

THE FORMALIZATION OF SHARIA IN ACEH PROVINCE: A GENDER PERSPECTIVE

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ABSTRACT

This paper explores the dimensions of gender equality within the context of law-making in Aceh province, emphasizing the importance of a gender perspective. Categorized as a normative study, it addresses the current issue by analysing principles, levels of synchronization, legal histories, and comparisons of constitutions. Additionally, an empirical study was conducted, involving interviews with relevant stakeholders directly involved in the development of Aceh Qanun. The findings of this paper highlight that Pancasila, the 1945 Constitution, and CEDAW serve as primary parameters for law-making and the implementation of gender equality in Indonesia. The formalization of shari'a in Aceh province, as a political endeavour by authorities, is seen as crucial for achieving both gender equality and the goals of shari'a (maqasid al-syariah). The inclusion of gender equality in the law-making process, particularly in relation to the implementation of shari'a in Aceh, is a principle that should be comprehensively understood and applied to ensure justice and equality for all genders in the formulation of qanun in Aceh.

Keywords: Gender equality, Sharia, Aceh.

INTRODUCTION

Article 28 I (2) of 1945 Constitution mentions that “Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment”. In the reality, discrimination toward women as citizens or as humans can still be found. This condition is pictured in the acknowledgement of Indonesia in International domain of which the discrimination in various forms toward women that commonly referred to as gender inequality is indeed still exist. Gender inequality can harm women and men (Ikrom, 2013), it is just, based on statistics, and women were more dominated as the victim of those several forms of inequality (Yuliani, 2004). Although Indonesia is not a religious-based state, however, throughout the history, this nation has never detached itself from the influence of Islam in many aspects, especially in the aspect of law. The formal implementation of sharia in Indonesia is embodied in various forms of government regulations and policies both in national or regional level. For Aceh, legally, the implementation of sharia was begun with the issuance of Law No.44/1999 concerning the Implementation of the Privileges of Aceh (religious, customary, education, and cultural sectors), which later emphasized by Law No.22/1999 concerning special autonomy (Ka’bah, 2004), and emphasized again by the ratification of Law No.18/2001 which known as Nanggroe Aceh Darussalam’s Law. Then, elucidated in regional regulations issued by the regional government until the implementation of sharia in Aceh can be ran and known as the kaffah (comprehensive) implementation of sharia with several qanuns that have been issued. Associated with the order of regulations, qanun has been placed as the subsystem of national laws even the system of national in general. Due to that matter, qanun should not contradict the higher level of law regulations (Daud Yoesoef, 2009).

As the province which implemented the sharia principles, besides containing the Islamic values, the lawmaking of Aceh’s qanun should be adjusted with the existing laws and highly protecting the interest of women. State has put massive attentions toward the interest of women through various public policies,

started from the ratification of some conventions including Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) through Law No.7/1984, the amendment of 1945 Constitution, Law No.39/1999 concerning Human Rights, Law No.23/2003 concerning the Eradication of Domestic Violence (KDRT), Presidential Instruction No.9/2000 concerning Gender Mainstreaming, and other regulations.

This paper focuses on what should be included in qanun to have gender equality perspective and to examine how Islamic scholar's view of the formulation of qanun to be based on gender equality in Aceh.

LITERATURE REVIEW

The most revolutionary teaching of the Qur'an, which constitutes the basic nature of sexual equality in Islam, and which undermines the notions of radical differences and hierarchy between the sexes, is related with the origin and nature of human creation. As the Qur'an describes it, based on Quran surah An-nisa verse 1 that man and woman, although biologically different, are ontologically and ethically-morally the same in the sense that both women and men originated in single Self, have been endowed with the same natures, and make up two halves of a single pair (Barlas, 2002) . Man and woman are two categories of the human species given the same or equal potential. There are no indications, whatsoever, that women have more or fewer limitations than men (Ali, 1989). Muslim societies have apparently contributed to the realities of Muslim women's backward status and their being deprived from basic women's rights. In response to women's detrimental situation, Muhammad Abduh called for the education of men "in the true meaning of Islam," which would make them give up all selfishness, material greed, power hunger, and love of tyranny, so that they would begin to deal with their wives in the spirit of love, compassion, equality that the Qur'an enjoins (Abduh, 2008). Fazlur Rahman brought into light a new epistemology by taking into consideration the historical sociological contexts when the Islamic traditions were formed. Muslims,

