Volume 15, No. 3 2018

# JOURNAL OF Islam in Asia

A Refereed International Biannual Arabic – English Journal

إنما يخشى الله من عباده العلماء

**Special Issue: Integration of Islamic Revealed Knowledge into Humanities and Social Sciences**

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

JOURNAL OF Islam in Asia

Volume 15, No. 3. 2018

ISSN: 1823-0970 E-ISSN: 2289-8077

# *Journal of Islam in Asia*

Special Issue: Integration of Islamic Revealed Knowledge into Humanities and Social Sciences 2018



Articles submitted for publication in the *Journal of Islam in Asia* are subject to a process of peer review, in accordance with the normal academic practice.

**This journal is indexed by ERA 2010 Journal Title List, Australian Research Council, Australian Government.**

# The Legal Framework of Islamic Criminal Law in Aceh with reference to Application, Challenges and Way Forward

# Kerangka undang-undang jenayah Islam di Aceh merujuk kepada aplikasi, cabaran dan jalan kehadapan

Ramizah Wan Muhammad,[*] Khairunnasriah Abdul Salam,[**] Afridah Abbas,[***] and Nasimah Hussin[****]

## Abstract

Aceh is a special province in Indonesia and different from other Indonesian provinces especially in the context of Shari'ah related laws. Aceh was granted special autonomy and legal right by the Indonesian central government in 2001 to fully apply Islamic law in the province. Generally, Islamic law which is applicable to Muslims in Indonesia is limited to personal laws just as in Malaysia. However, with the passage of time, Islamic law has expanded to include Islamic banking and finance. Besides that, Islamic law in Aceh is also extended to govern criminal matters which are in line with the motto of Aceh Islamic government to apply Islamic law in total or *kaffah.* Since 1999, the legal administration of Aceh has begun to gradually put in place the institutional framework to ensure that Islamic law is properly administered and implemented. Equally important, such framework is also aimed to ensure that punishments are fairly executed. This paper attempts to analyse the extent of the applicability of Islamic criminal law in Aceh. It is divided into three major parts. The first part discusses the phases in making Aceh an Islamic province and the roles played by Dinas Syariat Islam Aceh as

[*] Assoc. Professor, Department of Islamic Law, AIKOL, IIUM, email: ramizah@iium.edu.my

[**] Master Student, AIKOL, IIUM, email: nasriah.abdulsalam#@gmail.com

[***] Assistant Professor, Department of Legal Practice, AIKOL, IIUM, email: afridah@iium.edu.my

[****] Assoc. Professor, Department of Islamic Law, AIKOL, IIUM, email: nasimah@iium.edu.my



*Journal of Islam in Asia*
**Special issue Integration of Islamic Revealed Knowledge into Humanities and Social Sciences, Vol. 15, No. 3. 2018**
E-ISSN: 2289-8077

the policy maker in implementing Islamic law as well as educating and training the public about the religion of Islam. The second part gives an overview on the Islamic criminal law and punishment provided in Qanun Aceh No.6/2014 on Hukum Jinayat (hereinafter Qanun Hukum Jinayat or "QHJ") as well as the criminal procedural law concerning the methods of proof codified in Qanun Aceh No.7/2013 on Hukum Acara Jinayat (hereinafter "QAJ"). The third part of this paper highlightes the challenges in the application and implementation of Islamic criminal law in Aceh, and accordingly provides recommendations for the improvement of the provisions in the QHJ and QAJ. Inputs from the interviews with the drafters of QHJ, namely Prof. Dr. Hamid Sarong and Prof. Dr Al Yasa are utilized in preparing this paper. In addition, inputs gathered from nongovernmental organizations (NGOs), namely Indonesian Syarie Lawyers Association (APSI) and Jaringan Masyarakat Sipil Peduli Syariah (JMSPS) are employed. The findings of this research are important in providing an in-depth understanding on the framework of Islamic criminal law in Aceh as well as in recognizing the flaws in its application or practical aspects of the law in Aceh.

