat* in line with the legal principles in the unitary state of Indonesia, then the application of *Jinayat* law is better through cultural channels through customary law by adopting the principle of multiculturalism and eclecticism (Ali, 2011). Eclecticism also suggested by Rokhmad and Susilo in order to encourage women's rights in Islamic family law (Rokhmad and Susilo, 2017).

Conclusion

This study concludes that the background of the implementation or formalization of sharia in Aceh cannot be separated from the political bargaining between Free Aceh Movement and The Government of Indonesia alongside with the emergence of Islamism or fundamentalism group who made Islam as an ideology. The purpose of implementing the *Qanun Jinayat* in Aceh cannot be separated from the purpose of sharia namely: to bring justice, to give benefit for people and realize Islam which is *Rahmatan lil alamin*.

Although Indonesia was grouped in a secular state, it is by no means the Islamic law cannot be transformed into national law. Islamic law in Indonesia has entered into the life of the state through structural and cultural processes by transforming its values, norms or symbols. The types of criminal acts that are transformed into qanun are ten. All of them transformed normatively and symbolically from the classical sharia. This study found that the reforms carried out were adaptive, not progressive, as a result, women, and non-Muslims were still vulnerable to criminalization. It means that it fails to give a blessing for all (*Rahmatan lil alamin*)

If measured by John Rawls's theory of justice, namely justice which can be shared and felt together, then the application of Islamic law in the form of *Qanun Jinayat* also fails to meet the criteria of fairness. With the imposition of Islamic law through *Qanun Jinayat* to people who have different opinions in understanding the Shari'a with the

opinions used in the qanun, the application of Islamic law in Aceh has the potential to lose its sacred value as well as its flexibility. Given the impact on women and non-Muslims, the Aceh *Qanun Jinayat* still needs to be tested through pure legal theory to see its suitability with the constitution of Indonesia or the higher level of the law.

Suggestion

Since the model of practicing and transforming sharia in Indonesia is still in the making, regulation must be directed to realize the objectives of sharia by using more objective indicators in order to achieve justice and benefit for all citizens. Under these circumstances, if the public aspect of the sharia will be applied in Indonesia, then dialogue and deliberation must continue to be made to achieve justice that is acceptable to all citizens, Muslim, and non-Muslim. Because, If the transformation of sharia into the national law is done in an authoritarian, discriminatory way and not able to protect the weak and marginalized group then the sharia will lose its function as the spreading of mercy.

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