

The Future of *Uqubat Qishash* (Beheading Punishment) Enforcement in Aceh Province

Eka N. A. M. Sihombing and Cynthia Hadita

Faculty of Law, University Muhammadiyah of North Sumatera, Medan, Indonesia.

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Abstract : In early 2018 the Aceh Government through the Office of the Islamic *Sharia* in Aceh proclaimed the application of the beheading (*qishash*) law to the perpetrators of the murderous crime through the addition of the murder *Jarimah* (the prohibited act in *Qanun*) of the beheading law *uqubat* in *Qanun on Jinayat*. This application is claimed to be able to suppress the crime rate, especially the killings crime that occurs in Aceh. This research describes the problem on how constitutionality and future arrangement of *uqubatqishash* (law of beheading) in Aceh's qanun about Jinayat could be applied. The method used in this research is legal juridical, normative research method or doctrinal law research. The result of the research shows that the application of *qisashuqubat* in Aceh Province *qanunjinayat* in the future is a necessity, for: 1. the provision of Article 18B of the 1945 Constitution of Aceh Provincial Government gets the recognition and respect as a special regional government units; 2. The provisions of Law Number 11 Year 2006 also authorizes the Provincial Government of Aceh to establish a *Qanun on Jinayat* that may contain crime penalties as provided in the provisions of Article 241 paragraph (1) and paragraph (2) of Law Number 11 Year 2006; 3. Law Number 11 Year 2006 does not impose limits on crime threat material contained in a *Qanunjinayah* either.

1 INTRODUCTION

Based on the provisions of Article 18B of the 1945 Constitution of the State of the Republic of Indonesia, it is stated that the system of Government of the Unitary State of the Republic of Indonesia recognizes and respects the units of Regional Government special in nature and regulated by law. Furthermore, in the General Explanation of Law Number 11 Year 2006 on the Government of Aceh (*UUPA*), it is stated that the constitutional journey of the Republic of Indonesia places Aceh as a special regional government unit, related to the character of the history of the struggle of the Aceh people with high resilience and fighting power. Resilience and high fighting power is sourced from the view of life based on Islamic *shari'ah* giving birth to a strong Islamic custom. The manifestation of the placement of Aceh as one unit of government that is special raises the principle of autonomy. The granting of autonomy as widely as possible in the political field to the people of Aceh and managing local governance in accordance with the principles of good governance that is transparent, accountable,

professional, efficient and effective is intended for the greatest prosperity of society in Aceh (Elucidation of Aceh Government). However, the implementation of the Aceh government based on the principle of the broadest possible autonomy remains in the frame of the Unitary State of the Republic of Indonesia (Arbas, 2015).

In the implementation of the principle of broad autonomy in Aceh, the Aceh Government (especially the Aceh Provincial Government) is authorized to establish the Aceh *Qanun* as a legislative regulation similar to the provincial regulations governing the governance and life of the people of Aceh, including the enforcement of Islamic *syari'ah* and worship, *ahwal al-syakhshiyah* (family law), *muamalah* (civil law), *jinayah* (criminal law), *qadha* (court), *tarbiyah* (education), *da'wah*, *syiar*, and defense of Islam. In terms of setting *jinayah*, Aceh Province currently has Aceh *Qanun* Number 6 Year 2014 on *Jinayat* Law. *Qanun* organizes various *Jarimah* (Acts prohibited by Islamic *Shari'ah*) with a threaten of *uqubat* (punishment), including: *Khamar* (alcoholic beverages), *Maisir* (gambling), *kahlwat* (deeds of

two different and unbounded marriage, sexual harassment, rape, *qadzaf* (acts of accusing someone committing adultery), *liwath* (deeds of sexual intercourse between fellow men) and *musahaqah* (acts of sexual intercourse between fellow women). The act of eliminating the lives of others (murder) is not included in the scope set forth in the *Qanun*.

In early 2018 the Aceh Government through the Office of the Islamic *Sharia* in Aceh proclaimed the application of the beheading (*qishash*) law to the perpetrators of the murderous crime through the addition of the murdering *Jarimah* (the prohibited act in *qanun*) to the beheading *uqubat* in *Qanun* on *Jinayat*. *Uqubatqisash* is a punishment established by following the form of a criminal act committed “*sepertibunuhdibalasbumuhataupelukaandibalsden ganmelukai*” (Batubara, 2010:210).

