

ISLAMIC LAW AND NATIONAL LAW (Comparative Study of Islamic Criminal Law and Indonesian Criminal Law)

Moh. Yasir

*University of Bojonegoro, Indonesia
bmyasir646@gmail.com*

Joko Widodo

*Al-Mubamad Cepu Islamic College, Indonesia
joko.widodo021@gmail.com*

Ali Ashar

*Al-Mubamad Cepu Islamic College, Indonesia
aasharimulyoagung@gmail.com*

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Abstract

The Indonesian state, although the country is not an Islamic state, but in terms of Islamic legal values, both partially and completely, which are the substantive norms in various laws and regulations in Indonesia, such as the Marriage Law, Waqf Law, Hajj Law, Banking Law (both Law No. /1998 as well as Law 21/2008). The Islamic criminal law that has been implemented is in the Province of Aceh Darus Salam, which is only a small part. This study aims to determine the description of Islamic law, Islamic criminal law, and to determine the purpose of Islamic law and Indonesian criminal law. This study uses a qualitative method with a normative juridical approach. The results of the study indicate that Islamic law is a set of regulations based on the revelation of Allah and the sunnah of His Messenger regarding the behavior of the mukallaf human which is recognized and believed to be valid and binding for all Muslims who are Muslims with legal sources or arguments originating from the Qur'an, Sunnah Prophet, and Ra'yu/ Ijtihad. While Islamic criminal law is the law that regulates crime and its sanctions, with the aim of preserving human life in their religion, themselves, their minds, their assets, their honor and the relationship between the perpetrators of crimes, victims and society. Islamic law itself aims to realize or realize and maintain the benefit of humans in this life (world) in order to obtain happiness in this world and in the hereafter. Meanwhile, Indonesian criminal law aims to prevent crimes and violations of the law and provide a deterrent effect for perpetrators of criminal acts.

Keywords: Islamic law, Indonesian criminal law.

Abstrak

Negara Indonesia walaupun negaranya bukan bentuk negara Islam, namun secara nilai-nilai hukum Islam baik sebagian maupun seluruhnya yang menjadi norma substantif dalam berbagai peraturan perundang-undangan di Indonesia seperti UU perkawinan, UU Wakaf, UU Haji, UU Perbankan (baik UU No 10/1998 maupun UU 21/2008). Adapun hukum pidana Islam yang sudah menerapkan adalah di Provinsi Aceh Darus Salam yang baru sebagian kecil saja. Penelitian ini bertujuan untuk mengetahui gambaran hukum Islam, hukum pidana Islam, dan untuk mengetahui tujuan hukum Islam serta hukum pidana Indonesia. penelitian ini menggunakan metode kualitatif dengan pendekatan yuridis normatif. Hasil penelitian menunjukkan bahwa hukum Islam adalah seperangkat peraturan berdasarkan wahyu Allah dan sunnah Rasul-Nya mengenai perilaku manusia mukallaf yang diakui dan diyakini sah dan mengikat bagi seluruh umat Islam yang beragama Islam dengan sumber atau dalil hukum yang bersumber dari Al-Qur'an, Sunnah Nabi, dan Ra'yu/ Ijtihad. Sedangkan hukum pidana Islam adalah hukum yang mengatur tentang kejahatan dan sanksinya, dengan tujuan untuk memelihara kehidupan manusia dalam agamanya, dirinya, akalunya, hartanya, kebormatannya dan hubungan antara pelaku kejahatan, korban dan masyarakat. Hukum Islam sendiri bertujuan untuk mewujudkan atau mewujudkan dan memelihara kemaslahatan manusia dalam kehidupan (dunia) ini agar memperoleh kebahagiaan di dunia dan di akhirat.

Sedangkan hukum pidana Indonesia bertujuan untuk mencegah terjadinya kejahatan dan pelanggaran hukum serta memberikan efek jera bagi pelaku tindak pidana.

Kata Kunci: *Hukum Islam, hukum Pidana Indonesia.*

INTRODUCTION

Humans who live on this earth, can walk well and orderly in accordance with the common will because of the rules or laws that govern it. This is because since time immemorial in humans there has been a desire to gather together in one group. And the desire to live in a more peaceful and secure society.

As Ahmad Ali's opinion, quoting Satcipto Raharjo's opinion, that: "How the law exists in society is for the purpose of serving the community. Because by serving the community, the law is also more or less dictated and limited by the possibilities that can be provided by the community. In such circumstances, what the law can do is also determined by the resources available and available in the community."¹

Law is also a social institution in human association, nation and state, in realizing harmony, humanity and order and justice. According to Satcipto Rahardjo, in his book entitled Science of Law, it is stated that the position of law is as a social institution that aims to administer justice in society.²

The law gives various rights to humans, and at the same time the law also imposes various obligations on humans. Indonesia is an archipelagic country with a very diverse population, in terms of ethnicity, culture and religion. The majority of the population is Muslim. Along with the growth and development of religion, the law also comes by itself. In the midst of a life where the majority

are Muslim, the applicable law comes from the majority religion.