**Keywords**: Islamic law, Aceh, Administration, Punishment.

## Abstrak

Aceh merupakan sebuah Wilayah Istimewa di Indonesia dibandingkan dengan wilayah-wilayah lain dari segi pelaksanaan undang-undang Islam. Aceh diberi status Wilayah Istimewa yang berautonomi oleh Pemerintah Pusat Indonesia pada tahun 2001 untuk melaksanakan undang-undang Islam secara menyeluruh. Pemakaian dan pelaksanaan undang-undang Islam di Aceh tidak terhad pada Undang-undang jenayah tetapi telah meliputi bidang perbankan dan kewangan Islam. Sejak tahun 1999, Pentadbiran Undang-undang Aceh telah merangka undang-undang bagi memastikan undang-undang Islam dapat ditadbir dan dilaksanakan dengan baik. Selain itu juga, undang-undang yang dirangka juga turut bertujuan untuk memastikan hukuman yang berasaskan undang-undang Islam dapat dilaksanakan secara adil. Oleh itu, kajian dalam kertas kerja ini dibuat uuntuk menganalisa sejauh mana undang-undang jenayah Islam dilaksanakan di Aceh. Kertas ini terbahagi kepada tiga bahagan utama, yang mana bahagian pertama membincangkan latas belakang awal kewujudan wilayah Islam Aceh dan peranan yang dimainkan oleh Dinas Syariat Islam Aceh sebagai mpembuat dasar dalam pelaksanaan undang-undang Islam, mendidik serta menyediakan latihan kepada masyarakat umum di Aceh mengenai Islam. Bahagian kedua menyediakan gambaran umum tentang undang-undang jenayah dan hukuman dalam Islam sebagaimana termaktub dalam Qanun Aceh No.6/2014 berkenaan Hukum Jinayat ("Qanun Hukum Jinayat" atau "QHJ") serta undang-undang prosedur jenayah berkenaan cara pembuktiaan jenayah sebagaimana yag termaktub dalam Qanun Aceh No.7/2013 berkenaan Hukum Acara Jinayat ("QAJ"). Bahagian ketiga kertas ini menekankan masalah atau cabaran yang dihadapi daam pelaksanaan undang-undang jenayah Islam di Aceh, serta menyediakan cadangan-cadangan bagi penambahbaikan peruntukan-peruntukan yang ada dalam QHJ dan QAJ. Maklumat hasil dari temuramah dengan Prof. Dr. Hamid Sarong dan Prof. Dr Al Yasa telah digunakan bagi menyiapkan makalah ini. Selain itu, maklumat yang diperolehi daripada organisasi bukan kerajaan iaitu Indonesian Syarie Lawyers Association (APSI)

dan Jaringan Masyarakat Sipil Peduli Syariah (JMSPS) turut dimanfaatkan. Dapatan dari kajian ini penting bagi menyediakan kefahaman terhadap kerangka undang-undang jenayah Islam di Aceh serta mengenal pasti masalah dalam aspek peruntukan undang-undang tersebut atau pelaksanaannya di Aceh.

**Kata Kunci**: Undang-undang Islam, Aceh, Pentadbiran, Hukuman.

## Introduction

Aceh is a special province in Indonesia compared to other provinces in the Indonesian archipelago. It is unique due to the special position of Islam in the province in terms of customs, law and the mind of Acehnese people. Dutch anthropologist, B.J. Bollan once said, "*Being an Acehnese is equivalent to being a Muslim"*[1]. This remark is similar to the context of Muslims in Tanah Melayu or Malaysia where a person who embraced Islam is called a Malay or "Masuk Melayu" instead of Muslim. Prior to the Dutch colonisation in the Republic of Indonesia, Aceh stood as an independent monarch kingdom called the Aceh Sultanates. Islam and Islamic law have been embedded in the province since centuries ago – before the Dutch colonization, after the independence of Republic of Indonesia in 1945, after the 1959 decree from the Prime Minister No 1/Missi.1959 where Aceh was called Special Province in terms of faith, education and custom, after Tsunami occurred in 2004 and after the signing of a memorandum of understanding between the Government of Indonesia and Movement for the Freedom of Aceh (GAM) in Helsinki in 2005.