This application is claimed to be able to suppress the crime rate, especially the killings happening in Aceh. Based on 2017 Criminal Statistics data by the Central Bureau of Statistics of Indonesia at the end of 2017 there has been an increasing trend of murder cases in Aceh Province from year to year. In 2014 there are 21 (twenty-one) cases, in 2015 40 (forty) cases and in 2016 43 (forty three) cases handled by the Police of Aceh Province (*BadanPusatStatistik RI* 2017: 46,52 , 58). The discourse on the implementation of *Qisash* is certainly reaping controversy from various parties, especially from those questioning the constitutionality of the imposition of a beheading law that should not be regulated through the Aceh *Qanun*. It is because based on the hierarchy of legislation as regulated in Article 7 of Law Number 12 Year 2011 on the Establishment of Laws and Regulations *Qanunis* placed as a regulation legislation on the level of Regional Regulation with limited material. Based on the matters above, this paper describes how the constitutionality and future arrangement of *uqubatqisash* (law of beheading) in Aceh *qanun* on *Jinayat* could be implemented.

2 METHOD

The research method used in this study is the legal juridical normative research method. Normative legal research is an approach based on major legal material by examining theories, concepts of legal principles, norms, rules of legislation, court decisions, agreements and doctrines (Fajar and Achmad, 2010: 34). Based on Dworkin, this kind of research is also called the doctrinal research term, i.e. research that analyzes the law, as it is written in

the book (Hanitijo, 2003: 1). In this research the literature materials and document studies serve as the main material while the field data obtained will be used as supporting or complementary data.

2.1 Specificity of Aceh Province

In the Early days of independence of the Republic of Indonesia, Aceh emerged as the main support, so that by Bung Karno, Aceh was held as Capital Region (Ismail, in Tripa (ed), 2016: 9); it is because Acehnese have proven the real actions in the form of troop dispatch to block the rate of Dutch troops in Medan Area and the most concrete is that the people of Aceh are willingly collecting donations to buy *seulawah* aircraft which is the embryo or initial capital of Garuda Indonesia (Tripa (ed., 2016: 9).

The consistency of the Acehnese struggle can also be seen in the Dutch colonial period as well as in maintaining independence. History notes that Aceh's allegiance is seen when another region proclaims itself as a State within the framework of the United States of Indonesia, Aceh refuses to be part of the United States and chooses to remain a part of the Republic of Indonesia (Tripa (ed. 2016: 9-10), with the belief that the welfare of the people of Aceh will be achieved.

However, in the course of time, Aceh people feels that the promise made by the Government of the Republic of Indonesia does not come into realization, leading to trigger the conflict in Aceh for 3 (three) decades. In order to minimize the conflict in Aceh for more than 3 (three) decades, the Government of the Republic of Indonesia has made various efforts such as by establishing Law Number 44 Year 1999 on the Implementation of Special Feature of Aceh Special Province (Arbas, 2015: 10). Based on the provisions of Article 3 paragraph (2) of Law Number 44 Year 1999 it is stated that the privileges owned by Aceh Province is specifically to organize: a. Implementation of religious life; b. custom; c. education provision; d. the role of religious leader in determining regional policy. Furthermore, Aceh's privileges are also contained in Law No. 18 of Tahun 2001 on Special Autonomy for the Special Province of Aceh as the Province of Naggroe Aceh Darussalam governing the specific and special Regional Government. However, these laws and regulations have not been effective enough to reduce conflict in Aceh Province. In the end as a permanent resolution of the Aceh conflict, on August 15, 2005, the Government of the Republic of Indonesia and the Free Aceh Movement with CMI mediators signed the Helsinki Memorandum of

Understanding (MoU Helsinki) which is part of Aceh's recovery efforts (Arbas, 2015: 14).