Influenced by the number of adherents of that religion, Islamic law is one of the systems that apply in the midst of Indonesian society. However, it should be noted that Islamic law has a dynamic meaning as law that is able to provide answers to social discussions, so it does not always have to refer to classical fiqh books. Therefore, we need a breakthrough or thought related to answers to social phenomena that are increasingly dynamic in their development at this time. Islam also recognizes criminal law known as *jarimah* and *uqubah/punishment*. In *Jarimah*, it means sin, disobedience. As for the prohibition of *syara'* which is threatened with special punishment or the violation of *takzir* against the provisions of the shari'ah which results in the violator being threatened with punishment.³

In addition to Islamic law, there is positive law (*ius constitutum*), the law currently in force in a country. In the State of Indonesia known as Indonesian law, the opposite of this law is law (*ius constituendum*), namely laws that have not been implemented, or laws that are still in process, such as the legal aspirations of Indonesians or those who are still in the legal consciousness of the Indonesian nation.⁴ The positive law referred to in this paper is criminal law in Indonesia.

Based on the description above, the writer wants to analyze the description of how

¹ Ali Achmad, "Menguak Tabir Hukum," *Jakarta: Chandra Pratama*, 1996, 62.

² Satcipto Rahardjo, "Ilmu Hukum, Alumni," *Bandung, Hal 224* (1986): 152.

³ Lysa Angrayni, "Hukum Pidana Dalam Perspektif Islam Dan Perbandingannya Dengan Hukum Pidana Di Indonesia," *Hukum Islam* 15, no. 1 (2015): 46-60.

⁴ Bachsan Mustafa, "Sistem Hukum Indonesia Terpadu," 2003, 52.

the description of Islamic law, and Islamic criminal law, and also how the purpose of Islamic law and criminal law in Indonesia. So that the results of the presentation can provide an understanding to the wider community regarding the differences and objectives of Islamic law and Indonesian criminal law.

The methodology used in this research is a normative juridical research method approach, which includes legal principles. In this case, Islamic law and criminal law in Indonesia, as well as legal regulations relevant to this research. This normative juridical research is sourced from primary, secondary, and tertiary data. The primary data sources in the research are: fiqh books and books on law, secondary (laws and regulations, the Criminal Code,) while tertiary: legal dictionaries and scientific journals about law.

By using the normative juridical research method used in this research, it is carried out by examining library materials. In other words, this research is a library research, namely this research is carried out by reading works that are relevant to the object of study and then contains a study of the research.

Collecting data in this study, the authors conducted a search for data sources both primary, secondary and tertiary data. Which is then described in this study. So it will be more focused in the discussion in this study. That the data analysis technique in this study was carried out qualitatively by using a normative juridical approach, which means research on legal principles, namely researchers analyzing those contained in legal theory, both Islamic law and from a regulation.

DISCUSSION

The Concept of Islamic Law as a National Law Development Paradigm

Indonesia is a country with a majority population of Muslims, even the largest Muslim adherents in the world. In 2017,

Indonesia ranked first as the country with the largest number of adherents of Islam in the world, with a total of about 209,1 million adherents, followed by Pakistan with 176,2 million, and India with 167,4 million. Even though according to predictions in 2050, India will occupy the world's largest Muslim population, beating other countries including Indonesia, but for now Indonesia is still ranked first in the world's largest Muslim population.

In addition to customary law and continental European law, Islamic law with all its complexity has its own philosophical basis, and one of the philosophical foundations of Islamic law is benefit. Therefore, the meaning of Islamic law and national law needs to be explained first. The meaning of Islamic law is the rules made by Allah for His people brought by a Prophet SAW, both related to belief (aqidah) and related to amaliyah (deeds) carried out by all Muslims.⁵

The term Islamic law is explicitly not contained in the Qur'an, but the word/lafadz shari'ah or the same word appears in the Qur'an 5 times, and the word fiqh or the same word appears in 20 separate verses. in the Qur'an. Likewise, the word God's law in the Qur'an, as in Surah Al Mutmainah verse 10, which means sharia law. Islamic law originated or postulated; Al-Qur'an, Sunnah of the Prophet, and Ra'yu or ijtihad.

Law according to language is to assign something to something, or to negate something from it. Meanwhile, according to the terms of the scholars of Usul Fiqh, such as: khitab (command) of Allah (or the words of the Prophet) regarding all the work of mukallaf (people who have reached puberty and are reasonable) whether the stipulation contains demands (orders), prohibitions, or

⁵ Eva Iryani, "Hukum Islam, Demokrasi Dan Hak Asasi Manusia," *Jurnal Ilmiah Universitas Batanghari Jambi* 17, no. 2 (2017): 24–31.

simply explains permissible, or becomes cause, or condition, or obstruction of a law.⁶

If the word law is associated with Islam, then Islamic law has the meaning of a set of rules based on the revelation of Allah and the Sunnah of the Prophet regarding the behavior of the mukallaf human which is recognized and believed to be valid and binding for all Muslims.⁷

In Western literature there is the term Islamic law which literally can really be called Islamic law. Islamic scholars divide Islamic law based on its legal basis, namely the shari'a arguments, into two types, as follows:

1. Shari'ah law is Islamic law that is established by verses of the Qur'an, Allah or the latest Hadith of the Prophet that are qoth'i practiced (Islamic law, according to Western literature), for example: the law of obligatory prayer, fasting and zakat. The law is obliged to carry out the agreement and every contract is mandatory and the consent of all parties concerned. Such shari'ah law is a permanent, external, universal and absolute truth, because it is a clear divine revelation, so it is impossible to interpret/interpret otherwise.
2. The jurisprudence law is the ijtiḥad law of the Islamic scholars based on the verses of the Qur'an and the hadith of the Prophet which he did not practice or based on the syar'i arguments of the dzanni level, for example with the arguments of qiyas, istihsan, maslahah, mursalah, saddudz dzari'ah and so on. Fiqh law is flexible, not external, not universal, the truth is relative, therefore

fiqh law is not binding on all Muslims and is open to be understood/modified because it is the scope of ijtiḥad.⁸