Aceh is synonymously known as *Seuramoe Mekkah* which literally means “verandah of *Mekkah*”, that is the holy place for Muslims in Saudi Arabia. In Malaysia, Kelantan is known as the *Serambi Mekkah* that is also literally means “verandah of *Mekkah*” which is similar to *Seuramoe Mekkah* in Acehnese native language. The coincidence in usage of the terms reflects the values and position of Islam in both Aceh and Kelantan[2].

## Islamic Law in Aceh

The phrase Islamic law is often used interchangeably with the word Shari’ah. In a contextual sense, Shari’ah is wider than Islamic law

[1] H. Siregar, Lessons learned from the implementation of Islamic Shari’ah Criminal Law in Aceh, Indonesia, *Journal of Law and Religion* 24, no. 1 (2008-2009): 143-171.
[2] K. Bustamam-Ahmad, The application of Islamic Law in Indonesia: The case study of Acheh, *Journal of Indonesian Islam* 1, no. 1 (2007): 135-180.

per se. Islamic law can be defined as the laws themselves or the *fiqh*. Shari'ah is the corpus of all rules and standards in the Quran and Sunnah.

The starting point of the Islamization of Aceh in the Indonesian legal system was when Law No.44/1999 formally recognized Aceh as a Special Status Province in three important elements: faith, education and custom (*Undang-Undang Republik Indonesia Nomor 44 Tahun 1999 Tentang Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh*, n.d.). Later, Law No.18/2001 was passed and it gave wider power to Aceh in terms of self-governance to create legislation and administer its own laws without being subject to central administration in Jakarta (*Undang-Undang Republik Indonesia Nomor 18 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Daerah Istimewa Aceh Sebagai Provinsi Nanggroe Aceh Darussalam*, n.d.). In addition, Law No. 18/2001 also has provided a provision which recognized the independence of Syar'iyyah Courts in Aceh in the Indonesian legal system (*Undang-Undang Republik Indonesia Nomor 18 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Daerah Istimewa Aceh Sebagai Provinsi Nanggroe Aceh Darussalam*, n.d.). Prior to that, Law No. 22/1999 (which was amended in 2004 by Law No. 32) and Law No. 25/1999 on the respective financial authority and local governments are concrete evidence that decentralization and democratization took place in Indonesia (*Undang-Undang Republik Indonesia Nomor 22 Tahun 1999 Tentang Pemerintahan Daerah*, n.d., *Undang-Undang Republik Indonesia Nomor 25 Tahun 1999 Tentang Perimbangan Keuangan antara Pemerintah Pusat Dan Daerah*, n.d.). Article 8.1 of Law No. 22/1999, says to the effect

> *"The authority to govern, transferred to local government under the decentralization framework must be accompanied by a transfer of the financial resources, facilities and human resources in line with the authority given".*

In other words, the law requires the government of Indonesia to provide financial resources and other support for the purpose of the establishment of the province.

Pursuant to the power given by virtue of Law No.18 in 2001, in the year 2003, the Provincial Legislative Assembly in Aceh passed three Local Regulations; Qanun No.12/2003 on the prohibition of *khamr* (liquor), Qanun No.13/2003 on the prohibition of *maisir* (gambling) and Qanun No.14/2003 on *khalwat* ("improper covert association" between

unmarried couple of opposite gender). Prior to year 2003, Aceh had already implemented Qanun No.11/2002 pertaining to the *aqidah*, *ibadah* and *Syi'ar* Islam[3].

The latest laws which were passed by the legislative assembly were Qanun Jinayat Syariah, Qanun No. 6/2014 and Qanun Acara Jinayah, Qanun No.7/2013 in order to implement Islamic criminal law in Aceh. These two qanun or laws are the substantive laws on criminal law and the criminal procedure law.

