

The Territorial Principles in Islamic Criminal Law: Should A Non-Muslim Be Punished?

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The legal substance regulated in Aceh Qanun (Bylaw) Number 6 Year 2014 concerning Jinayah Law includes Khalwat jarimah. Article 23 paragraph (1) of the Qanun Jinayah Law stipulates: “Every person who intentionally conducts a khalwat jarimah is punishable with a maximum uqubaah ta’zir of 10 (ten) whips of canning or a maximum fine of 100 (one hundred) grams of pure gold or an imprisonment of no more than 10 (ten) months. The Jinayah Law Qanun in Aceh is enforced based on territorial principles. Article 5 of the Jinayah Law Qanun states that the Bylaw applies to every Muslim breaking those Bylaw in Aceh. The Problem is when non-Muslim breaking those Bylaws. Interpretation has appeared in this case. The interpretation of some cases have expanded beyond the bylaw itself, tending to infringe upon justice for non-Muslims.

Key words: *Territorial principle, khalwat jarimah, non-Muslim perpetrator, jinayah law qanun.*

Introduction

This article investigates the implementation of Islamic criminal bylaw in Aceh. The investigation will concern the implementation of an Islamic criminal bylaw called *Khalwat* (secluding with illegal spouse). The law only covers Muslims dwelling or visiting Aceh Province. However, the law has not clearly regulated how to deal with non-Muslim perpetrators, who are caught red-handed breaking Islamic criminal bylaws in Aceh, chiefly *Khalwat*. The due process of law on non-Muslim have various approaches that sometimes are against the bylaw itself. This article will clearly explore this problem based on facts of Aceh.

The legal basis of Islamic Shari'a in Aceh Province is Law Number 44 of 1999 concerning the Implementation of the Privileges of the Special Province of Aceh. It is strengthened by Law Number 11 of 2006 concerning the LoGA (Law on the Governing of Aceh) (Losi 2018). Islamic Shari'a in Aceh covers the matters of aqeedah (theological conception), shari'a (law), akhlaq (code of conduct in religious practice), ahwal syaksiyyah (family law), muamalah (civil law), jinayah (criminal law), qada' (justice), tarbiyyah (education), dakwah (mission), syiar (Islamic propagation), and the defence of Islam (Article 125 of the Law Number 11 2006).

Based on Law Number 11 of 2006 concerning the Law on the Governing of Aceh, one of the Islamic Shari'a domains that requires giving legal enforcement is the jinayah law (Islamic criminal law). On the basis of the provisions of the aforementioned Law, Aceh then established the Aceh Qanun Number 6 of 2014 concerning Jinayah Law. One of the legal substances regulated in the Jinayah Law Qanun is the Jarimah (crime) of Khalwat (Munawwir 1997). Article 23 paragraph 1 of the Jinayah Law Qanun stipulates: Every person who intentionally performs the khalwat jarimah is punishable with an uqubat ta'zir of 10 (ten) whips of canning or a maximum fine of 100 (one hundred) grams of pure gold or a maximum imprisonment of 10 (ten) month.

The territorial principle is stipulated in Article 2 of the Book of Criminal Code (KUHP), which states: "Criminal provisions in Indonesian Law apply to every person who commits a criminal action within the territory of Indonesia." Based on the provisions of the aforementioned article, anyone (either an Indonesian citizen or a foreigner) who commits a criminal offense within the territory of the Republic of Indonesia is prosecutable and imposable under the criminal rules of Indonesian applying law. According to Moeljatno, this principle suggests that the criminal law legislation of a state is applicable to any person who commits a criminal action in that state, whether it is committed by a citizen of the state itself or a citizen of a foreign country (Moeljatno 1980; Heinrich 2018).