The presence of the Helsinki MoU has had a significant impact on the constitutional system in Indonesia, particularly in relation to specific regional government systems. As an implementation of the point of understanding in the Helsinki MoU, on August 1, 2006 Law No. 11 of 2006 on Aceh Government was born. Law Number 11 Year 2006 is closely related to the recognition and respect of special regional units as contained in Article 18 B of the 1945 Constitution of the State of the Republic of Indonesia as a constitutional basis for the specificity of the Aceh Regional Government. The specificity contained in Law Number 11 Year 2006, such as: (see Sesung, 2013: 105-107)

1. Regional divisions in Aceh divided into districts / municipalities, sub-districts, residence, urban village and *Gampong*;

2. The plan of international agreement directly related to the Government of Aceh made by the Government shall be carried out in consultation and consideration of the Aceh Advisory Council (DPRA);

3. The plan for the establishment of Law by the House of Representatives of the Republic of Indonesia which is closely related to the Government of Aceh is to be made by the Government and shall be conducted in consultation and consideration of the DPRA;

4. The administrative policies directly related to the Government of Aceh isto be made by the Government and shall be conducted in consultation and consideration of the Governor;

5. Aceh residents can form local political parties with the right to: elect the elections to elect members of the DPRA and the DPRD, propose candidate pairs of Governors and Vice Governors, candidates for Regents and Vice Regents and candidates for Mayors and Deputies Mayor in Aceh;

6. There is an Islamic *Shari'ah* court conducted by a *Shari'ah* Court, comprising the Aceh *Syar'iyah* Court as the appellate court and the Regency / City Court of *Syar'iyah* as the court of first instance. This *Syar'iyah* court has the authority to examine, adjudicate, decide upon and settle matters which include the field of *ahwal al-shakhsiyah* (family law), *muamalah* (civil law), and *Jinayah* (criminal law) based on the Islamic *Shari'ah* with the law of the event which is determined based on *Qanun*.

7. Similar legal products Local regulations in Aceh are referred to as *Qanun*. There are 2 (two) types of *Qanun*, namely the Aceh *Qanun* which is endorsed by the Governor after the approval of the DPRA, and the Regency / Municipal *Qanun* is determined by the Regent / Mayor after obtaining approval with the DPRK. *Qanun* is formed in the framework of the administration of Aceh, Regency / Municipal Government, and the implementation of assistance tasks. *Qanun* may contain a crime penalty or a fine of 6 (six) months in jail and / or a maximum fine of Rp. 50,000,000.00 (fifty million rupiahs). *Qanun* regarding *Jinayah* also can determine the type and threat of criminal separation;

8. The Government of Aceh and the Government of the Districts / Municipalities may establish institutions, bodies and / or commissions with the approval of DPRA / DPRK. Such as the Supreme Consultative Assembly (MPU), WaliNangroe Institution and Customary Institution, Human Rights Court, Truth and Reconciliation Commission, and *WilayatulHisbah* Police Unit as part of the civil service police force as enforcer of Islamic *Shari'ah*.

2.2 Position of *Qanun* in the Legislation System in Indonesia

The understanding of the *Qanun* is closely related to how to understand the Local Regulations as part of the national legal system as reflected in the type and legal hierarchy of governing regulation (Taib, 2017: 227). Based on the provisions of Article 7 paragraph (1) of Law Number 12 Year 2011 it is stated that the type and hierarchy of legislation are as follows:

- a. 1945 Constitution of the State of the Republic of Indonesia;
- b. Decision of the People's Consultative Assembly;
- c. Law / Government Regulation in Lieu of Law;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regulations; and
- g. Regency / City Regulations.

In the explanation of Article 7 paragraph (1) letter f and letter g, described as follows:

"Letter f

Included in the Provincial Regulation is the Qanun applicable in Aceh Province and the Special Regional Regulations (Perdatus) as well as the Provincial Regulations (Perdasi) prevailing in Papua and West Papua Provinces.

Letter g

Included in the Regency / City Regulation is the Qanun applicable in the Regency / City in Aceh Province."