Terminologically, Islamic law is explicitly not contained in the Qur'an, but the word shari'ah appears in the Qur'an 5 times, and the word fiqh appears in the Qur'an 20 separate verses. Likewise, the word God's law in the Qur'an surah al-Mutmainah verse 10 which means syara' law. In Indonesia, Islamic law is defined as a translation of al-fiqh al-islami or in certain contexts as a translation of al-shari'a Islamiyah.⁹

The word shari'ah etymologically means a road to a watery place or a path through which water flows in a river. In short, when the Arabs say shari'ah means the path to be followed. According to the definition given by the shari'ah scholars, are all the books of Allah that regulate human behavior beyond separate morals. Thus, sharia is the same as amaliyah law.¹⁰

In the Sharia, a certain law has been established with a clear and firm text, as for the relation of determining the law according to the "letter" correctly, without any changes and deviations at all.¹¹

The word fiqh according to as-Saiyid al-Jurjani al-Hanafi quoted by T.M. Fiqh Hasbi ash-Shidiqy, in language is understanding someone's speech, while according to the term is the science that explains the laws of syara' amaliyah taken from clear arguments. Fiqh law

⁸ Masjfuk Zuhdi, *Masail Diniyah Ijtima'iyah* (Haji Masagung, 1994), 257–58.

⁹ Nurhayati Nurhayati, "Memahami Konsep Syariah, Fikih, Hukum Dan Ushul Fikih," *Jurnal Hukum Ekonomi Syariah* 2, no. 2 (2018): 124–34.

¹⁰ Ismail Muhammad Syah, "Filsafat Hukum Islam," *Jakarta: Bumi Aksara*, 1992, 12.

¹¹ Fatmawati Widyansari, "KONSEPSI MAQASHID AL-SYAR'AH DALAM PEMIKIRAN AL-SYATHIBI," *Modal Sosial Dalam Pendidikan Berkualitas Di Sekolah Dasar Muhammadiyah Muutiban 1*, no. September (2014): 147–56.

⁶ Hasbi Ashshidieqy, *Pengantar Hukum Islam 1* (Jakarta: Bulan Bintang, 1975), 51.

⁷ Ainun Najib, "Legislasi Hukum Islam Dalam Sistem Hukum Nasional," *Istidial: Jurnal Ekonomi Dan Hukum Islam* 4, no. 2 (2020): 116.

is also known as *ijtihad* law (Islamic law according to western literature). Masfuk Zuhdi argues, the term used by some modern scholars divides Islamic law into two types, namely: Sharia Law (revelation) and Islamic Law (the result of *ijtihad*). So the most appropriate terms for the two types of Islamic law are Sharia Law/Qath'i Law and Fiqh Law/Ijtihad Law.¹²

Meanwhile, the definition of national law itself is a legal regulation that applies in a country which consists of principles and regulations that must be obeyed by the people of a country. National Law is a legal system formed from the process of discovery, development, adjustment of several existing legal systems. National law in Indonesia is a law consisting of a mixture of religious law systems, European law, and customary law. Religious Law, because the majority of Indonesian people embrace Islam, Islamic law dominates, especially in the fields of kinship, marriage, and inheritance. The national legal system adopted is largely based on continental European law, both civil law and criminal law. European law adopted mainly refers to laws originating from the Netherlands, because in the past Indonesia was a colony of the Netherlands. The customary law system is also part of national law, because in Indonesia it is still thick with local customary rules from the people and culture that exist in Indonesian territory.

The National law is all applicable laws in the territory of the Unitary State of the Republic of Indonesia, both written and unwritten laws. Legislation is one form of written law that exists. Legislation and the process of its formation have a significant function in the development of national law.

¹² Suparman H Usman and H Busthanul Arifin, *Hukum Islam: Asas-Asas Dan Pengantar Studi Hukum Islam Dalam Tata Hukum Indonesia* (Gaya Media Pertama, 2001), 28.

This is because in Indonesia, legislation is the main way to create law, and is the main joint of the national legal system. In addition, legislation is a very effective instrument in legal reform because it has binding and coercive legal force. The legislation also provides higher legal certainty than customary law, customary law, or jurisprudential law.

To build a national legal system, the Indonesian government set a policy to utilize the three existing legal systems in Indonesia, such as, the Adat, Islamic and Western (Dutch) legal systems as raw materials. The national law was formed to fulfill the principles of legal certainty, benefit and justice, so that welfare will be achieved.

So Islamic law when associated with national law has the same goal, namely Islamic law, for the benefit, happiness, welfare and safety of mankind in the world and in the hereafter. Indonesian nation. The positivization that occurs is a transformation of the values of Islamic law either partially or wholly which has become a substantive norm in various laws and regulations. For example, the Marriage Law, the Waqf Law, the Hajj Law, the Banking Law (both Law No. 10/1998 and Law 21/2008), and no less important is the Compilation of Islamic Law based on Presidential Instruction No. 1/1991 dated June 10, 1991 and the Compilation of Islamic Law. Sharia Economic Law based on Perma No. 2 of 2008. Thus, what is included in Islamic civil law can include family law, economic law, political law, procedural law etc.