It is worth to mention here, Dinas Syariah Islam is one of the Islamic institutions that draft Islamic law in Aceh. It was established in 2001 by virtue of Local Regulation No.33/2001 (*Peraturan Daerah Propinsi Daerah Istimewa Aceh Nomor 33 Tahun 2001 Tentang Pembentukan Susunan Organisasi Dan Tata Kerja Dinas Syariat Islam Propinsi Daerah Istimewa Aceh*, n.d.). The vision of Dinas Syariat Islam is to establish an Acehnese society that is just, civilized and in harmony with Islamic values. Among the strategies of Dinas Syariah Islam are as follows:

1. To disseminate the information about Islamic law in total to the public
2. To create awareness to the public about the *ibadah* and *syi'ar* Islam
3. To facilitate the public with the right infrastructure for the purpose of performing their *ibadah*.
4. To prepare the public and future generations to become shariah law obedient.

### Crimes and Punishments in Qanun Hukum Jinayat

The QHJ governs three main matters, which are the offender, the crime (*jarimah*) and the punishment (*uqubat*). It consists of 10 Chapters and 75 Articles. The crimes provided in QHJ are *khamar*, *maisir*, *khalwat*, *ikhtilath*, *zina*, sexual harassment, rape, *qadzaf*, *liwath* and *musahaqah*.

As for the punishment or *uqubat*, QHJ has provisions for the punishment for *hudud* and *ta'zir*. Nevertheless, *qisas* and *diyat* are excluded since the crime of murder or injury is not regulated by the Qanun. The punishment of *hudud* is imposed in the form of whipping, whereas the

[3] H. Siregar, Lessons learned from the implementation of Islamic Shari'ah Criminal Law in Aceh, Indonesia, *Journal of Law and Religion* 24, no. 1 (2008-2009): 143-171.

punishment of *ta'zir* is of two types, first, as main punishment and second, as additional punishment. The main *ta'zir* punishments are whipping, fine, imprisonment and restitution. Additional *ta'zir* punishment can be in the form of restitution by the guardian, dissolution of marriage, withdrawal of permit, confiscation or community service.

It is provided in the QHJ that the punishment of *hudud* is applicable in the case of *zina* (whipping with 100 lashes), *qadzaf* (whipping with 80 lashes) and *khamar* (whipping with 40 lashes). Besides, whipping is imposed as a main *ta'zir* punishment for the crime of *maisir, khalwat, ikhtilath, liwath, musahaqah*, sexual harassment and rape. Whipping is also imposed as additional *ta'zir* punishment for repeated offenders who commit *zina, qadzaf* and *khamar* or if it involves children.

As far as the offence of rape is concerned, Prof. Dr. Al Yasa remarked that the offence of marital rape could literally fall under the definition of rape under the QHJ.[4] However, the criminalization of marital rape requires a thorough research in many aspects since such offence is not only controversial in the eyes of Muslim society but it also leads to severe impacts towards the family institution, and consequently affects the society at large.[5]

It is interesting to note that this Qanun is not only applicable to the Muslim who commits *jarimah* in Aceh, but it is also applicable to the non-Muslim who chooses to submit himself or herself to the Qanun voluntarily provided that the crime is regulated by the Qanun.

### Methods of Proof under Qanun Acara Jinayat

The QAJ was formulated in order to provide the procedure for the Islamic judicial system in Aceh. The procedural law that is applicable should be based on Islamic law which is aplicable under the QHJ. Even though there is Hukum Acara Pidana (KUHAP), Law No.8/1981 which

---

[4] Article 1(30) of the Qanun Hukum Jinayat defines 'rape' as "sexual contact between either the penis of the offender or another object and the vagina or anus of the victim or between the vagina or anus of the victim and the mouth of the offender or between the mouth of the victim and the penis of the offender accomplished by force or threat". The definition of rape under the Qanun Hukum Jinayat is wider than the definition of rape under the Kitab Undang-Undang Hukum Pidana (KUHP) of Indonesia, Article 284 of which defines rape as "the use of force or threat of force to compel a woman who is not the perpetrator's wife to engage in sexual intercourse".