he argues in his later book in 1982 have yet to resolve 'basic questions of method and hermeneutics (Afkhami, 1995). No method of Qur'anic exegesis is fully objective as each exegete makes some subjective interpretation which is not necessarily the intent of the text. It is, therefore, crucial to distinguish between the text and its interpretation. We cannot look to a text alone to explain why people have read it in a particular mode or why they tend to favor one reading of it over another. This is especially true of the Qur'an, as it "has been ripped from its historical, linguistic, literary, and psychological contexts and then been continually recontextualized in various cultures and according to the ideological needs of various actors" (Arkoun, 1994). The reform movement in Indonesia has been the growing demands for formalization of shari'a. The desire for formal shari'a may be viewed as a proposal indicating the birth of fundamentalism in its political form (Roy, 1994) Pioneered by Nanggroe Aceh Darussalam which imposed it formally on Islamic New Year's Day 1 Muharram 1423, formal shari'a soon became a widespread issue nationwide. For its effective enforcement, shari'a is to be supported by local authorities and local government regulations. Meanwhile, what people aspire out of the formal shari'a in Aceh is related to the solution of various cases of violence perpetrated to them such as killing, rapes, looting, and gender equality which basically constitute the core problems of people in Aceh, and which apparently has not been well responded to by the current authorities (Kingsbury, 2010). Interesting that most informants viewed formalization of shari'a as a political undertaking by authorities (Lacombe, Lagos, Reuben, & van Winden, 2017) rather than a religious endeavor to achieve *maqasid al-syariah* (goal of shari'a), which is welfare for all.

METHODS

This research was a normative encompassed studies regarding law principles, law systematics, level of synchronization, and law histories and comparisons (Soemitro, 1985) a field study was also performed to acquire the supporting data by conducting structured interview towards parties who

comprehend and directly involved in the formulation process of qanun in Aceh. The acquired data were analyzed qualitatively by using systematic thinking stages to obtain the answers over the main problem proposed in the research which eventually will provide interpretations in the form of descriptions; thus, descriptive-analytic research will be produced (Hartono, 2006).

DISCUSSION/ANALYSIS

1. Gender Equality in Law Making

Gender is not a new issue in social, legal, religious, or other studies, however, the study about gender is still actual and interesting (Saiful, 2015). Gender inequality can harm both women and men, it is just, according to the statistics, women were more dominated as the victim of several forms of inequality (Duflo, 2012) due to that matter, movements to fight for the rights of women to acquired justice have emerged which commonly referred to as feminist movement.

The aim of this movement is to embody gender equality and justice through gender mainstreaming in various sectors of life and development (Hassan, 1995), programs as well as the implementation of respective duties and functions, thus, the outcome and the impact of gender equality can be achieved in sectorial management and development. The gender disparity does not actually become the issue as long as it does not result in gender inequality (Howland, 1999). However, the problem is that gender disparity has produced various inequalities either for men or particularly for women. Gender gap is a reality that has to be faced by each woman in almost every part of the world and can be found in every public or private domain, domestic-reproductive or productive, including in legal sector (Ritzer & Goodman, 2003).

The protection toward women rights is contained in many international instruments and laws including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); a United Nations' treaty adopted by

UN's General Assembly in 1979. Indonesia has followed the ratification of CEDAW convention through Law No.7/1984. The convention, promotes the implementation of national laws that forbid discriminations and adopt temporary specific actions to accelerate de facto equality between men and women by also changing the practice of habit and culture which based on inferiority or superiority (Shogan, 1992) of one sex type or the stereotype role for men and women.