Thus, the existence of *Qanun* in the hierarchical system of legislation in Indonesia is domiciled as legislation at the level of Regional Regulation whose validity area only covers Aceh Province (for Aceh *Qanun*) and Regency / City in Aceh Province (for Regency / City *Qanun*). There are some differences between the Regional Regulation and *Qanun* such as the differences related to the material content; this is because the arrangement concerning the content of both types of legislation is regulated in different laws.

Based on the provisions of Article 14 of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations, it is mentioned that the content of provincial regulation and regency / municipal regulations contain content in the framework of the implementation of regional autonomy and assistance tasks and to accommodate special regional conditions and / or translation further higher legislation. Furthermore Sihombing & Marwan describes that: (Sihombing, 2017: 227-228) *"The content material in the context of regional autonomy and co-administration means that the formation of regional regulations should be based on the distribution of functions between the government, provincial and district / municipal governments as regulated in Law Number 23 Year 2014 on Regional Government and Legislation Related to the content material in order to accommodate the special conditions of the region, implying that the local regulations as a rule that abstracts the values of the community in the region contains the contents of the values identified as special conditions area. In connection with further elaboration of the higher legislation, this means that juridically the formation of local regulations come from higher legislative regulations. In other words the formation of local regulations should be based on the delegation of the higher legislation. "*

The provisions of Article 236 of Law Number 23 Year 2014 on Regional Government determines that the contents of regional regulatory content are as follows:

(3) The regional regulation as referred to in paragraph (1) shall contain the content of:

a. Implementation of regional autonomy and assistance tasks; and

b. Further elaboration of the provisions of the higher legislation.

(4) In addition to the content as referred to in paragraph (3), local regulations may contain local content in accordance with the provisions of legislation.

While the *Qanun's* content material is not explicitly stated, but the provisions on *Qanun* content material can be seen in the provisions of Article 1 number 21 and number 22 *UUPA*, which reads:

21. Aceh Qanun is a legislative regulation similar to provincial regulations governing the governance and life of the people of Aceh.

22. Regency / municipality Qanun is a

legislative regulation similar to regency / municipal regulations governing the governance and life of district / municipal communities in Aceh.

Thus, the content of *Qanun* is a matter of content within the framework of governance of Aceh and the life of the people of Aceh derived from the division of authority as referred to in the provisions of Chapter IV of *UUPA*. Including in it is material content in the framework of implementation of Islamic *Shari'ah*.

2.3 Constitutionality Formulation of *Uqubat Qisash* in Aceh *Qanun*

Implementation of capital punishment in Indonesia seems to never escape from the pros cons, This is caused by the differences in interpretation of the formulation of the right to live in the 1945 Constitution which is one of the rights that cannot be reduced in any condition (Non derogable Rights), but in the development of the Constitution Court in its decisions, namely Decision Number 15 / PUU / X / 2012, Number 2 / PUU / V / 2007 and Number 3 / PUU / V / 2007 it is stated that capital punishment does not contradict the 1945 Constitution; similarly, the plan for the formulation of *Qisashuqubat* (beheading punishment) in Aceh *Qanun* on *Jinayat*. Since the emergence of Islamic *Shari'ah* arrangements in various *Qanun* especially regarding *Jinayah* such as Aceh *Qanun* Number 12 Year 2003 about the consumption of *Khamar* and the like, Aceh *Qanun* Number 13 Year 2003 about *Maisir*, Aceh

Qanun Number 14 Year 2003 on *Khalwat*, and last *Qanun* Aceh No. 6 of 2014 on *Jinayat* Law reaps controversy. Even in 2015 by the Institute for Criminal Justice Reform (*ICJR*), the *Qanuns* were petitioned for a judicial review of the Supreme Court. The Supreme Court. In Decision Number 60 P / HUM / 2015 it is stated that the petition is unacceptable (*nietonvankelijkeverklaard*) because the petition for the judicial review is premature, with the consideration of Law Number 12 Year 2011 as the basis in the petition for judicial review is in the process of testing in the Constitutional Court by registering case No. 59 / PUU-XIII / 2015 (see Endri, 2018: 126).

The discourse of the *Uqubatqishash* in *QanunJinayah* in Aceh is constitutionally justified. This can be seen in the formulation of Article 18 B of the 1945 Constitution which recognizes and respects specific or special regional government units regulated by law. Furthermore, the implementation of the specificity of Aceh Province is stipulated in the provisions of Law Number 11 Year 2006 which is a special provision (*lex specialist*) overriding the provisions of Regional Government in general which is currently regulated in Law No. 23 of 2014 on Regional Government (*lexgeneralis*). According to JazimHamidi contextually the hierarchical system of legislation is known by the three fundamental principles (2012: 19). The three principles referred to are *lex superior de rogatlex inferior*, *lex specialist derogatlexgeneralis*, *lex posterior de rogatlex priori* (JazimHamidi, 2012: 19). Furthermore JazimHamidi elaborates that based on the study of jurisprudence, the three principles referred to constitute an important pillar in understanding the construction of legislation in Indonesia in detail and can be explained that (2012: 19):

a) *The principle of superior lex superior de rogatlex inferior, higher rules will override the lower rules when setting the same substance and contradictory.*

b) *The principle of lex specialist derogatlexgeneralis, a more specific rule will overrule the general rule when setting the same substance and contradictory.*

c) *The principle of lex posterior de rogatlex priori, the new rules will override the old rules.*

Similarly, the establishment of *Qanun* in Aceh, although the hierarchy of the *Qanun* is a legislation equivalent to the Regional Regulation, but there are differences in terms of material content,

especially in the formulation of *Qanunjinayah*. In general, the formulation of criminal provisions in regional regulations refers to the provisions of Article 15 paragraph (2) of Law Number 12 Year 2011 and the provisions of Article 238 of Law Number 23 Year 2014, states that the Regional Regulation can only contain the threat of imprisonment for a maximum of 6 (six) month or penalty of a maximum of Rp50,000,000.00 (fifty million rupiah).

The formulation of criminal law in *Qanun* other than *Jinayah* shall also apply to the provision that the *Qanun* shall only contain a maximum imprisonment of 6 (six) months or a maximum fine of Rp50,000,000.00 (fifty million rupiahs) as provided in the provisions of Article 241 paragraph 1) and paragraph (2) of Law Number 11 Year 2006. However, specifically for the formulation of criminal provisions in *QanunJinayah* there are exceptions. *QanunJinayah* may contain crime penalties other than those mentioned in the above provisions, and even to this day Aceh has imposed crime penalties against *Jarimah* (Acts prohibited by Islamic *Shari'ah*) including: *Khamar*, *Maisir*, *kahlwat*, *ikhtilathzina*, sexual harassment, rape, *qadzaf*, *liwath* and *musahaqah* with *whipuqubat*. In addition, in Law Number 11 Year 2006 it is also found that there is no limit of material criminal threats that can be contained in a *Qinunjinayah*. So it is only natural that the people of Aceh today and in the days of echoing apply the discourse of *qisashuqubat* enforcement for the perpetrators of killing through the establishment of *QanunJinayah* in Aceh Province, for it gets the basis of constitutional legitimacy.

3 CONCLUSION

The application of *qisashuqubat* in *Qanunjinayah* in the province of Aceh in the future is a necessity, this is due to several things:

- a. The provisions of Article 18B of the 1945 Constitution of the Aceh Provincial Government receive recognition and respect as special regional government units;
- b. The provisions of Law Number 11 Year 2006 also authorizes the Provincial Government of Aceh to establish a *Qanun* on *Jinayat* containing a crime penalty other than a maximum imprisonment of 6 (six) months or a maximum fine of Rp50,000,000.00 (fifty million rupiah) as regulated in the provisions of

Article 241 paragraph (1) and paragraph (2) of Law Number 11 Year 2006;

- c. Law Number 11 Year 2006 also does not impose limits on criminal threat material which can be contained in a *Qinunjinayah*.

In order to safeguard the dynamic spirit of the era and the Government's commitment to ensure harmony with the reform of the criminal law system in Indonesia, it is necessary to consider limiting the application of crime sanctions to non-compliance with Local Legal Products (such as *Qanun*). Such restrictions can be formulated through the formulation in the latest Criminal Code Draft and Amendment of Law Number 11 Year 2006.

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