[5] The interview was conducted on 16th January 2017 at Grand Permata Hati Hotel, Banda Aceh, at 2 p.m.

provides the procedure for civil judicial system, the law is insufficient to provide the procedure required for the Islamic judicial system.[6] Therefore, the QAJ is needed to uphold the principle of justice in accordance with the Islamic perspective in Aceh. The QAJ consists of the provisions, which among others, provide for the arrest, detention, search, seizure and investigation, rights of accused person, reports of the procedure, oath, jurisdiction of the court, trial, evidence etc.

**Methods of proof**

Methods of proof for the criminal offences are provided in Chapter 4 of QAJ. The methods of proof are determined by the types of cases: *hudud, qisas/diyat* and *ta'zir*. The evidence that can be used to prove an offence are testimony by a witness, expert opinion, real evidence, documentary evidence, electronic evidence, admission by the accused and evidence by the accused as expressly provided in Article 181 of the QAJ. A judge shall not convict the accused except if he is certain without doubt (*yaqin*) that the offence was committed by the accused and has been proved by at least two types of evidences.

However, Article 182 (5) of the QAJ provides that the offence of *zina*, shall be proved by four male witnesses who have seen with their own eyes the act happening at the same time and place, and between the same persons. If the witness gives false evidence, he will be charged with the offence of *qazaf*. The requirement for four male witnesses for the offence of *zina* is an exception to the method of proof required to prove other offences under the QHJ.

In an interview with Prof Al Yasa, he highlighted that the requirement of 2 modes of proof in proving the offence means that the evidence given by a witness is not sufficient to convict the accused, unless it is supported by another mode of evidence.[7] The rationale for the requirement of two modes of proof is to attain the standard of *yaqin.*

The Qanun has further explained the mode of evidence:

a. Evidence by a witness must be sworn, given in Court, he must give evidence on what he perceived by his own senses, not as a presumption or opinion. If the evidence given by a witness is not sworn, it is not ad-

[6] Dinas Syariat Aceh, *Hukum Jinayat dan Hukum Acara Jinayat* (Aceh: Penerbit Naskhah, 2015).

[7] The interview was conducted on 16th January 2017 at Grand Permata Hati Hotel, Banda Aceh, at 2 p.m.

missible as evidence, but if it is consistent with other sworn statement of another witness, that unsworn statement can support the sworn statement (Article 182 (9) of the QAJ).

b. Expert opinion is considered as one of the modes of evidence if it is given by a person who is an expert and possesses knowledge on a matter that is in issue at the trial (Article 183 (1) of the QAJ).

c. Real evidence refers to the instrument used in the commission of an offence, or anything which shows the consequence of a crime, which has been found in the place of a crime or other places, produced in court as evidence (Article 184(2) of the QAJ).

d. Documentary evidence is considered as one of the modes of evidence under Article 181(1)(d) of the QAJ. Document in this context refers to any *berita acara* and any official document made by public office that has the jurisdiction to prepare the document, and it contains the evidence on the occurrence of a crime which he or she has witnessed or seen, and the justification on the evidence. It also includes any document made in accordance with any law regarding the matter which is included in its responsibility and which is provided to prove certain facts, and any document provided by an expert as an answer to a request made for his opinion (Article 185 (1)(a), (b), and (c) of the QAJ).

e. Electronic evidence can also be tendered in order to prove certain facts. Electronic evidence here means any proof through any electronic devices which can be read, seen or heard directly or through any intermediaries (Article 186 of the QAJ).

f. Another mode of evidence that can be tendered is admission or confession by an accused. Admission is a statement made by an accused voluntarily on what he did or knew or underwent. The admission made by an accused only binds himself and not others. However, admission by an accused alone is not sufficient to prove his guilt, unless supported by other evidence except for *zina* (Article 187 (1), (2), (3) and (4) of the QAJ).

g. Statement of an accused is also recognized as one mode of evidence accepted by Court. Statement of the accused means that the accused makes such statement in Court on the circumstances of the case after being asked by the prosecution or defence counsel. Any statement made by the accused outside the Court will only be admissible if it is supported by other evidence (Article 188 (1), (2) and (4) of the QAJ).