Meanwhile, among the positive legal products in this temporary reform era, which are very clearly charged with Islamic law (Islamic Civil Law), these include:

1. Law Number 38 of 1999 concerning Zakat Management;
2. Law Number 41 of 2004 concerning Waqf;

3. Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1999 concerning Religious Courts.

Differences of Sharia And Fiqh

There is a difference between two terms of Islamic law which is called Sharia Law and Islamic law which is called Fiqh Law. The differences between the two are: 1-Shari'ah, which means shari'ah is the revelation of Allah and the sunnah of the Prophet Muhammad as His Messenger. Fiqh in question is human understanding that meets the Shari'a about the Shari'a and the results of that understanding. 2-Sharia is fundamental and has a wider scope because it includes aqidah and morals by many experts. Fiqh is instrumental, its scope is limited to the laws governing human actions, which are usually referred to as legal acts. 3-Sharia is the decree of Allah and His Messenger. Because of its eternal nature, fiqh is a human work that is not eternal, it can change from time to time. 4 Shari'ah is only one, while fiqh can be more than one as (for example) seen in the schools of law called madzab or madzab. 5-Sharia shows unity in Islam while fiqh shows uniformity.¹³

So based on this it can be concluded that shari'ah which includes the notion of fiqh is the notion of shari'ah in a broad sense. Shari'ah in the narrow sense is the laws that postulate definite and firm as contained in the Qur'an and authentic hadith or determined by ijma.

Meanwhile, Islamic law itself is a set of rules based on the revelation of Allah and the sunnah of His Messenger regarding the behavior of the mukallaf human which is recognized and believed to be valid and binding for all Muslims. The source or legal argument comes from the Qur'an, the Sunnah

of the Prophet SAW, and Ra'yu/Ijtihad. So that a new fiqh emerged that was adapted to conditions in Indonesia, such as the emergence of a compilation of Islamic law (KHI) as an answer or guideline by religious court judges in handling Islamic civil cases. then social fiqh emerged as an answer to the problems of life written by KH MA Sahal Mahfudh.

Islamic Criminal Law Concept

According to the fiqh experts, they have created a special terminology to categorize these crimes into two types:

1. 1. Jaraaimu 'l Huduud, which means a crime punishable by the law of hadd.
2. 2. Jaraaimu'l Qishaash, which means a criminal act which is punishable by the law of qishaash.¹⁴

In Indonesian, the word jarimah means crime. Another term that is often used as the equivalent of the term jarimah is the word jinayah. However, among the fuqaha, the term jarimah is generally used for all violations of acts prohibited by syara, both those involving the soul and others. While jinayah is generally used to refer to violations involving the soul or limbs, such as killing and injuring certain limbs.¹⁵

The term Islamic Criminal Law (HPI) in the Islamic literature is commonly called al-ahkam al-jinaiyyah, which regulates the violations committed by the mukallaf and the punishments for them. 7 Scholars use the term jinayah in two senses, namely the broad meaning and the narrow meaning. In a broad sense, jinayah are acts that are prohibited by the Shari'ah and can result in hadd punishment (punishments that have textual provisions such as punishment for thieves, murderers,

¹⁴ Sayyid Sabiq, "Fikih Sunnah 10 Alih Bahasa HA Ali," *Al Ma'arif, Bandung*, 1987, 7.

¹⁵ H A Djazuli, "Fiqh Jinayah; Upaya Menanggulangi Kejahatan Dalam Islam, Cet. III," *Raja Garfindo Persada, Jakarta*, 2000, 12.

¹³ Daud All Muhammad, "Hukum Islam: Pengantar Ilmu Hukum Dan Tata Hukum Islam Di Indonesia" (Rajagrafindo, 2007), 45.

etc.), or ta'zir (punishments for which there are no textual provisions). such as traffic violations, attempted criminal acts, etc.). In a narrow sense, jinayah are acts that are prohibited by Syara' and can result in hadd punishment, not ta'zir. Another term that is identical with jinayah is jarimah:

While hudud jarimah is a finger that is determined by the type and number and becomes the right of Allah, then the punishment has no lower or highest limit. The definition of Allah's Right is that punishment cannot be abolished, neither by the individual nor by the society represented by the state.¹⁶

As for the types of hudud crimes, there are 6 types according to fiqh experts, such as: apostasy, crime of adultery, crime of false accusation of adultery (qadzaf); crime of theft; crime of robbery and crime of drinking liquor (syrb al-khamr); The punishments mentioned above are the punishments that have been determined by Allah SWT.¹⁷ Giving this punishment has benefits, namely preventing immoral acts, antidote to disobedience and a brake for someone from committing prohibited acts, this punishment is also a guarantor of security, like the guarantor of the safety of life, wealth, good name, independence and honor. While Jarimah Qishaas, diat is an act that is threatened with qishaas or punishment, both qishaas and diat whose punishment has been determined with limits and there is no lower or highest limit. The definition of Diat is property that must be fulfilled because of a crime, then given to the victim of a crime or to his guardian, Diat includes fines as a substitute for qishaas and fines other than qishaas.