The territorial principle is based on a variety of conceptions. One of which is that a crime which takes place in the jurisdiction of a state must be addressed by the state where the crime occurs. Another consideration is that the state where crime is committed serves the authority considered to have the strongest interest, the best facility and the most powerful instrument to apply its criminal law over the crime committed either by its citizens or by foreigners who are in its territory (Starke 2003; Billah 2018). The application of territorial principles in enforcing the Jinayah Law Qanun in Aceh follows the provisions of Article 2 of the Book of Criminal Code, which outlines that Jinayah Law Qanun applies to all persons residing in the territory of the Aceh Province. In regards to the territorial principle of the Jinayah Law Qanun, Article 5 of the Jinayah Law Qanun states:

This Qanun applies to:

- a. Every Muslim who commits a Jarimah in Aceh;
- b. Every non-Muslim in collaboration with a Muslim who perform a Jarimah act in Aceh and submits himself voluntarily and chooses to be prosecuted under the Jinayat Law;
- c. Every non-Muslim in Aceh who commits Jarimah act that is not regulated in the Book of Criminal Code (KUHP) or other criminal provisions outside the Book of Criminal Code; rather, the act is regulated in this Qanun; and
- d. Any Business Entity that runs its business activities in Aceh;

According to the Islamic legal conception of the territorial principle, Islamic criminal law only applies in regions where Islamic law is enforced (Ratno 2019). Abu Hanifah argues that Islamic law is applicable to jarimah (criminal action) carried out in dar as-salam, namely regions that are filial to the power of Islamic government and do not see aspects of jarimah type and its perpetrators, either Muslims or non-Muslims (al-Qadir 1994). Islamic criminal rules only apply fully to Muslim countries (Djazuli 2000; Bader 2016; Vogler 2017; Lindsey 2013). The exposition above lays down the objective of this study, namely, to explore the position of non-Muslim perpetrators of khalwat jarimah with the application of territorial principles onto the Jinayah Law Qanun enactment in Aceh.

Research Methods

This study involves library research, which is research that is conducted by examining secondary data. The approach employed here is the statue approach, which scrutinises legislations and conceptions. The primary reference used in discussing the issue of khalwat are laws and regulations; predominantly the Book of Criminal Code (KUHP), Law Number 11 Year 2006, the Jinayah Law Qanun, and the opinions of legal scholars. Data analysis is carried out through descriptive analysis.

Discussion

Definition of Territorial Principles

The application of territorial principles in the enforcement of the Jinayah Law Qanun in Aceh follows Article 2 of the Book of Criminal Code outlining that the Jinayah Law Qanun applies to all persons who live in the Aceh Province. In regards to the territorial principle in the Jinayah Law Qanun, Article 5 paragraph (e) affirms:

The Qanun applies to:

- e. Every non-Muslim in Aceh who commits a Jarimah action which is not regulated in the Book of Criminal Code (KUHP) or other criminal provisions outside the Criminal Code, is regulated in this Qanun;

Corresponding to the provisions of the aforementioned article, everyone (either Acehnese or non-Acehnese) who commits jarimah in the Aceh Province is subject to the criminal rules as provided in the Aceh Jinayah Law Qanun regardless of their religion or belief.

Legal Status of Non-Muslim Perpetrators of Khalwat Jarimah Based on the Aceh Jinayah Law Qanun

The Environment for the Applicability of Islamic Criminal Rules

Islamic law is basically not a locally or regionally binding shari'a; however, it is a global and universal shari'a. In regards to the environment for the enactment of the criminal code of Islam, Muslim Jurisprudential experts (the fuqoha) theoretically categorise the environment into two realms (Sukron Kamil; Mohd Hisham and Mohd Kamal 2019; John-Hopkins 2016; Hamdamiyan and Behniafar 2016; KUHP Islam 1392. J. Pol. & L).