Articles 51-56 of QHJ provide the procedure for a rape trial. If any person claims she was raped, she can forward the accusation to an

investigating officer together with *prima facie* proof that rape has happened. If the *prima facie* proof is not sufficient, the claimant can take oath to substantiate her claim. Oath shall be taken five times asserting that she is true in her accusation in first to fourth oaths, and the fifth one that the curse of Allah will be on her if she is telling a lie. If she is not ready to take the oath she is proven to have committed the offence of *qadzaf* which makes her liable for 80 lashes of whipping. If the accused person denies the accusation of rape, he can also take oath five times and after that he will be acquitted. If both take the oath, they will be exempted from the respective punishment.

## Challenges in the Application and Implementation of Qanun Hukum Jinayat and Way Forward

Based on an interview with the Jaringan Masyarakat Sipil Peduli Syariah (JMSPS),[8] the application, implementation and execution of the provisions in QHJ are controversial due to several grounds in certain practical aspects and substantial issues. To begin with, the provision in Article 10 of the QHJ raises an issue pertaining to the criminal liability of a person who was of unsound mind during the commission of crime under the Qanun since such a person is not exempted from his criminal liability if the crime has directly affected another person.[9]

The provision has drawn criticism. The concern is voiced out by the JMSPS as the unsoundness of mind of a person during the commission of crime can be raised as a ground of defense of the accused person in Islamic law due to the lack of mental capacity. Hence, the imposition of punishment on a person who lacks mental capacity during the commission of the crime undoubtedly prejudices the spirit of justice and it is against the equitable principles in Islam as generally founded in Hadith No. 2042 in Sunan Ibnu Majah that the liability of a person is lifted from

---

[8] The interview was conducted on 15th January 2017 at Ring Road Coffee, Banda Aceh at 2 p.m.

[9] Article 10 of the Qanun Hukum Jinayat reads:

> A person shall not be punished, if:
>
> a. …
>
> b. at the time of the commission of crime was suffered from mental illness, or by reason of the defective development or sickly disorder of his mental capacities, unless such act had caused injury to other people. *(translated)*

a sleeping person until he wakes up, an insane person until he regains sanity and from a child until he reaches the age of puberty.[10]

Apart from the Islamic law perspective, the unsoundness state of mind of an accused person during the commission of offence also exempts him from his criminal liability in most jurisdictions worldwide, including Indonesia. To be specific, the provision in Article 44 of the Kitab Undang-Undang Hukum Pidana (KUHP) of Indonesia explicitly exempts a person of unsound mind from criminal liability.[11]

However, in another angle of discussion, the issue on the liability of a person of unsound mind in Article 10 of the QHJcan be extended to the issue of the right of the victim and victim's family, particularly if the unsound person's act directly affected the victims' and his family's dignity or property. In this regard, the person of unsound mind might not be fully held liable on his own capacity. However, his guardian or immediate family members may be held financially liable in order to preserve the victim's right or to compensate the victim's loss or injury (Mohammad M Hedayati-Kakhki, 2014). Hence, the provision in Article 10 of the QHJ should be amended by extending the financial liability to the family members of such person of unsound mind so as to avoid ambiguity in the present provision, and at the same time preserve the rights of the accused person of unsound mind as well as that of the victim. This idea reflects the concept of restorative justice – which is remarked by Prof. Dr. Hamid Sarong as the practice that is rooted from the Acehnese custom or *"adat"* where the society also bear the collective responsibility to restore the right of the victim as well as to restore the public peace affected by the commission of the crime.[12]

In addition, the issues on human rights were also highlighted by the JMSPS as the whipping punishment was claimed as a form of cruel

---

[10] M. T. Ansari, Sunan Ibn Majah (New Delhi: Kitab Bhavan, 2000).