The provisions of equality in CEDAW are the reflection in Article 6 to Article 16, namely:

1. The elimination of human trafficking and the exploitation of women (Article 6)
2. The equality in public and political lives (Article 7)
3. The representation of women in International domain (Article 8)
4. Nationality (Article 9)
5. Education (Article 10)
6. Employment (Article 11)
7. Health (Article 12)
8. Social and economic life (Article 13)
9. The rights of rural women (Article 14)
10. Equality before the law (Article 15)
11. Equality in marriage and family (Article 16)

Referring to the provisions in CEDAW, the convention obliges the member states in the formulation of legislation to implement the principle of substantive equality through sameness, protectionist, and corrective, non-discriminative principle related to ideology, action, intention and cause as well as the principle of state obligation to provide instruments and the obligation to obtain actual outcome, respect, fulfilment and protection, affirmative action, due diligence, and national harmonization.

Aside from the provisions in CEDAW, Pancasila as the national principle can be made as one of the parameters of gender equality in the law making, in addition,

there are several other provisions that can be made as the parameter of gender equality, namely:

1. The Provision of People's Consultative Assembly of Republic of Indonesia No. XVII/MPR/1998 concerning Human Rights which enacted on November 13 1998
2. 1945 Constitution of Republic of Indonesia which contains 14 clusters of rights and described in 40 constitutional rights of every Indonesian citizen.
3. Law of Republic of Indonesia No.7/1984 concerning the ratification of the Convention on the Elimination of All Forms of Discrimination against Women.
4. Law of Republic of Indonesia No.39/1999 concerning Human Rights
5. Law of Republic of Indonesia No.11/2004 concerning the Ratification of International Convention on Economic, Social, and Cultural Rights
6. Law of Republic of Indonesia No.12/2005 concerning the Ratification of International Convention on Civil and Political Rights
7. Law of Republic of Indonesia No.19/2011 concerning the Ratification of the Convention Regarding Disable People
8. Presidential Decree No.36/1990 concerning the Ratification of the Convention on Child Rights
9. The Result of the fourth world conference in 1995 on women regarding the Beijing Declaration and Action Plan
10. Declarations of 2000 Millennium Development Goals (MDGs) and SDGs
11. Law of Aceh Governance No. 11/2006

Some of the provisions/regulations can be made as the parameter in understanding the perspective of gender equality in the making of laws or policies which expected to be able to fulfil the constitutional rights of women and achieving the gender equality. Islamic values in Aceh should also get special study in the effort of formalizing qanun based on gender equality.

2. The Views of Islamic Scholars concerning the Formulation of Qanun Based on Gender Equality in Aceh

Although Al-Qur'an and hadiths own legal rules, but the amount is only a few compared to the numerous human social issues that require legal provisions. Therefore, the renewal of interpretation is a necessity (Umar, 1999) . The thing is, the comprehension on both sources mentioned before is not merely based on literal text interpretations but more into non-literal interpretations or the contextual of text by referring to essential purpose of sharia (maqashid al-syari'ah) in order to acquire deep wisdom, namely as the grace for human race (Shidiq, 2009) . This concept leads to the importance of seeing humans as the objective as well as the law subject in sharia. It won't be excessive if Ibnu al-Qayyim al-Jawziyah has formulated the concept as follows: in principle, Sharia was established for the sake of humanity and the universal purposes of humanity such as benefit, justice, grace, and wisdom. These principles have to be the reference in law making and the inspiration for every law maker (Djalil, 2014).

All Muslim believe that Islam has a comprehensive teaching system in guiding human daily activities. Qur'an and Hadith are used as basic sources in translating a variety of basic values on human problem especially about gender equality. The classical Islamic scholars taught that all dimensions of human practices and rituals should be based on an interpretation from the Ulama. This interpretation is often functioned as a guideline for Muslims. Even though there are different interpretations on the basis of this religion among scholars, it should be no matter due to the differences occurred will direct to the similar goal which is being closer to Allah.

In Islamic law, the command to act just is aimed toward every matter without any exception. The right words have to be delivered as they are although the words might put harm the relatives. The obligation to act just has to be enforced in families and the Muslim community themselves, even to the heathens; Muslims have to be fair (Bowen, 2017) . Social justice will have to be enforced without

discrimination because rich or poor, officials or commoners, men or women, they all have to be treated equally and own equal opportunities (Agustina, 2005) . Since almost a century ago, lots of women, including Muslim women who experienced the imparity in gender relation have fought to establish gender equality which embodied through the act of feminism. In general, there is no difference between Islamic Feminism and the feminism that grows in the western world except that the Islamic feminism is stand on sacred religious literatures (Dzuhayatin, 2002).

The particularity of Islamic feminism is that it attempts to unveil the sources of problem in the teaching of Islam and questioning the cause of domination of men in the interpretation of hadith and Quran (Wiyatmi, 2010). Through the perspective of feminism, various gender-biased being normative knowledge but made as the orientation of religious life especially what related to the gender relation is unveiled, reconstructed, and returned to the Islamic spirit which positions more liberation ideology of women in the ideological framework of human dignity (Burhanudin & Fathurahman, 2004). Thus, the feminist scholars have emerged such as: Riffat Hassan (Pakistan), Fatima Mernissi (Mesir), Nawal Sadawi (Mesir), Amina Wadud Muhsin (Amerika), Zakiah Adam, and Zainah Anwar (Malaysia), Asghar Ali Engineer as well as some individuals from Indonesia, such as Siti Chamamah Soeratno, Wardah Hafidz, Lies Marcoes Natsir, Siti Ruhaini Dzuhayatin, Zakiah Daradjat, Ratna Megawangi, Siti Musdah Mulia, Mansoer Fakihi, Masdar F. Mas'udi, Budhy Munawar Rachman, Nasaruddin Umar, K.H Husein Muhammad (Muqoyyidin, 2013)

With the spirit of feminism, thus, various notions and studies on the interpretation of Quran's verses and hadiths performed by Muslim scholars who known as Muslim feminists have emerged (Zakariya, 2011) In the criticism discourse of Islamic law, there are three groups of gender perspective, Islamic law perspective including conservative, liberal, and collaborative schools (Abdul Rahim & Ramli, 2010)

Conservative group perceives Islamic law as providing limited space for women. This view departs from the perception in which women are considered as weak and have less strong muscles, thus, they have to be protected in any aspects of life. Based on this view, men are more superior to women (Baroroh, 2002). The liberal view contains more counter-discourse toward Islamic law or fiqh which demands the absolute equal rights of women and men, perceiving that women in Islam have equal position with men. Their common existence as the worshipper of Allah who have similar human reproduction process, even in Quran of which either men and women have the same duty as the caliph on earth and as the leader or ruler. Due to that matter, men and women have the same superiority. The mere difference is only on the natural aspects owned by men and women, such as giving birth in women. However, the natural aspects do not indicate the difference in all aspects; the difference is only related to physical-biological function but not regarding the existence, position, and dignity (Hulwati, 2015).

Specifically, in Aceh, from the research results, associated with the implementation of Sharia, the public of Aceh including the Islamic scholars and academicians have continuously discussed about:

1. The Sharia applied in Aceh at present is the identity for Aceh's people and the flashback of Aceh's glory in the past.
2. The nonstandard concept of Islamic Sharia. This condition is seen from the trajectory of Islamic histories and the experience in some countries that attempt to implement Sharia but yet to be embodied as a peaceful Islamic order which based on the Sharia sourced from Allah. This is the result of various different interpretations in understanding the Sharia.
3. Weak legal instrument and the weak instrument of Sharia enforcement. This condition is indicated by some cases, including:
 - a. The clash between the position of national positive laws and Aceh's Qanun.
 - b. Limited authority of Sharia police (Wilayat al- Hisbah).

- c. The Specialization of Investigator (Police) and Public Prosecutor which limited only to Islamic Criminal Law (Jinayah) that also merely on certain cases.
 - d. The fraught execution of the verdict of Sharia Court.
4. Unclear priority in the enforcement of Sharia, between worship and moral as individual right (mu'amalah), dealings which regulate collective rights as well as preaching (dakwah), development (tarbiyah), and Islamic eminence (syiar).
 5. Limited equalities/views on Sharia. The understanding of the implementation of Sharia is only limited on the matter of criminal in Islam such as hudud, jinayat, and ta'zir, therefore, Islam seems to be cruel and inhumanity.
 6. Low number of human resources who comprehend Sharia.
 7. The offender of Sharia can be managed at village (*gampong*) level upon the approval of Majelis Adat Aceh (MAA), therefore, the enforcement of Sharia is on the different hand of people between one regions to another.
 8. There is a concern in which the implementation of Sharia will raise new problems such as stagnant democratization, discriminations toward women and minority groups, restricted human rights and liberty, and decreasing amount of revenues for the region and the community.

The observer of national law considered the implementation of Sharia in Aceh as the first event after the independence in which there is an area in the territory of Indonesia which implemented a law system that relatively different with the national law. The occurrence of contradictions and controversies regarding the formalization of Sharia in the domain of positive law is common, responding to this indication, Al Yasa' Abu Bakar (the first head of the Islamic Syariat Service in Aceh) argued that the Sharia which will be implemented in Aceh should remain in legal frameworks that apply in Indonesia. The implementation of Sharia in Aceh is still a trial and error. Thus, inputs from various parties in the implementation

process of Sharia in Aceh are still required. Apart from the debates and controversies related to the implementation of Sharia in Aceh, the Regional Government of Aceh has socialized the implementation into every corner of the region and the community has responded to it in various ways. The community expects that the Sharia implementation will be able of solving every problem rage in Aceh (Azra, 2001).

The comprehensive (kaffah) implementation of Sharia will surely face some barriers, this factor is among others caused by the situation of Aceh which susceptible to conflict, the other factor is the software such as materials and implementation guidelines that yet to be formulated in detail (Ibrahim, 2004).

Therefore, according to Syahrizal Abbas (ulama in Aceh), the formulation of qanun's materials which responsive to gender is the result of independent reasoning (ijtihad) on sharia text that should consider some aspects as follows:

1. Each material of qanun that being formulated should not only has access to the explicit texts of Quran and as Sunnah, but has to be investigated deeply to discover the essence of the existence of the text for the mankind. The comprehension on the essence of the existence of text will discover the soul of Sharia (philosophic values).
2. The discovery of the soul of Sharia will not only require the philosophical study on Islamic law but also requires the sociological study in which the understanding of society condition when the texts were born will be crucial because the cases occurred around the birth of the texts that can be made as the reference in formulating the qanun's materials at present.
3. Thematic approach (maudhui) is not solely relying on verses or hadiths that discuss about the same themes but also need to look at the interpretation of the themes according to the companions. The comprehension of companions become such an important matter by considering that during their times, the revelations have been disconnected upon the death of the

Messenger of Allah (please be upon Him) while the issues of law keep emerging.

4. The sociological passion established by Quran in its regulations need to be contemplated by Aceh's people because there are numerous legal practices and traditions of Aceh which have become the living law and can provide the sense of justice among the society.
5. The frameworks described above will surely be meaningful if the level of education of the community and the socialization of qanun's materials based on the equality of gender equality can be improved toward better direction, therefore, the existence of Sharia qanun in the region given with special autonomy will generate the value of a mercy to all creation (rahmatan lil-'alamin) felt by the entire community either Muslims or non-Muslims, both men and women.

In Islamic concept, each individual should not use their liberty to fulfil their own interest while abandoning the interest of the society. If this matter is not managed, thus, conflict of interest will occur. On the contrary, if the interest of the society is being prioritized and the individual interest is abandoned (Moors, 1995), therefore, the worst result is that the individual potentials will be undeveloped, for this matter, thus, the concept of equality and equity need to be enforced.

CONCLUSION

In order to implement gender equality, legislation should be formulated based on the principles of sameness, protectionism, and corrective measures, as outlined by CEDAW. These principles encompass non-discrimination in terms of ideology, action, intention, and cause, as well as the state's obligation to provide necessary instruments and ensure actual outcomes, respect, fulfilment, and protection. Additionally, affirmative action, due diligence, national harmonization, and the national principle of Pancasila in Indonesia can serve as parameters for promoting gender equality in law-making, alongside existing regulations such as

CEDAW and other relevant provisions applicable in Aceh. It is important to note that within Islam, there is room to extract principles that promote a broader and egalitarian understanding, ensuring justice, liberty, and equality for all individuals, regardless of gender. Further research is necessary to evaluate the gender perspective within qanun content, as this study only addresses a small part of the larger issue concerning the application of a gender perspective in Sharia law in Aceh. Moreover, this integration of a gender perspective into all regulations is also mandated by the 1945 Indonesia Constitution, which encompasses forty constitutional rights.

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