The territorial principle in Islam lays out that Islamic criminal law only applies in the region where Islamic law is enforced. According to Imam Abu Yusuf, Islamic criminal law applies to the jarimah that occurs or is committed within the territory of the Islamic state, either by Muslim, dzimmi or musta'man residents. The musta'mans who gain the right to temporarily live in the land of Islam sometimes happen to commit jarimah that offends the God's or the community rights, such as adultery, stealth and so on; and they also happen to commit the jarimah that offends individual rights such as *qishas* (murder), *qadzaf* (fraudulency), embezzlement, looting and etcetera (Frank 2017; Noel Coulson 2017; Ahmed 2016; Basri 2015).

According to the *jumhur* (consensus) of Imam asy-Syafi'i, Imam Maliki, and Imam Ahmad, Islamic law is applicable to all criminal actions committed anywhere as long as it belongs to the territory under dar-as-salam jurisdiction, regardless of whether the perpetrators are Muslims, the dzimmis, or the musta'mans. This signifies that criminal rules are not bound to territory; but rather to the subject of law (Abdul Kadir; Scalia 1989; Salter 2008; Patrick 1970; Scharf 1996). Therefore, each Muslim should not perform prohibited actions or neglect their obligatory practices wherever they are. Islamic Shari'a establishes the rules for every jarimah committed by Muslims or dzimmis in non-Islamic states. The musta'mans who commit a jarimah in a non-Islamic state are not subject to punishment by an Islamic state because they bear no obligation to submit to Islamic law unless they enter an Islamic state (Tajul Arifin

2019). On the contrary, the law applies to Muslims and the dzimmis who commit jarimahs both in an Islamic country and outside of an Islamic country; both bear no difference.

The Legal Status of Non-Muslim Perpetrator of Khalwat Jarimah in the Jinayat Law Qanun

Khalwat (seclusion) is forbidden by Islam because such actions can lead people towards adultery, an intimate relationship outside marriage. The prohibition of adultery is stipulated in the Quran chapter Al-Isra, verse 32: “And never approach adultery, for it signifies a despicable deed and an indecent pathway.” The verse lays down the basis for imposing the ta'zir punishment over the khalwat jarimah. Likewise, the hadith of the Messenger of Allāh has also highlighted the demarcation of association between men and women who are not mahrams (unmarriageable kin):

1. The Prophet forbids a woman from associating with men who are not her mahrams without being accompanied by the woman's mahram.
2. The Prophet forbids a man from performing khalwat with a woman who has been engaged by a marriage proposal with another man. Islam does allow a man to look at the woman whom he has been engaged with to make him more convinced to marry her.
3. The Prophet forbids a man from entering the house of a woman at the absence of her mahram or other accompanies.
4. The Prophet forbids a woman from traveling without her mahram's accompany (Abu Bakar and Halim 2007; Saeeda 2019; Senutha Poonale and Nor Hafizah 2018).

The *Qanun on Khalwat* puts up a *jarimah ta'zir* as a criminal action whose size of punishment is specifically defined in the scripture. In other words, *ta'zir* can be referred to as a punishment over an act of immoral conduct or a wrongdoing. It is seen as of the ‘*had*’ and ‘*kaffarah*’ whose level of punishment is not particularly outlined. Its degree of punishment is entrusted to the judge or the government authority to decide. Based on this realm, it is apparent that ta'zir does not stand under a specific provision in terms of both the type and the degree of punishment to be imposed on the perpetrator because ta'zir denotes a punishment intended for preventive and educational measures (Chairul Fahmi).

Although the *Qanun on Khalwat* has been enacted, the prosecution of khalwat cases in the community is carried out differently in different districts. Such differences can result from varied interpretations of the legal community who participates in khalwat qanun enforcement. The prohibition from performing khalwat in Aceh is regulated under the Aceh Qanun Number 6 of 2014 concerning the Jinayah Law. It is outlined as a prohibition for two people of different sexes, who are not mahram and who are not husband and wife, to stay together in a secluded or hidden place. This prohibition aims at: (1) enforcing the Islamic shari'a and the living customs that apply within the community of the Nanggroe Aceh Darussalam Province; (2)

protecting the community from various activities and/or actions that can damage their dignity; (3) preventing the community members from performing the behaviours that lead them to adulterous actions; (4) increasing the community participation in preventing and eradicating the actions of khalwat/obscenity; and (5) impeding the opportunity for moral damage.

The prohibition of khalwat is regulated in Article 23 of the Aceh's Jinayah Law Qanun that reads:

1. Whomsoever intentionally performs *Khalwat jarimah* is charged with 'Uqubat (sanction) Ta'zir (on Judge's discretion) of a maximum canning of 10 (ten) whips or a maximum fine of 100 (one hundred) grams of pure gold or a maximum imprisonment of 10 (ten) months.
2. Whomsoever intentionally organizes, provides facilities for or promotes a Khalwat jarimah is charged with 'Uqubat Ta'zir of a maximum canning of 15 (fifteen) whips and/or a maximum fine of 150 (one hundred and fifty) grams of pure gold and/or a maximum imprisonment of 15 (fifteen) months.

The interpretation of the article brings about a number of insights in prosecuting the khalwat cases that take place in the community such as whipping upon a judge's verdict, being advised and released, forced marriage under the community's arrangement, being bathed by the community residents, being paraded around the village, and others. Resolution to khalwat cases should not be decided upon the community's unilateral and arbitrary will. The procedures and codes towards the perpetrators' punishment are already put up by law (Chairul; Lacey, Nicola and Hanna 2019; Bahwan 2019; David 2018). According to the basic provisions in Islamic law in regards with *jarimah*, *hudud* and *qishas*, the hudud jarimah (specific jarimahs whose punishments have been set by Allah) should not be applied to other jarimahs that have not been decided; for example a case of the attempt to commit a jarimah (Ahmad; Nugrahaeni and Nadea 2018; Wahyuningsih 2018; Fadlia 2018). This provision is based on the hadith narrated by imam al-Baihaqi from nu'man ibn Basyir that the Messenger of Allah said: Whosoever arrives at (executes) a punishment of a hudud beyond the given jarimah hudud provision, he is among those who transgress the boundary (Jalaluddin; Kamal 2019; Nugrahaeni and Nadea 2018; Muhammad, Ramizah, Khairunnasriah, Afridah and Nasimah 2018).

An attempt to commit adultery should not be punished as committing adultery – whose charge is a hundred *whips* of canning or stoning. Thus, the punishment for an attempt towards committing a *jarimah* is the punishment for the *ta'zir* itself. In Indonesian Criminal Law, the punishment for a jarimah attempt is stipulated in article 53 paragraph (2) of the Book of Criminal Code which reads:

1. The maximum degree of the substantial punishment for an attempt to commit a crime is reduced by one third.

2. If the crime is chargeable by capital punishment or life-long imprisonment, so it should be charged with a maximum imprisonment of fifteen years (Boediono 2018; Sholihah 2018; Hasanah 2009).

Based on the aforementioned provisions, it is apparent that if one is proven to have committed *khalwat* (indecent acts), one is chargeable between a maximum canning of 9 (nine) whips and 3 (three) whips at the least. This penalty can add up or be substituted for other sorts of penalties, namely a maximum fine of Rp. 10,000,000 (ten million rupiahs) or a fine of Rp. 2,500,000,- (two million five hundred thousand rupiahs) at the least. In the meantime, those who are proven to have provided facilities to help or protect the perpetrators of a filthy action are imposable according to paragraph 2 of article 22 above (Chairul Fahmi; Hays 2018; Jones and Samuel 2015). Particular conditions that have to be met as contained in the special criminal provision of the *jarimah* are:

1. The action of seclusion;
2. Committed by a man and a woman who are not mahram;
3. The presence of evil intension;

The emphasis on ‘the seclusion of a man and a woman who are not Mahram’ bears some flexibility in its application. With this notion, all practices seen as *khalwat* will be prosecutable, even if they take place in public spheres such as hotels, inns, cafes, and etcetera (Alyasa’ 2007; Radics 2015). Based on the provisions of the *Jinayah Law Qanun of Aceh*, the enforcement of Islamic Shari'a is based on territorial principles, which means that the *Jinayah Law Qanun* applies in the jurisdiction area of the Aceh Province. This also takes its basis on Law No. 11 of 2006 concerning the Law on the Governing of Aceh, which is stipulated in Article 128 (2) regarding the appointment of the *Syar'iyah Justice* as the justice house for all Muslims who reside in Aceh. Hence, it is clear that the context only applies to those who commit crimes within the territory of Aceh Province. Furthermore, article 125 of the Law on the Governing of Aceh (LoGA) affirms that "it is mandatory to comply with and respect all existing and applying rules or Islamic law in Aceh," specifically the paragraphs regarding *khalwat jarimah*.

The provisions of Article 5 of the *Jinayah Law Qanun* affirm the following:

This Qanun applies to:

- f. Every Muslim who commits a *Jarimah* in Aceh;
- g. Every non-Muslim together with a Muslim who commits a *Jarimah* in Aceh and voluntarily submits to and chooses to be prosecuted under the *Jinayah Law*;

- h. Every non-Muslim in Aceh who commits a Jarimah which is not regulated in the Book of Criminal Code (KUHP) or other criminal provisions outside the Book of Criminal Code, but is regulated in this Qanun; and
- i. Any business Entity that runs its business activities in Aceh.

This principle does not absolutely apply to Muslims. Non-Muslims are permitted to submit themselves or choose the *qanun* to be enforced on them as stipulated in Article 129 of the Law Number 11 of 2006 concerning the Law of the Governing of Aceh:

- 1) In the event of a criminal action committed by two or more people, a non-Muslim perpetrator can choose and submit himself voluntarily to be prosecuted under jinayah law.
- 2) Any non-Muslim who commits a criminal action which is not regulated in the Book of Criminal Code or other criminal provisions outside the Book of Criminal Code, jinayah law is applicable on him.

Both Muslims and non-Muslims are prosecutable under the *rechtdelicten* (Hamid 2015; Fenwick and Stewart 2016; Muller and Dominic 2018) principle which is jointly recognized in common, for it denotes a *jarimah ta'zir* established by the authorities in the same way as other countries do when enforcing the laws in their respective countries. On top of that, *Acehnese context* is integral to religious and *customary* values which are inherent to the *Acehnese* society tradition which greatly concerns moral behaviours and conducts.

Jinayah Law, particularly on *khalwat jarimah*, as regulated in the Aceh qanun Number 6 of 2014, is separated from the matter of *aqeedah / belief* (religion) embraced by diverse citizens. Jinayah Law is a concern of public interest which is intended for the common benefit of the community who lives in the state. Today Jinayah Law is enacted in the province of Aceh, which is basically a part of Indonesian territory and is still within the jurisdiction of the Unitary State of Indonesia. This corresponds to the principles of *wetdelicten* and *rechdelicten* of all nations, thus enforcing the laws for the sake and the benefit of their citizens. If a citizen commits an action of intimacy with a person of opposite sex without a legitimate marriage bond, the perpetrators are prosecutable under a jinayah qanun for the charge of *ikhtilath*, which is identical to the case of moral violations (articles 532-536) or moral crimes (article 281) as stipulated in the Book of Criminal Code. With the identical nature of the two sources of law, the perpetrator can choose which law they should be prosecuted under. However, the perpetrator of *Khalwat Jarimah* does not have the alternate law because the *jarimah* is not regulated in the Book of Criminal Code. It is only specifically regulated and stipulated in the Aceh Jinayah Qanun Number 6 of 2014, which applies in Aceh based on the territorial principle.

In case the occurrence of a violation of an act is not regulated in the Book of Criminal Code or criminal law outside the Book of Criminal Code, any such violation is only recognised in the jinayat qanun of Aceh; therefore, the perpetrator will find it impossible to free himself from the legal consequence of his action. Jinayat law is a public law. The dimension of public law comprises the following elements: (1) public interest; (2) state security; and (3) public tranquillity. Viewed from these angles, Jinayat Law is not related to the issue of religion. When someone commits an action that can interfere with the element of public law, the perpetrator must be punished regardless of his or her religion (Hamid 2015; Hashemi and Kamran 2017; Abou El Fadl 2017; Babiker and Mohamed 2017).

In light of the historical context and socio-cultural development it is merely an unreasonable fear to perceive that non-Muslims will be threatened in the midst of a Muslim majority when the Islamic Shari'a is adopted and upheld. Aceh has a strong "legal standing" for the implementation of Islamic law in the province; hence, the authority to enforce the Shari'a will certainly consider the cultural values of the people who inhabit Shari'ah land. It can be said that there is no conflict between Muslims and non-Muslims as a result of religious practice behaviours. Perhaps, if there is any, the conflict is triggered by economic conditions and the behaviour of massive injustice in the midst of society. In manifesting the enforcement of Islamic law, Muslim communities must refer to the spiritual value of the Shari'a itself whose objective is to benefit human life. Human interaction in Muslim society applies the principle of equality. What makes a human different from others is devotion to Allah. Therefore, the position of non-Muslims in the Islamic social order is clear and their integration into the behavioural realm of the Muslims majority society is nothing to worry about.

In addition to that, the local wisdom of the Acehnese society reflects the normative order of their living which strongly features a sense of mutual respect (Muhammad 2018). Representing its cultural treasure, it is the essential element that creates conducive social order towards the enforcement of Islamic law (Samsul 2011; Nugroho, Carden, and Antlov 2018; Riviere 2016; Abdullah, Suhaila and Mohd Nizam 2017). Moral principles play three main roles in shaping the people's lives: they are tawjih (direction), tatsbit (fortification) and himayah (conservation). Tawjih is practiced through information dissemination, preaching, and counselling involving various informational media.

Tatsbit can be done through in-depth education in various learning environments such as families, schools, and universities. Himayah can be executed under two methods; first, actively control public opinion on the basis of *amar ma'ruf* and *nahi mungkar* (promoting virtues and evading mischief) principles in order to protect the community from damaging and disorderly behaviours. Second, enforce laws or regulations to anticipate the emersion of destructive actions. By optimising the Islamic moral values that cover the aspects of direction, stabilisation



and protection, the community will grow and develop with a proper social life order (Khoiruddin 2003; Ning, Liu and Wang 2019; Reus-Smit and Christian 2018).

Conclusion

The enforcement of Islamic Shari'a through the Jinayah Law Qanun in Aceh based on territorial principle means that the Jinayah Law Qanun applies in the Aceh Province territorial jurisdiction. Based on the Jinayah Law Qanun, a Non-Muslim perpetrator of khalwat jarimah does not have an alternate law under which his or her case is to be prosecuted because the khalwat jarimah is not regulated in the Book of Criminal Code; rather, it is only specifically regulated in the Jinayah Law Qanun. A violator of an act that is not regulated in the Book of Criminal Code or a criminal law outside the Book of Criminal Code cannot be exempted from legal prosecution. With its position as a public law, Jinayah is not associated with religious practices; rather, it is a matter of public interest. Therefore, if a person commits an action that can disrupt public concerns, he or she must be punished, whether he is a Muslim or a non-Muslim. It is suggested that non-Muslims in Aceh, legal activists and communities, and external parties both in Aceh and elsewhere, explore the materials of the Jinayah Law Qanun more extensively to acquire a better understanding of the Jinayah Law Qanun, and at the same time avoid the misinterpretation of law enforcement in Aceh.

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