[11] Article 44 of the Kitab Undang-Undang Hukum Pidana (KUHP) reads:

> (1) Not punishable shall be the person who commits an act for which by reason of the defective development or sickly disorder of his mental capacities, he is not liable.
>
> (2) If it is evident that he is not liable for the committed act by reason of the defective development or sickly disorder of his mental capacities, the judge may give an order that he be placed in a lunatic asylum during a probation time not exceeding the term of one year.
>
> (3) …

[12] The interview was conducted on 14th January 2017 at Grand Permata Hati Hotel, Banda Aceh, at 2 p.m.

punishment. The JMSPS views that such form of punishment should not be imposed on an accused person who is found guilty as Indonesia is one of the parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ratified the Convention in 1998. The imposition of whipping punishment on the offender in Indonesia in general and in Aceh in particular is inhuman and may amount to torture, and indeed against the objectives of the Convention. On the similar ground, the punishment specified for children under the QHJ was also criticized on the basis of rights of children because under Article 67 of the QHJ children may be subject to whipping punishment with maximum 1/3 of punishment imposed on adult person.[13] In other words, whipping punishment may be imposed on a child if he is found guilty under the QHJ and consequently results in the infliction of an inhuman or cruel punishment upon the child.

However, the critic on the imposition of whipping punishment highlighted by the JMSPS is arguable as the nature of whipping punishment in Islamic law is generally different from the whipping punishment in Civil law as the execution of such punishment in Islamic criminal law is more lenient or less rigorous. Indeed, the discussion on the issues of human rights and inhumane punishment undoubtedly involves a lengthy discussion on jurisprudential and philosophical aspects of punishment which is not intended to be covered in this paper. However, in a preliminary analysis, the provision in Article 67 of the QHJ needs to be revised and a clear provision concerning the punishment for the children needs to be inserted in order to preserve the right of the children as the literal reading of the provision suggests that a child may be whipped if he is found guilty. In that case, no existing provisions in the same QHJ or in the QAJ suggests to the contrary of the provision codified in Article 67 of the QHJ. In other words, a specific provision on the punishment intended for children needs to be inserted in the QHJ so as to avoid ambiguity in its interpretation and implementation.

In addition to the highlighted issues on the provisions embodied in the QHJ, the provisions concerning the procedural matters relating to proof in proving the offence of rape also need to be scrutinized as whether the general principle that requires two types of evidence is applicable

[13] Article 67 of the Qanun Hukum Jinayat reads:
(1) If a child reached the age of 12 (twelve) years but has not yet attained the age of 18 (eighteen) years or not yet married committed a crime, the child would be punished with maximum 1/3 (one third) of the punishment specified for an adult…. *(translated)*

to the offence of rape, or whether there is any exception to the principle in order to prove the case beyond reasonable doubt or *yaqin*. Basically, the punishment provided for the offence of rape is harsher as compared to punishment provided for other forms of sexual offences in the QHJ, such as *zina*, *liwat, khalwat, musahaqah* and sexual harassment.

Article 48 of the QHJ provides that the person who is found guilty is liable to *ta'zir* whipping where the maximum punishment is 175 lashes while the minimum is 125 lashes, or fine where the minimum punishment is 1.250gram of pure gold and the maximum is 1.75gram of pure gold, or imprisonment where the minimum term is 125 months and the maximum is 175 months. In addition, the punishment is higher if the offence of rape was committed against *mahram* or child as provided in Article 49 and Article 50 of the QHJ. On the other hand, a person who is convicted with *zina* offence under the QHJ is liable for *hudud* whipping punishment that is 100 lashes, and the similar person shall be punished with 100 lashes of whipping together with fine 30gram of pure gold, or imprisonment of maximum three months if he is found to have committed similar offence. The harsher punishment for the offence of rape is basically based on the nature of the offence since it involves the elements of "force" inflicted towards the victim as compared with the elements of "mutual consent" in the offence of *zina*, hence harsher punishment is substantially needed to protect the victim and the accused person's dignity as well as to protect the society.[14]

In a logical sense, a harsher punishment for an offence requires more stringent evidence, and the quality of the proof must be more reliable or more authentic. In this regard, the JMSPS remarks its concern that the present provisions relating to the mode of proof in establishing the offence of rape are insufficient to protect the rights of the rape victim if she is unable to produce sufficient evidence as she must take five times of oath in the absence of any *prima facie* evidence to support her claim while the accused person must also take five times of oath in denying the accusation.