Broadly speaking, there are two kinds of qishas or diat crimes, namely murder and persecution. However, if the discussion is

expanded, the scope is of five types, such as: intentional murder, murder by mistake, intentional ill-treatment and unintentional torture.¹⁸ Allah SWT, has established qishas, because by enforcing the law of qishas, life is protected and humans can live their lives safely.¹⁹

That Islamic criminal law is the law that regulates crime and its sanctions, the purpose of which is to maintain human life in their religion, themselves, their minds, their assets, their honor, and the relationship between the perpetrators of crimes, victims and people. In addition, according to the term that Islamic law comes from three basic words, namely 'law', 'criminal', and 'Islam'. In the Indonesian Dictionary the word 'law' is defined as a regulation or custom which is officially considered binding, which is confirmed by the ruler, government, or authority; laws, regulations, etc. To regulate the social life of the community; standards (rules, provisions) regarding certain events (natural, etc.); and decisions (considerations) determined by the judge (in court); verdict.

In addition there are jarimah had and qishash there is also jarimah ta'zir, according to the terminology of Islamic jurisprudence Ta'zir is an educational act against the perpetrators of sin for which there are no sanctions and kifarats, in other words ta'zir is an educational punishment set by the judge for the perpetrator or perpetrator immoral acts whose punishment has not been determined by the Shari'a or there is no legal certainty.²⁰

The existence of ta'zir in Islamic law guarantees a sense of community justice to realize the benefit. The nature and form of punishment for ta'zir is left to the wisdom of

¹⁶ Ahmad Wardi Muslich, *Hukum Pidana Islam* (Sinar Grafika, 2005).

¹⁷ Syah, "Filsafat Hukum Islam," 227.

¹⁸ Angrayni, "Hukum Pidana Dalam Perspektif Islam Dan Perbandingannya Dengan Hukum Pidana Di Indonesia."

¹⁹ Sabiq, "Fikih Sunnah 10 Alih Bahasa HA Ali," 25.

²⁰ Sabiq, 159.

common sense, belief and a sense of justice for judges based on a sense of community justice.²¹

The provisions of Islamic criminal law are prescribed in two main sources of Islamic doctrine: the Qur'an and Hadith. There are about thirty verses of the Qur'an related to the issue of criminal law, these verses discuss the types of crimes, the specific punishments against them, and some rules of evidence for the punishment to be carried out. These verses are the goal of the basic principles for the first category of Islamic criminal law, namely hudud. In addition to these specific verses, the Qur'an is also equipped with a number of verses that generally require Muslims to enforce Islamic law. Surah an-Nisa: 59 obliges Muslims to obey Allah, Muhammad and their leaders. Included in this provision does not violate His law in the criminal field, because when someone embraces Islam it is already regulated by sharia law and is responsible for making it happen. Turning away from the provisions of Allah and His Messenger is considered a crime and a real error.²²

There are several principles in Islamic criminal law, first, punishment is only imposed on people who commit crimes or crimes, it is not permissible for people who have not committed crimes, second, there is intentional, someone is punished for committing a crime if there is an element of intent to commit a crime, no intention. means negligence, error or mistake or forgetfulness, even though wrong, wrong or forgetting there is a penalty but it is not a punishment for a crime, but for the sake of education and interests, third, punishment is only imposed if the crime has been committed convincingly, fourth, carefully

punish, let not punish and leave it to Allah if there is no evidence.²³

The application of Islamic criminal law that is enforced in the Province of Aceh has only been issued or issued only a small part, such as; 1). Regarding the Implementation of Islamic Shari'ah in the Fields of Aqidah, Worship, and Islamic Syi'ar as regulated by Qanun Number 11 of 2002, 2). Regarding Alcoholic Drinks and the like, which are regulated by Qanun Number 12 of 2003., 3). Regarding Maisir (Gambling) which is regulated by Qanun Number 13 of 2003., 4). Regarding Seclusion (Mesum) which is regulated by Qunun Number 14 of 2003., 5). Regarding Zakat Management as regulated by Qanun Number 7 of 2004.²⁴ Based on this reality, it can be seen from the respondents' answers as follows;

Enforcement of Islamic Law Only for Muslims Who Commit Criminal Actions in Nanggroe Aceh Darussalam (NAD) Only

Question	Strongly agree	Agree	Just normal	Do not agree	Strongly Disagree	Amount
What do you think if Islamic law only applies to Muslims who commit crimes in Aceh only.	11	25	20	80	24	160
Percentage	6,9	15,6	12,5	50	15	100

It turns out that in general the people of Aceh do not agree that the application of Islamic law is limited to the Muslim

²¹ Syah, "Filsafat Hukum Islam," 228.

²² Lex Crimen Vol, "PENGUATAN SANKSI PIDANA ISLAM DALAM SISTEM PELAKSANAAN PEMIDANAAN MENURUT KUHP" VI, no. 1 (2017): 150-57.

²³ Syah, "Filsafat Hukum Islam," 229.

²⁴ Jamhir Jamhir, "Hukum Pidana Di Provinsi Aceh Analisis Terhadap Dampak Penerapan Qanun Syari'at," *Jurnal Justisia: Jurnal Ilmu Hukum, Perundang-Undangan Dan Pranata Sosial* 4, no. 2 (2019): 108-26.

community of Aceh, and Muslim communities other than Aceh who commit crimes in Aceh only. It is evident from the rejection of the community by 65% who do not agree with it, with details of a strong rejection of 15%, and an ordinary rejection of 50%. On the other hand, only a small part of the community agreed, namely 22.5%, consisting of 6.9% strongly agree, and 15.6% normally agree. The rest, which is 12.5% are apathetic.²⁵

So based on the analysis above, according to the author, the chances of applying Islamic law can be accepted in the Indonesian legal political system which is supported by two factors, namely external factors and internal factors. The external factor in question is the state constitution which provides opportunities for the implementation of Islamic law for Indonesian Muslims, as reflected in Pancasila and the 1945 Constitution of the Republic of Indonesia. While the internal factor is Islamic law itself which has legal principles that can be applied and accepted by the community and can be give satisfaction to justice seekers.²⁶

Indonesian Criminal Law

The term criminal law is one of the sub-systems in the legal system in a country, what is criminal law? There are two terms, namely law and criminal. Law according to Prof., Dr. Van Kan, is a coercive rule of life to protect human interests in society. According to Professor Van Hamel, criminal or straf is: "A special suffering, which has been forced by an authorized official to impose a crime on behalf of the state as the person in charge of public order for violator, namely solely because that

person has violated a regulation. The law that must be enforced by the state.²⁷

According to Leon Duguit, the law is the rule of action of members of society, the rule to use coercion at certain times is followed by members of the community to ensure the common interest, and violations lead to mutual harm. Responding to people who commit violations.²⁸ Meanwhile, according to Hans Kelsen are; Law is a coercive order of human behavior, law is the main norm that determines sanctions (law is a command that is imposed on human behavior, law is the basic rule that determines sanctions.²⁹ So based on the explanation above, it can be concluded that the law are regulations that contain orders to force human behavior. If it is not heeded, it will cause a reaction from the apparatus/law enforcement. Law is a reflection of the state of society, so that law cannot be separated from the nature of the nation. Law grows and arises from the legal awareness of the community. In addition, the law is also useful for channeling the will of the community towards the realization of a common goal. Law affects society and society also affects law.

Among the laws that exist in Indonesian society is criminal law. Criminal law, part of the law that applies in a country, which provides the basics and rules for: 1-Determining and determining the types of actions that should not be carried out or prohibited, accompanied by threats of punishment or certain criminal sanctions for anyone who violates them. 2-Determine when and by what means those who violate the prohibition can be prosecuted or punished as has been threatened. 3-Determine how the

²⁵ Jamhir.

²⁶ Rahmatunnair Rahmatunnair, "Paradigma Formalisasi Hukum Islam Di Indonesia," *AHKAM: Jurnal Ilmu Syariah* 12, no. 1 (2012).

²⁷ R Mukhlis, "Tindak Pidana Di Bidang Pertanahan Di Kota Pekanbaru," *Jurnal Ilmu Hukum* 4, no. 1 (2012): 203-4.

²⁸ Achmad, "Menguak Tabir Hukum," 34.

²⁹ Christine S T Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia* (Balai Pustaka, 1992), 36.

punishment can be carried out if the person is suspected of violating the provisions.³⁰

According to Professor Simons, a crime or straf is: "An affliction which the criminal law has associated with a violation of a norm, which by a judge's decision has been handed down to a guilty person.. While criminal law according to Pompe: that criminal law is the entire rule of legal provisions regarding criminal acts and their criminal rules.³¹ According to the Indonesian Dictionary, criminal law is a law that determines events (criminal acts) that are punishable by punishment. Meanwhile, Indonesian criminal law currently in force is a codified criminal law, the rules of which have mostly been compiled according to a certain system, in a single book of law called the Criminal Code (KUHP). Besides being standardized, this Criminal Code also applies to all groups of people, so that there is no longer legal dualism, as in civil law.³²

Indonesian criminal law also applies to Indonesian citizens outside Indonesia who commit a criminal act which according to Indonesian criminal law and abroad who commits a criminal act will be punished with a criminal offense.

Since the ninth century, there has been a *lex loci delicti* or law in force under which the crime was committed against the perpetrator. The law has imposed the criminal law of a country both against its own citizens and against foreign nationals who are known to have committed crimes in their territory.

Penalty system of Indonesian criminal law:

The main punishment, consisting of;

1. Death penalty
2. Imprisonment

3. Confinement, and

4. Criminal fines

Additional penalties, consisting of;

1. Revocation of certain rights
2. The confiscation of certain goods, and the announcement of the judge's decision.³³

So based on the explanation above, it can be concluded that Indonesian criminal law is a whole series of regulations that contain conditions or prohibitions if violated there will be punishment in the form of torture, which is a criminal law codified in the form of torture. KUHP in force in Indonesia and criminal law regulations outside the KUHP.

Purpose of Islamic Law

Islamic law means a set of rules based on the revelations of Allah and the Sunnah of His Messenger regarding behavior and is binding on all Muslims. The word set of regulations explains that what is meant by Islamic law are regulations that are formulated in detail that have binding power. The word based on the revelation of Allah and the Sunnah of the Prophet describes a set of rules that are extracted from and based on the revelation of Allah and the Sunnah or are popular with the Shari'a.³⁴

Islamic law also has principles such as law and other principles that show its strength and ability to adapt to social developments, namely *nafy al haraj* (not making it difficult) is one of these principles. The second principle is that Islamic law does not carry a legal burden that is too heavy so as not to embarrass humans as its implementation.. Surah al-Maidah (5) verse 101 which is the basis for this principle Friends and fiqh experts of Medina always pay attention not to

³⁰ Martiman Prodjohamidjojo, "Memahami Dasar-Dasar Hukum Pidana Indonesia," 1998, 1.

³¹ Prodjohamidjojo, 5.

³² Prodjohamidjojo, 4.

³³ Mustafa, "Sistem Hukum Indonesia Terpadu," 165.

³⁴ Syah, "Filsafat Hukum Islam," 18.

ask questions about cases that hasn't happened yet.

Another principle is the determination of letters that develop in society. While itself is the rules that have developed and are well known in society and are not seen as bad.³⁵

Allah does not make laws or Shari'ah jokingly or jokingly, nor does He create them haphazardly, but Allah establishes Islamic law for a great purpose with the benefit of the world and the hereafter returning to His servants. The benefits of the world are categorized as those whose achievements are achieved by attracting benefits and rejecting harm, namely dharuriyyah (core) benefits; the benefits of the maqashid syar'iyah above.³⁶

Therefore, Allah SWT revealed Islamic law (law) to regulate human life, both as individuals and as members of society.

Among the famous scholars agree that Allah SWT prescribes Islamic law for nothing but the safety of His servants. Salvation sometimes brings benefits and sometimes brings evil that arouses tasyri 'that is, brings benefits to people living in society and throws away their evils.

In addition, the purpose of Islamic law which is often formulated in general is the happiness of human life in this world and in the hereafter by taking (everything) that is beneficial and preventing or rejecting evil that is not beneficial to life and life. The purpose of Islamic law can be seen from two aspects, namely (1) the aspect of the maker of Islamic law, namely Allah and His Messenger and (2) the human side who is the perpetrator and implementer of Islamic law. And the purpose

of the Shari'ah globally in establishing the law is for the benefit of mankind, entirely, both in this impermanent world, and the benefit of the last day.

Based on these global goals, it can be understood in detail as follows

1. Maintaining the benefit of religion

Religion is belief or belief in God, an event to worship God. Religion is something that must be owned by humans so that their dignity can be raised higher than the dignity of other creatures and also to fulfill the desires of their souls. Islam is the highest and perfect favor of Allah which has been stated in the Qur'an Surah al-Maidah verse 3 which means: "On that day I have perfected your religion and have also perfected My favor on you, and I have accepted Islam. be a religion for you"

2. Nurturing the soul

For this reason, Islam prohibits killing that is not justified in Islam, so the perpetrators of this murder are threatened with qishos (as a balanced retaliation). Islamic law prohibits killing as an attempt to eliminate the human soul and protects the various methods used by humans to maintain the benefit of their lives.³⁷

3. Maintain sense.

Intellect is thought, intelligence, trickery, way or means to achieve a goal. Humans are creatures who are given reason by Allah SWT, which has made them different from other creatures of Allah SWT. By maintaining or using their minds, humans can develop science and technology. Without human reason,

³⁵ Abdul Aziz Dahlan and Ensiklopedi Hukum Islam, "Cet. 2, Jilid 3," Jakarta: Ictiar Baru van Hoeve, 2001, 576.

³⁶ Laila Hasanah, "Perspektif Hukum Pidana Islam Terhadap Tindak Pidana Pembakaran Lahan," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 12, no. 1 (2018): 85-106.

³⁷ Usman and Arifin, *Hukum Islam: Asas-Asas Dan Pengantar Studi Hukum Islam Dalam Tata Hukum Indonesia*, 66.

it is also impossible to become actors and implementers of Islamic law. Therefore, the preservation of reason is the goal of Islamic law.

4. Caring for offspring

Islam regulates marriage and prohibits adultery, stipulates who should not be married and so that offspring are maintained. This is stated in the blood relationship which is a condition for inheriting each other, see the Qur'an (4):11. The prohibition of marriage is mentioned in detail in the Qur'an (4): 23. And the prohibition of adultery is contained in the QS. (17): 23. All of that was ordained by Allah to maintain the purity of blood and the benefit of the offspring.

5. Protect property and honor.

In essence, all property belongs to Allah, but Islam also recognizes a person's personal rights. Therefore, Islamic law protects human rights to obtain property in lawful and legal ways and protects the interests of one's property, society and the state.

Property maintenance applications include recognition of personal rights, muamalat arrangements such as buying and selling, leasing, pawning, etc. The prohibition of usury, the prohibition of fraud, theft, the threat of punishment for theft, etc. then, the maintenance of honor is seen in the prohibition of insulting others, the threat of punishment for accusers of adultery / qadzaf.³⁸

So based on the description above, it can be concluded that Islamic law aims to realize and maintain the benefits of human beings in this life (world) so that they gain happiness in this world and in the hereafter.

Purpose of Indonesian Criminal Law

Actually the purpose of crime is to prevent crime and offences. Serious crimes and the death penalty in the history of criminal law are two components of a closely related problem. This can be seen in the Indonesian Criminal Code which threatens serious crimes with the death penalty.

Criminal is a juridical term as a translation of the Dutch straf. In English it is called a sentence. Alf Rose said that the concept of punishment began with two purposes, namely the first to impose suffering and the second as a statement of reproach. Based on several descriptions of the definition of punishment, it can be seen that there are three dominant essences of punishment, namely (1) the existence of suffering or other unpleasant consequences, (2) imposed by the competent body, (3) imposed on criminal law violators.³⁹

According to Tirtaamidjaja, that the purpose of criminal law is to protect the interests of the community. This goal is general purpose, which if further exploits a different stream.

The classical school argues that the purpose of criminal law is to protect individuals from the power of state authorities. This school first emerged when modern criminal law was known and influenced by the history of the French revolution. The case of Jean Calés te Toulus who was sentenced to death for not guilty of murdering his own son, Mauriac Antoine Calés, became the basis for Beccaria, JJ Rousseau, and Montesqueu to argue that the king's power was limited by the written (criminal) law. Modern schools teach the purpose of criminal law to protect society from crime. This modern flow comes from criminology.

³⁸ Usman and Arifin, 66.

³⁹ A Santoso Muhari, "Paradigma Baru Hukum Pidana" (Averroes Press, 2002), 23.

In criminal law, there are several theories regarding the purpose of punishment, including absolute theory (revenge theory), relative theory (prevention theory), and combined theory. The absolute theory (retaliation) states that the crime itself is the elements that demand punishment and justify the sentence imposed. Revenge theory. Basically it is distinguished from the subjective pattern in which revenge is shown by the fault of the despicable maker and the objective style in which revenge is shown only in what actions the person concerned has done.

The theory of relative (prevention) provides a basis for punishment in maintaining social order. Therefore, the purpose of punishment is to prevent (prevention) from violating the law. The main purpose of punishment to be achieved is prevention shown to the general public, to everyone so as not to violate public order.

The purpose of criminal law, Muladi mentions the purpose of integrative criminal law, namely: 1. The purpose of the criminal is to prevent (general and specific) 2. The purpose of the criminal is to protect the community, 3. The purpose of the crime is to maintain community solidarity, 4. The purpose of the crime is compensation/ balance.⁴⁰

In addition to having a purpose, criminal law also has a function, namely, according to Sudarto, the general function of criminal law is to regulate social life or organize government in society. The special function of criminal law is to protect legal interests from acts that want to damage them. Thus criminal law overcomes evil acts that want to harm the legal interests of a person, society, or state.

The positive criminal law only tends to side with the perpetrator, although basically positive criminal law aims to maintain human life in society so that it is orderly and peaceful.

While the criminal law system is a unified system with a goal and punishment only as a means to achieve the goal, the concept of formulating the purpose of sentencing is based on a balance of two main objectives, namely community protection and individual protection/development. In another sense, the way criminal law works must face social realities.⁴¹

So far, the purpose of criminal and sentencing has never been formulated in the Act. The formulation of the new sentencing objectives can be seen in the Draft Criminal Code, namely:

- a. prevent the commission of criminal acts by enforcing legal norms for the protection of society;
- b. socialize the convicts by conducting coaching so that they become good and useful people;
- c. resolve conflicts caused by criminal acts, restore balance, and bring a sense of peace in society; and
- d. release the guilt of the convict.⁴²

So from what is stated above, it can be concluded that the purpose of sentencing is formulated as follows:

1. The imposition of punishment or torture is an attempt to neutralize the individual imbalance.
2. Punishment as a type of sanction is a stimulus that can be positive or negative.

So that the opportunity for Islamic law and Islamic criminal law in supporting the

⁴¹ Randy Pradityo, "Menuju Pembaharuan Hukum Pidana Indonesia: Suatu Tinjauan Singkat," *Jurnal Legislasi Indonesia* Volume 14, no. Nomor 02 Juni (2017): 137–44.

⁴² Puteri Hikmawati, "Pidana Pengawasan Sebagai Pengganti Pidana Bersyarat Menuju Keadilan Restoratif (Criminal Conditional Supervision As a Substitute of Probation Sentence Towards Restorative Justice)," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 7, no. 1 (2017): 71–88.

⁴⁰ Muhari, "Paradigma Baru Hukum Pidana."

development of national law in Indonesia according to Juhaya S. Praja argues in responding to the discourse of making Islamic law a supporter of development within the framework of the national legal system saying that although in practice it no longer plays a comprehensive role, Islamic law still has a great meaning for the lives of its adherents. At least, there are three factors which according to Juhaya Praja cause Islamic law to still have a big role in the life of the nation. First, Islamic law has participated in creating values that regulate the lives of Muslims, at least by stipulating what should be considered good and bad, what are religious orders, recommendations, impositions, and prohibitions. Second, many legal and jurisprudential decisions from Islamic law have been absorbed into the applicable positive law. Third, there are groups that still have theocratic aspirations among Muslims so that the full role of Islamic law is still a slogan of struggle that still has a considerable influence.

CONCLUSION

That Islamic law can be explained, namely: a collection of regulations based on the revelation of Allah and the sunnah of His

Messenger regarding the behavior of the mukallaf human which is recognized and believed to be valid and binding for all Muslims. And the new Islamic law in Indonesia applies in the field of Islamic civil law such as marriage, waqf inheritance, etc. According to Islamic jurisprudence experts, Islamic jurisprudence has made special terminology to categorize there are two types of crimes, namely: *First*: Jaraaimu 'l-Huduud, namely criminal acts that are sanctioned by the law of had. *Second*: Jaraaimu'l - Qishaash, which is a criminal act sanctioned by the law of qishaash, the Islamic Criminal Law which is new in the State of Indonesia, only in the Province of Aceh Darus Salam. But not everyone agrees to apply. Islamic law has a goal which in essence is to maintain the benefits of human beings in this life (world) so that they can obtain happiness in this world and in the hereafter. while the purpose of Indonesian criminal law itself is for prevention (general and specific), protection of society, maintaining community solidarity and compensation. So that the crime is not repeated and the perpetrator has a sense of deterrence because he is threatened with sanctions or punishment for the perpetrators.

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