The current procedure would be abused or manipulated by a perpetrator as he could simply take five times of oath and declare his innocence. Hence, the loophole in the provisions concerning the method of proof in respect of rape offence should be thoroughly analyzed. It is rec-

[14] S. Abbas, Maqasid Al-Syari'ah dalam Hukum Jinayat di Aceh (Banda Aceh: Dinas Syari'at Islam Aceh, 2015).

ommended that the mode of evidence in proving the offence of rape should be more stringent and not only limited to two modes of evidence so as the rights of the rape victim can be accordingly preserved.

Last but not least, the Association of Syarie Lawyer in Aceh (APSI) led by Mr. Bahrul Ulum,[15] has expressed his views about the functions of Syarie lawyers as part of the legal personnel in the administration of Syar'iyyah Courts in Aceh. According to Mr. Bahrul Ulum, Syarie lawyers are not popular among the accused persons charged with the offence under the QHJ due to the feeling of embarrassment after committing the crime. As a result, accused persons tend to plead guilty to the charge which is read to them despite of the fact their rights as an accused person would be more protected if they were represented by counsel.

## Conclusions

On the whole, the implementation and administration of Islamic law is part of the *siyasah syar'iyyah* of a governing country, including Aceh. Undoubtedly, every law in a legal system is developed through a process of transition in respect of its legal aspects whether substantive or procedural – along with criticisms and challenges. In a like manner, the similar process of development is undergone by Aceh in term of the application and implementation of Islamic law, particularly in the implementation of Islamic criminal law as provided in QHJ and QAJ. Initially, certain provisions relating to human rights and rights of children need to be thoroughly examined as its implementation mirrors the image of Islam in general. Likewise, the provisions concerning the mode of evidence in proving the offence of rape should be revised as the implementation of Islamic law in Aceh is not only intended to protect the interest of the victim, but to preserve the objectives of Islamic law or *maqasid al-syar'iyyah* as a whole.

[15] The interview was conducted on 17th January 2017 at Ring Road Coffee, Banda Aceh, at 2 p.m.

## BIBLIOGRAPHY

Abbas, S. (2015). *Maqasid Al-Syariah Dalam Hukum Jinayah di Aceh*. Banda Aceh: Dinas Syariat Islam Aceh.

Bustamam-Ahmad, K. (2007). The Application of Islamic Law in Indonesia: The Case Study of Aceh. *Journal of Indonesian Islam*, 1(1): 135–180.

Dinas Syariat Aceh. (n.d.). Misi. Retrieved February 2, 2017, from https://dinassyariatislam.wordpress.com/frofile/misi/

Dinas Syariat Aceh. (2015). *Hukum Jinayat and Hukum Acara Jinayat*. Aceh: Penerbit Naskhah.

Mohammad M Hedayati-Kakhki. (2014). *General Defences in Criminal Law: Domestic and Comparative Perspectives*. (A. Reed, M. Bohlander, N. Wake, & E. Smith, Eds.). Surrey: Ashgate.

Muhammad Tufil Ansari. (2000). *Sunan Ibn-i-Majah* (Volume 3). New Delhi: Kitab Bhavan.

Peraturan Daerah Propinsi Daerah Istimewa Aceh Nomor 33 Tahun 2001 Tentang Pembentukan Susunan Organisasi Dan Tata Kerja Dinas Syariat Islam Propinsi Daerah Istimewa Aceh.

Siregar, H. B. (2008-2009). Lessons Learned from the Implementation of islamic Shari'ah Criminal Law in Aceh, Indonesia. *Journal of Law and Religion*, *24*, 143–171.

Undang-Undang Republik Indonesia Nomor 18 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Daerah Istimewa Aceh Sebagai Provinsi Nanggroe Aceh Darussalam.

Undang-Undang Republik Indonesia Nomor 22 Tahun 1999 Tentang Pemerintahan Daerah.

Undang-Undang Republik Indonesia Nomor 25 Tahun 1999 Tentang Perimbangan Keuangan antara Pemerintah Pusat Dan Daerah.

Undang-Undang Republik Indonesia Nomor 44 Tahun 1999 Tentang Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh.