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Punishment for *Zina Muḥṣān* Offenders in Aceh Qanun No. 6 of 2014 in the Perspective of *Fiqh al-Siyāsah*

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Abstract: This paper attempts to answer the issue of punishment for *zina muḥṣān* offenders in Aceh Qanun No. 6 of 2014 from the perspective of *fiqh al-siyāsah* and the ways the law is implemented in closed spaces such as prisons per the Governor Regulation No. 5 of the 2018. This study is a legal study with a Islamic politic approach (*fiqh al-siyāsah*) with a literature study data collection method. The polemic of the implementation of the Qanun Jinayah (criminal regional bylaws) in Aceh not only receives attention from outside such as human rights and non-governmental organization activists, but also from among Islamic academics or Acehese *ulemas*. One of the most discussed topics is related to ‘*uqūbah* (punishment) for fornicators that does not distinguish between *muḥṣān* (married) and *ghayr muḥṣān* (unmarried) fornicators as is the case in classical *fiqh* (Islamic jurisprudence) literature. Qanun Jinayah does not at all separate between *muḥṣān* and *ghayr muḥṣān* fornicators, unlike the provisions of Islamic law which prescribe a hundred lashes for *ghayr muḥṣān* fornicators and stoning to death for *muḥṣān* fornicators. This indicates that those who commit *zina* in Aceh, whether married or unmarried, are punished with the same severity, which is 100 (one hundred) lashes. Further, the issue of changing the place of the flogging execution from public to prison in accordance with Aceh Governor Regulation No. 5 of 2018 concerning the implementation of the *jināyah* (criminal) procedural law is also worth to study from the point of view of *fiqh al-siyāsah* (Islamic politics) and legislation.

Keywords: Punishment, *zina muḥṣān*, qanun jinayah, *siyāsah*

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Abstrak: Tulisan ini berusaha menjawab persoalan hukuman bagi pelanggar zina muḥṣān dalam Qanun Aceh No. 6 Tahun 2014 dari perspektif Fiqh al-Siyāsah dan cara penerapan hukum di ruang tertutup seperti penjara sesuai dengan Peraturan Gubernur No. 5 Tahun 2018. Kajian merupakan studi hukum dengan pendekatan politik Islam (fiqh al-siyāsah) dengan metode pengumpulan data studi literatur. Polemik penerapan Qanun Jinayah di Aceh tidak hanya mendapat perhatian dari luar seperti aktivis hak asasi manusia dan lembaga swadaya masyarakat, tetapi juga dari kalangan akademisi Islam atau ulama Aceh. Salah satu topik yang paling banyak dibicarakan adalah terkait dengan uqūbah (hukuman) bagi pezina yang tidak membedakan antara muān (menikah) dan ghayr muḥṣān (belum menikah) pezina seperti halnya dalam literatur fiqh klasik. Qanun Jinayah sama sekali tidak memisahkan antara pezina muān dan ghayr muḥṣān, berbeda dengan ketentuan hukum Islam yang menetapkan hukuman cambuk seratus kali bagi pezina ghayr muḥṣān dan rajam sampai mati bagi pezina muḥṣān. Hal ini menunjukkan bahwa orang yang melakukan zina di Aceh, baik yang sudah menikah maupun yang belum menikah, diancam dengan hukuman yang sama yaitu cambuk 100 (seratus) kali. Lebih lanjut, isu perubahan tempat pelaksanaan hukuman cambuk dari umum menjadi penjara sesuai dengan Peraturan Gubernur Aceh Nomor 5 Tahun 2018 tentang pelaksanaan hukum acara jināyah (pidana) juga patut dikaji dari sudut pandang fiqh al-siyāsah (politik Islam) dan legislasi.

Kata Kunci: Hukuman, zina muḥṣān, qanun jinayah, siyāsah.

Introduction

Qanun No. 6 of 2014 concerning Jināyah (criminal) Law came into effect in Aceh on October 23, 2015, one year after its promulgation on October 23, 2014. The enactment of the Qanun on the Jināyah Law automatically revoked the Qanun of the Province of Nanggroe Aceh Darussalam No. 12, No. 13, and No. 14 of 2003 concerning *khamr* (intoxicants), *maysīr* (gambling), and *khalwat* (close proximity).¹

Qanun No. 6 of 2014 regulates several *jarīmah* (criminal acts) such as *khamr*, *maysīr*, *khalwat*, *ikhtilāṭ* (act of intimacy), *zina* (illicit sexual intercourse),

¹ Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii, 2008); Mohd Din and Al Yasa' Abubakar, "The Position of the Qanun Jinayat as a Forum for the Implementation of Sharia in Aceh in the Indonesian Constitution," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, no. 2 (2021): 689-709; Adang Darmawan Achmad Hudzaifah Achmad Qotadah, "Qanun Jinayat Aceh Antara Implementasi, Isu dan Tantangan," *Adliya: Jurnal Hukum dan Kemanusiaan* 14, no. 2 (2020): 171–89.

sexual harassment, rape, *liwath* (male homosexuality), *musāhaqah* (female homosexuality), and *qazf* (false accusation of *zina*). In addition, Qanun Jinayah also regulates *‘uqūbah* (punishment) for people who provide facilities for offenders of *khamr*, *maysīr*, *khalwat*, *ikhṭilāf*, and *zina*, to whom they are subject to a maximum penalty of 100 lashes or a fine of 1,000 grams of pure gold. The Jinayah law also applies to business entities that carry out their business activities in Aceh.²

Linguistically, the word *jarīmah* is derived from the word “*jarama*”, after which it becomes a form of *masdar* “*jarīmatan*” which means an act of sin, wrongdoing, or crime. The individual who commits a criminal act is called “*jārim*” and the one who is subject to the act is “*mujaram ‘alayhi*”.³

According to some *fuqahā’* (Islamic jurists), *jarīmah* refers to “all the prohibitions of sharia (i.e., committing prohibited acts and/or leaving out obligatory acts) which are punishable with *ḥadd* (fixed punishment) or *ta’zīr* (discretionary punishment)”.⁴

Jarīmah also shares the same definition as a criminal event, or a criminal act or offense in positive law.⁵ The only difference is that positive law distinguishes between crimes and violations based on the severity of the punishment, while Islamic law does not as it refers all as *jarīmah* or *jināyah* due to the nature of the crime. On the other hand, according to Qanun Jinayah No. 6 of 2014, *jarīmah* is “an act that is prohibited by Islamic law wherein in this Qanun it shall be punished with *‘uqūbahal-ḥudūd* and/or *ta’zīr*.”⁶

In Article 1 of Qanun Jinayah which regulates general provisions in point 15, it is stated that “Jinayah law is the law that regulates *jarīmah* and *‘uqūbah*” and the next points state that “*Jarīmah* is an act that is prohibited by Islamic sharia which in this Qanun is punishable with *‘uqūbahal-ḥudūd* and/or *ta’zir*. *‘uqūbahis* a punishment that can be imposed by a judge against the perpetrators of *jarīmah*.”

² Muhammad Amin Suma, et.al, “The Implementation of Shari’a in Aceh: Between the Ideal and Factual Achievements,” *Ahkam: Jurnal Ilmu Syariah* 20, no. 1 (2020): 19–48, <https://doi.org/10.15408/ajis.v20i1.14704>. Khamami Zada, “Politik Pemberlakuan Syariat Islam Di Aceh Dan Kelantan (1993-2014),” *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 10, no. 1 (2015), <https://doi.org/10.19105/ihkam.v10i1.588>; Ahyar Ahyar, “Aspek Hukum Pelaksanaan Qanun Jinayah Di Provinsi Aceh,” *Jurnal Penelitian Hukum De Jure* 17, no. 2 (2017): 1313–154, <https://doi.org/10.30641/dejure.2017.v17.131-154>.

³ Marsum, *Fiqh Jinayah: Hukum Pidana Islam* (Yogyakarta: FH UII, 1991), p. 2.

⁴ A. Djazuli, *Fiqh Jinayah: Upaya Menanggulangi Kejahatan Dalam Islam* (Jakarta: Raja Grafindo Persada, 2000).

⁵ Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam* (Jakarta: Bulan Bintang, 1993).

⁶ Qanun Aceh Nomor 6 tentang 2014 tentang Hukum Jinayah, General Provisions, Article 1 (16).

Hudūd is a type of *'uqūbah* whose form and scale have been determined in the Qanun expressly. *Ta'zīr* is a type of *'uqūbah* predetermined in the Qanun whose form is optional and the scale is within the highest and/or lowest limits.”

Apart from *'uqūbahal-hudūd* and *ta'zir*, Qanun Jinayah also introduces an additional and/or substitute punishment model in the form of restitution. Restitution is defined as a certain amount of money or property, which must be paid by the *jarīmah* perpetrator, the family, or a third party based on a judge's order to the victim or the family, for suffering, loss of certain assets, or reimbursement of costs for certain actions.⁷

The implementation of the Qanun Jinayah in Aceh uses the principle of personality, indicating that this Qanun only applies to Muslims who commit *jarīmah* (actions that are prohibited by Islamic law) in Aceh. As for non-Muslims who commit *jarīmah* along with Muslims, they can choose and submit voluntarily to the Jinayah Law. Non-Muslims are also subject to punishments that apply in this Qanun if they commit criminal acts in Aceh that are not regulated in the Criminal Code (KUHP) or other criminal provisions outside the Criminal Code.

Unsurprisingly, the implementation of Qanun Jinayah in Aceh has received attention from outside such as human rights and non-governmental organization (NGO) activists. Additionally, some materials within Qanun have also been the subjects of debate among Islamic academics or Acehese *ulemas* (Islamic scholars).

Among the materials often discussed is the *'uqūbah* for *zina* offenders that does not distinguish between *muḥṣān* and *ghayr muḥṣān* offenders as is understood in classical *fiqh* literature. Article 33 paragraph (1) of Aceh Qanun No. 6 of 2014 stipulates that “Whoever intentionally commits *zina* shall be punished with *'uqūbahal-hudūd* of 100 (one hundred) lashes.”

Qanun does not separate between *muḥṣān* and *ghayr muḥṣān* offenders, unlike in the provisions of Islamic law which sentence 100 lashes for *ghayr muḥṣān* offenders and stoning to death for *muḥṣān* offenders. This indicates that the *zina* offenders in Aceh, whether married or unmarried, are punished with the same severity, namely 100 (one hundred) lashes.

Moreover, the changing of the place of the caning execution from public to prison after the issuance of Aceh Governor Regulation (Pergub) No. 5 dated February 28, 2018,⁸ regarding the implementation of the *jināyah* procedural law

⁷ Qanun Aceh Nomor 6 tentang 2014 tentang Hukum Jinayah, General Provisions, Article 1 (20).

⁸ Peraturan Gubernur No. 5 Tahun 2018 Tentang Pelaksanaan Hukum Acara Jinayah.

has also become a new polemic worth to study from the point of view of *Fiqh al-Siyāsah* and legislation.

The Pergub has also attracted public attention from various groups in Aceh, especially from some members of the Aceh Ulema Consultative Council (MPU).⁹ The chairman of the Aceh People's Representative Council (DPR), Muharuddin even considered what the Aceh governor had done was unconstitutional. He viewed that the governor had violated the constitution because he annulled the Qanun which had been legally agreed upon by the legislature and the executive.¹⁰

In light of the aforementioned discussions, this study posed several questions as follows: 1) What is the punishment for *zina* in Islamic *fiqh*? 2) What is the perspective of *fiqh al-siyāsah* on the punishment for *zina muḥṣān* offenders in Aceh Qanun No. 6 of 2014? and 3) What is the view of *fiqh al-siyāsah* on the implementation of 'uqūbah of flogging in closed spaces such as prisons?

This study is a legal study with a Islamic politic approach (*fiqh al-siyāsah*) with a literature study data collection method.¹¹ This paper attempts to answer the issue of punishment for *zina muḥṣān* offenders in Aceh Qanun No. 6 of 2014 from the perspective of *fiqh al-siyāsah* and the ways the law is implemented in closed spaces such as prisons per the Governor Regulation No. 5 of the 2018.

Legal Basis for the Prohibition of *Zina* and its Punishment in Islamic Law

Zina according to Imam al Qurthuby is a term for *watha'* (intercourse) of a man against a woman in his genitals with his willingness without any marriage bond or without a *shubhat* (semblance) marriage bond. In other words, *zina* refers to inserting one's genitals into another that are of interest to them by character, which is forbidden by law.¹²

⁹ <https://waspadaaceh.com/2018/04/15/tgk-faisal-ali-ulama-tak-dilibatkan/> accessed on July 18, 2018.

¹⁰ <https://www.pikiranmerdeka.co/news/dpr-aceh-pergub-tentang-hukum-cambuk-di-lapas-melanggar-konstitusi>

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2014); Mohammad Mahfud MD, *Politik Hukum di Indonesia* (Jakarta: Rajawali Press, 2012). Kamsi, *Politik Hukum dan Positivisasi Syari'at Islam di Indonesia* (Yogyakarta: Suka-Press, 2012).

¹² Muhammad ibn Ahmad al-Qurthuby, *Tafsir al-Qurthubi*, http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=48&surano=24&ayano=2, p. 147, accessed on July 6, 2018

Zina also means sexual intercourse between a man and a woman without marriage ties,¹³ regardless whether one or both parties have their respective life partners or not married at all. In addition, *zina* also indicates any intercourse that occurs not because of legal intercourse, not because of *shubhat*,¹⁴ nor because of possession (slave).¹⁵ To add, the meaning of *zina* in Qanun No. 6 of 2014 is “an intercourse between a man or more with a woman or more without marital ties with the willingness of both parties.”¹⁶

To conclude, *jarīmah zina* is an act of sin committed through intimate relations between the two sexes, a man and a woman, without any marriage ties. The legal basis for the prohibition of *zina* is found in the *Qur’ān*, *Ḥadīṣ*, *Ijmā’* (scholarly consensus) and *Qiyās* (analogical reasoning). Although *zina* is a crime that is prohibited for anyone, Islamic law distinguishes punishments for *zina* offenders, between married (*muḥṣān*) and unmarried (*ghayr muḥṣān*), and between free persons and slaves. Such a consideration is made because the impact caused by *zina* has different levels of harm depending on the status of the offender.

Ibn Rushd is of the view that the punishment for *zina* offenders in Islam consists of three: stoning, whipping, and expulsion. Further, the punishment is divided into four categories of offenders: widows/widowers, single people, free people, and slaves. *Ulemas* agree that the punishment for *muḥṣān* and free offenders is stoning,¹⁷ except for a small minority who states that the punishment for *zina* is flogging on the basis of the generality of the Qur’anic verse which does not distinguish between *muḥṣān* or *ghayr muḥṣān* offenders. The legal basis for the prohibition of *zina* in the Qur’an is found in Surah an-Nur (24:2) which reads:

¹³ A. Rahman, *Penjelasan Lengkap Hukum-Hukum Allah* (Jakarta: Raja Grafindo Persada, 2002)..

¹⁴ *Waḥā’ syubhat* is intercourse between a man and a woman, who is thought to be his wife or his female slave or female slave belonging to his son.

¹⁵ Imam Ghazali Said, *Bidayatul Mujtahid Analisa Fiqih Para Mujtahid* (Jakarta: Pustaka Amani, 2007), p. 60.

¹⁶ General Provisions, Article 1, Qanun No. 6 of 2014 concerning Jinayah.

¹⁷ Muḥammad ibn ‘Alī ibn Muḥammad Al-Syawkānī, *Fath Al-Qadīr*, vol. 4 (Bayrūt: Dār al-Kutub al-Ilmiyyah, 2003), p.121; Muḥammad Amīn ibn ‘Umar bin ‘Ābidīn, *Rad Al-Mukhtār ‘Alā al-Durr al-Mukhtār (Hāsiyyah Ibn ‘Ābidīn)*, vol. 4 (Bayrūt: Dār al-Fikr, 1992), p. 11; Ibn Ḥajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah al-Muḥtāj* (Bayrūt: Dār al-Fikr, 1994), p. 10-108; Syams al-Dīn ibn Abī al-‘Abbās Aḥmad bin Syihāb al-Dīn al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Syarḥ al-Minhāj*, vol. 7 (Bayrūt: Dār al-Kutub al-‘Arabiyah, n.d.), p. 426; Yūnus al-Bahūtī Ḥanbalī, *Syarḥ Muntahā Al-Irādāt*, vol. 6 (Mu’sasah al-Risālah, 2000), p. 181; Muḥammad ibn Yūnus ibn Idrīs Al- Bahūtī, *Kasysyāf al-Qinā’*, vol. 14 (Bayrūt: Dār al-Fikr, 1982), p. 39.

الرَّائِيَةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ

“As for female and male fornicators, give each of them one hundred lashes, and do not let pity for them make you lenient in (enforcing) the law of Allah, if you (truly) believe in Allah and the Last Day. And let a number of believers witness their punishment.”

The generality of the law in this verse applies to male and female fornicators who are mature, independent, and *ghayr muḥṣān*. On the other hand, the additional punishment in the form of expulsion for one year is based on a hadith. Female fornicators from the slave class are punished with 50 lashes based on another verse in Surah an-Nisa (4:25). The punishment also applies to male slaves on the basis of *qiyas*.¹⁸

فَإِذَا أُحْصِنَ فَإِنَّ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ

Meaning: “If they commit indecency after marriage, they receive half the punishment of free women.”

The majority of *ulemas* agree that the punishment of stoning for *zina muḥṣān* offenders is based on the Prophet’s hadiths that concern with *zina* as prescribed in an-Nur (24:2). There is the hadith about the stoning that the Prophet ordered to a woman from the al-Ghamidiyah tribe and the hadith on Ma’iz who came to confess the sin to the Prophet saw. Similarly, the following hadith also discusses about *zina*:

عَنْ أَبِي هُرَيْرَةَ وَ زَيْدِ بْنِ خَالِدِ الْجُهَنِيِّ أَنَّهُمَا قَالَا: إِنَّ رَجُلًا مِنَ الْأَعْرَابِ أَتَى رَسُولَ اللَّهِ ص فَقَالَ: يَا رَسُولَ اللَّهِ أَنْشُدْكَ اللَّهَ إِلَّا قَضَيْتَ لِي بِكِتَابِ اللَّهِ. وَقَالَ الْحَضَمُ الْآخِرُ وَ هُوَ أَفْقُهُ مِنْهُ: نَعَمْ، فَأَقْضِ بَيْنَنَا بِكِتَابِ اللَّهِ وَ ائْتِدَنَّ لِي. فَقَالَ رَسُولُ اللَّهِ ص: قُلْ، قَالَ: إِنَّ ابْنِي كَانَ عَسِيْفًا عَلَى هَذَا فَزَنَى بِامْرَأَتِهِ، وَ إِنِّي أُحْبِرْتُ أَنَّ عَلَى ابْنِي الرَّجْمَ فَافْتَدَيْتُ مِنْهُ بِمِائَةِ شَاةٍ وَ وَلِيْدَةٍ. فَسَأَلْتُ أَهْلَ الْعِلْمِ،

¹⁸Muḥammad bin Aḥmad al-Qurṭūby. *Tafsīr al-Qurṭūby*, http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=48&surano=24&ayano=2, hlm. 147, diakses 6 Juli 2018.

فَأَحْبِرُونِي أَمَّا عَلَى ابْنِي جَلْدُ مِائَةٍ وَ تَعْرِيبُ عَامٍ، وَأَنَّ عَلَى امْرَأَةِ هَذَا الرَّجْمِ. فَقَالَ رَسُولُ اللَّهِ ص: وَ
 الَّذِي نَفْسِي بِيَدِهِ لَأَفْضِيَنَّ بَيْنَكُمَا بِكِتَابِ اللَّهِ. الْوَلِيدَةُ وَالْعَنَمُ رُدُّ. وَ عَلَى ابْنِكَ جَلْدُ مِائَةٍ وَ تَعْرِيبُ
 عَامٍ. وَ اَعْدُ يَا أُنَيْسُ إِلَى امْرَأَةِ هَذَا، فَإِنِ اعْتَرَفَتْ فَارْجُمِيهَا. قَالَ: فَعَدَا عَلَيْهَا، فَأَعْتَرَفَتْ، فَأَمَرَ بِهَا
 رَسُولُ اللَّهِ ص، فَرُجِمَتْ. مسلم

Meaning: From Abu Hurairah and Zaid ibn Khalid Al-Juhaniy, they said: That a Bedouin man came to the Messenger of Allah saw and said, “O Messenger of Allah, by Allah, I do not ask you unless you decide the law for me with the Book of Allah.” And the other said (and he was smarter than him), “Yes, judge between the two of us according to the Book of Allah, and allow me (to say).” Then the Messenger of Allah saw replied, “Please.” Then the second man said, “My son worked for this man and committed zina with his wife, while I was told that my son should be stoned. So, I redeemed him with a hundred goats and a female servant, then I asked the people of knowledge, and they told me that my son was only flogged a hundred times and exiled for a year, while this man’s wife should be stoned. The Messenger of Allah saw said, “By Allah in Whose Hand is my soul, I will decide upon you both with Allah’s Book. The female servant and the goats will return to you, while your son must be beaten a hundred times and exiled for a year.” And you, O Unais, go to the place of this man’s wife, and ask, if she confesses, then stone her.” Abu Hurairah said, “Unais then went to the woman’s place, and the woman confessed.” Then the Messenger of Allah saw ordered to stone her, and then she was stoned. (Narrated by Muslim)¹⁹

For the majority of *fuqahā’*, this hadith and several others that talk about the case of stoning for *muḥṣān* fornicators at the time of the Prophet are considered as legal arguments for hadith that specify (*takhṣīs*) the law of the Qur’an.

However, some *fuqahā’* that rejects the view that the Ahad (single narrator) hadith is not in the position to specify the Qur’an which has the *mutawātir* (consecutive) characteristic. If the sentence of stoning as stated in the hadith is true, then according to this opinion -as quoted from Mustafa Mahmud- all of the events occurred before the revelation of an-Nur (24:2). They argue that it is impossible for the Prophet to violate Allah’s rules in the Qur’an which states

¹⁹ Imām Muslim al-Naysabūrīy, *Ṣaḥīḥ Muslim*, n.d., 1324–1324.

that the punishment for fornicators is 100 lashes without mentioning other types of punishment.²⁰

The majority of *ulemas* who are the proponents of the stoning sentence also rely on a verse whose law is still valid but the *rasm* (written text) had been abrogated, namely the verse *الشيخ والشيخة اذا زنيا فأرجموا هما البتة*. In one of his sermons, the Caliph Umar ibn Khattab mentioned that had it not been for fear of being said he had added to the verses of the Qur'an, he would have actually ordered people to write down the verse.²¹

They also reason with the argument of Surah an-Nisa' (2:25) regarding the punishment for fornicators from among slaves, which is being sentenced to half of the punishment for free people. If the punishment for a free *muḥṣān* fornicator is stoning to death, it is questionable to what kind of punishment that a *muḥṣān* fornicator of a slave class should receive, as there is no such punishment of half stoning to death. On this basis, this group states that the absolute punishment for *zina* is 100 lashes, not stoning.²²

Nevertheless, many *ulemas* who argue about the existence of stoning in the punishment for *zina* disagree on whether or not the offender is also whipped before being stoned, and the majority says there is no need.²³ They reason that the Prophet had stoned Ma'iz, a woman from the tribe of Juhainah, a woman from Banu Azd, and two Jews without being lashed. They also argue that *ḥadd*'s lesser punishment is covered by the larger *ḥadd*'s. In addition, if the purpose of the punishment is to teach a lesson, then there is no use in flogging as the offender will also be sentenced to death by stoning.

On the contrary, al-Hasan al-Basri, Imam Ahmad,²⁴ and Daud²⁵ share the view that *muḥṣān* fornicators should be first whipped before being stoned. Their opinion is based on the actions of Ali ibn Abi Talib who whipped Shurahah al Hamdaniyah on Thursday and later stoned him on Friday. For these, Ali said, "I

²⁰ See: Faisal ibn Abdul Aziz Mubarak, *al-Ḥad al-Zinā fī al-Fiqh Islāmī*, in <http://www.alukah.net/sharia/0/120779/#ixzz4xpjL4EyV>, accessed on July 6, 2018.

²¹ Faisal ibn Abdul Aziz Mubarak.

²² Faisal ibn Abdul Aziz Mubarak.

²³ Muḥammad ibn 'Alī ibn Muḥammad Al-Syawkānī, *Fath Al-Qadīr*, p. 133; Muḥammad Amīn ibn 'Umar bin 'Ābidīn, *Rad Al-Mukhtār 'Alā al-Durr al-Mukhtār (Ḥāsiyah Ibn 'Ābidīn)*, p. 15; Ibn Hajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah Al-Muḥtāj*, p. 108; Syams al-Dīn ibn Abī al-'Abbās Aḥmad bin Syihāb al-Dīn al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Syarḥ al-Minhāj*, p. 426; Yūnus al-Bahūtī Ḥanbalī, *Syarḥ Muntahā Al-Irādāt*, p. 182; Muḥammad ibn Yūnus ibn Idrīs Al-Bahūtī, *Kasysyāf Al-Qinā'*.

²⁴ Abū al-Ḥasan 'Alī bin Sulaymān al-Mardāwī al-Ḥanbalī, 'Alāuddīn, *Al-Inṣāf*, vol. 26 (Dār Ihyā' al-Turāṯ al-'Araby, 1955), p. 239.

²⁵ *Mukhtaṣar al-Iṣāl al-Mulḥaq bi al-Muḥallā*, vol. 11, n.d., p. 231.

whipped him on the basis of the Book of Allah while I stoned him on the basis of the Sunnah of His Messenger.”²⁶ Likewise, the hadith narrated by Muslim from Ubadah ibn Shamit also provides the same punishment:

أن النبي عليه الصلاة والسلام قال: خُذُوا عَنِّي قَدْ جَعَلَ اللَّهُ لَهْنِ سَبِيلاً، البكر بالبكر جلد مئة وتغريب عام، والثيب بالثيب جلد مئة والرجم بالحجارة²⁷

Meaning: “The Messenger of Allah saw said: “Follow my orders! Follow my orders! Verily, Allah has decreed the punishment for zina for women, namely unmarried women (who commit zina) with unmarried men, they are lashed with a hundred strokes and exiled for one year, while married women (who commit zina) with married men, and then they will be punished with a hundred strokes and stoning”. (Narrated by Muslim).

Nonetheless, the scholars of the *maḥab* (school of thought) disagree about the conditions for the stoning of the *muḥṣān* fornicators. Imam Malik is of the view that there are five conditions for a person to be declared *muḥṣān*:²⁸ *balīgh* (adult), Islam, independent, having intercourse in a legal marriage, and being in conditions that allow intercourse (e.g., not during menstruation or in the month of Ramadan). If a person who meets these conditions commits *zina*, then the person is punished according to the *muḥṣān* category.

Abu Hanifah has also agreed on the conditions proposed by Imam Malik, only that he requires both male and female fornicators to be free people.²⁹ On the other hand, Imam Shafī’i does not require Islam as a condition for stoning for *zina muḥṣān*³⁰ on the grounds that the Prophet had stoned two Jews who committed *zina* whom the Jews reported to the Prophet.³¹ As for the reason Imam Malik requires Islam for *zina muḥṣān* is because marriage is a virtue, and without Islam, the virtue becomes non-existent.

²⁶ Akhrajahu al-Bukhārī 6812, Aḥmad 1/93, 107,141,153, al-Ṭahāwī 3/140, min ṭarīq Salmah bin Kuhayl, ‘an al-Sya’bīy bih.

²⁷ Akhrajahu Muslim 1690.

²⁸ *Syarḥ al-Ṣaghīr* 2/423, *Hāsyiyah al-Dusūqī* 4/320.

²⁹ Muḥammad ibn ‘Alī ibn Muḥammad Al-Syawkānī, *Faṭḥ Al-Qadīr*, p. 130-131; Muḥammad Amīn ibn ‘Umar bin ‘Ābidīn, *Rad Al-Mukhtār ‘Alā al-Durr al-Mukhtār (Hāsyiyah Ibn ‘Ābidīn)*, p. 17-18.

³⁰ Ibn Ḥajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah Al-Muḥtāj*, p. 108; Syams al-Dīn ibn Abī al-‘Abbās Aḥmad bin Syihāb al-Dīn al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Syarḥ al-Minhāj*, p. 427; Yūnus al-Bahūtī Ḥanbalī, *Syarḥ Muntahā Al-‘Irādāt*, p. 182.

³¹ Al-Bukhārī 6841, Muslim 1699.

The *fuqahā'* also differ on the punishment of exile for a year for the *ghayr muḥṣān* fornicators. Abu Hanifa perceives that there is no punishment of exile at all.³² On the other hand, Imam Shafi'i has emphasized that the punishment of exile begins with flogging for every fornicator, male and female who is *ghayr muḥṣān*, whether free or slave.³³ Imam Malik, however, distinguishes the punishment; male fornicators are exiled while women are not. Imam Malik is also of the view that the fornicator of the slave class is not punished by exile.³⁴

The argument for those who agree that there is an absolute punishment of exile is the general meaning of the previous hadith of Ubadah ibn Shamit which explains the existence of exile for *ghayr muḥṣān*. However, Imam Malik used the *qiyās mursal/maṣlaḥi* method in his opinion about the exclusion of women. He believes that women who are exiled will get a bigger impact than the *zina* she has committed. Here, Abu Hanifah views the *ḥadīṣ al-aḥad* which is the basis for the punishment of exile cannot specify or enforce the punishment for *zina* in the Qur'an. Therefore, according to Abu Hanifah, there is no exile punishment for *zina*.

The *mazhab* scholars also agree that female slaves who commit *zina* after marriage (*muḥṣān*) are subject to 50 lashes on the basis of Surah an-Nisa (4:25). The scholars, however, have different opinions if the female slave who commits *zina* is not married (*ghayr muḥṣān*). Nevertheless, the majority agrees that the punishment is still 50 lashes.³⁵ In contrast, other scholars who narrate the opinion of Umar ibn al-Khattab state that there is no *ḥadd* punishment for the female slave, only having *ta'zīr*. This difference arises from understanding the word *iḥṣān* in the verse فاذا أحصن فلهن نصف ما على المحصنات من العذاب. Some interpret it with marriage, and so those who are not married (*ghayr muḥṣān*) are not punished, whereas others understand the word *iḥṣān* with Islam, and thus the punishment applies in general to those who are *muḥṣān* or not.

³² Muḥammad ibn 'Alī ibn Muḥammad Al-Syawkānī, *Fath Al-Qadīr*, p. 134; Muḥammad Amīn ibn 'Umar bin 'Ābidīn, *Rad Al-Mukhtār 'Alā al-Durr al-Mukhtār (Ḥāsiyah Ibn 'Ābidīn)*, p. 15.

³³ Ibn Ḥajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah Al-Muḥtāj*, p. 428.

³⁴ Yūnus al-Bahūtī Ḥanbalī, *Syarḥ Muntahā Al-Īrādāt*, p. 185; Muḥammad ibn Yūnus ibn Idrīs Al-Bahūtī, *Kasysyāf Al-Qinā'*, p. 46.

³⁵ Muḥammad ibn 'Alī ibn Muḥammad Al-Syawkānī, *Fath Al-Qadīr*, p. 130; Muḥammad Amīn ibn 'Umar bin 'Ābidīn, *Rad Al-Mukhtār 'Alā al-Durr al-Mukhtār (Ḥāsiyah Ibn 'Ābidīn)*, p. 5; Ibn Ḥajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah Al-Muḥtāj*, p. 112; Syams al-Dīn ibn Abī al-'Abbās Aḥmad bin Syihāb al-Dīn al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Syarḥ al-Minhāj*, p. 429.

The group of *ulemas* who holds the view that the *ghayr muḥṣān* female slave who commits *zina* is not subject to the *ḥadd* punishment argues with the following hadis.

عَنْ عَبْدِ اللَّهِ بْنِ عَبْدِ اللَّهِ بْنِ عُتْبَةَ بْنِ مَسْعُودٍ عَنْ أَبِي هُرَيْرَةَ وَزَيْدِ بْنِ خَالِدِ الْجُهَنِيِّ رَضِيَ اللَّهُ عَنْهُمَا قَالَ : سُئِلَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ الْأَمَةِ إِذَا زَنَتْ وَمَ تُحْصَنُ؟ قَالَ : ”إِنْ زَنَتْ فَاجْلِدُوهَا ثُمَّ إِنْ زَنَتْ فَاجْلِدُوهَا ثُمَّ إِنْ زَنَتْ فَاجْلِدُوهَا ثُمَّ بَيْعُوهَا وَلَوْ بِصَفِيرٍ“³⁶

Meaning: “From ‘Ubaidullah from Abu Hurairah and Zaid ibn Khalid radhiyallahu ‘anhuma that the Prophet sallallahu ‘alaihi wa sallam was asked about a female slave if she committed zina while she was not married, and then he said: “If she commits zina, lash her, and if she commits zina again, then lash her, and then if she commits zina again, then lash her, and then sell her even for a piece of rope.” (Narrated by Bukhari and Muslim)

As for the male slave who commits *zina*, the punishment is half that of a free man. This is based on the law of *qiyas* to the female slave.³⁷ However, the Dhahiri school views that the punishment for *zina* from a slave is still being punished with 100 lashes on the basis of the generality of the verse on *zina*, Surah an-Nur (24:2), which does not specialize slaves from free people.

Between Fiqh and Qanun in the Perspective of Fiqh al-Siyāsah

From the Islamic law’s viewpoint, the sanctions for fornicators listed in the Aceh Qanun Jināyah are indeed not in accordance with the views of the majority of *fuqahā’* who distinguish between punishments for *muḥṣān* and *ghayr muḥṣān* fornicators. However, from the point of view of *siyāsah sharia*, the uniformity of sanctions for fornicators in Aceh for the current situations is very realistic and does not conflict with the principles of enforcing Islamic law which require phasing (*al-tadarruj*), flexibility (*al-murūnah*), and priority (*al-awlawiyyāt*).

³⁶ Al-Bukhārī 6838, Muslim 1704.

³⁷ Yūnus al-Bahūtī Ḥanbalī, *Syarḥ Muntahā Al-Irādāt*, p. 185; Muḥammad ibn Yūnus ibn Idrīs Al-Bahūtī, *Kasysyāf Al-Qinā’*, p. 46; Muḥammad ibn ‘Alī ibn Muḥammad Al-Syawkānī, *Fath Al-Qadīr*, p. 130; Muḥammad Amīn ibn ‘Umar bin ‘Ābidīn, *Rad Al-Mukhtār ‘Alā al-Durr al-Mukhtār (Ḥāsiyyah Ibn ‘Ābidīn)*, p. 5; Ibn Ḥajar Aḥmad ibn Muḥammad al-Ḥaytamī, *Tuḥfah Al-Muḥtāj*, p. 112.

The current condition of the Acehnese Muslims who are no longer accustomed to Islamic criminal law is a challenge in itself in the application of Islamic law. Despite firmly adhering to Islamic principles, the Acehnese Muslims have long abandoned Islamic legal practices, especially on the *jināyah* law, due to external factors such as Western colonialization in the Islamic world since the 15th century. Moreover, several internal factors such as ignorance and moral degradation among the people are also the reasons that can hinder the *kaffah* (comprehensive) enforcement of Islamic law.

Thus, improving the quality of religious understanding, increasing people's awareness on the need for Islamic law, and providing intensive socialization of the rules still require a relatively long time efforts. On that basis, the implementation of all Qanun regulations related to the implementation of Islamic law in Aceh –including the Qanun Jinayah– needs to be carried out carefully, structured, planned, and measured. Without such strategies, the implementation of Islamic law in Aceh will perhaps become a boomerang for Aceh itself.

The phasing, flexibility, and choosing priorities in the application of sharia are not prohibited in Islam. The Prophet saw had in fact preached in these ways, and as a result, in only two decades, the entire Arabian Peninsula was Islamized with full awareness in carrying out Allah's law. There are at least three historical events that can be become the reasons for delaying the *kaffah* implementation of the *jināyah* law of in Aceh.

The first event is the Hudaibiyah agreement in 6 AH between the Prophet and the Quraysh infidels. The Prophet's companions considered the contents of the Hudaibiyah agreement to be very detrimental to Muslims since Muslims were prohibited from entering Mecca to perform *Umrah* that year, any Muslim who had emigrated without the permission of his/her guardian could be asked to return, and those who returned to Mecca were not obliged to come back to Medina. On the other hand, the Quraysh who went to Medina had to be returned. Further, the Hudaibiyah agreement also obliged the Muslims to erase the words *Basmalah* at the beginning of the agreement and did not recognize Muhammad as the Messenger of Allah, instead directly wrote the name of Muhammad ibn Abdullah. The abolition of these two sentences of creed basically gave enormous implications for Muslims. It was unthinkable that the Prophet could agree to the abolition of the monotheism sentences. Nevertheless, the Prophet still accepted the offer of the Quraysh infidels even though Umar and the other companions initially did not want to accept the agreement. However, after the Prophet did *tahallul* (dissolution of the ceremonial state for *Hajj* and '*Umrah*) and slaughtered

the *dam* (sacrifice), the companions finally followed him and returned to Medina that year without successfully entering Mecca to perform ‘*Umrah*’.

This event had proven that the implementation of Islamic law such as ‘*Umrah*’ worship or even more principled matters such as the sentence of monotheism could be put aside when dealing with the greater benefit of the people. If the Prophet did not accept the offer, it was certain that there would be a war between the Muslims and the Quraysh of Mecca at that time, in which the consequences would be much greater from various aspects such as loss of life and property and obstruction of worship, among others. In contrast, when the Prophet accepted the offer, the biggest benefit was the first written acknowledgment of the political existence of the Islamic community by the Meccan Quraysh, while the ‘*Umrah*’ could still be performed as it was postponed to the following year.

The second event is the Fathu Mecca which occurred in 8 AH. After the Ka’bah was cleared of all forms of idol worship, the Messenger of Allah saw stated his intention to Aisha ra that he wished to return the Ka’bah to its original form when it was built by the Prophets Ibrahim as and Ismail as where there were two doors for the Ka’bah. However, because his wish had the potential to lead to a new polemic among the Quraysh who might assumed the Prophet would destroy the Ka’bah and replaced it according to his wishes, the intention was not carried out to maintain the benefit of the people and avoid a greater potential harm as narrated in the authentic hadis. If it weren’t for your people, O Aisha, who had just come out of ignorance, I would have destroyed the Ka’bah and put into it what was brought out, and then I built for it two doors to the east and the west, until I rebuilt it on the foundation of the building of the Prophet Abraham. (Narrated by Bukhari, Muslim and Ahmad).³⁸

The third event is the delay of the *ḥadd al-sarīqah* (theft) punishment during the Caliph Umar ibn Khattab because the caliph considered that the conditions were not fulfilled, as there were drought and famine seasons that people had difficulty getting food after which some people stole food from others on the grounds that they had rights to the wealth of the rich. On the basis of doubts in this matter, Caliph Umar did not apply the punishment of cutting off the hands of the thieves only at that time. This is in accordance with the words of the Prophet who ordered not to carry out *ḥudūd* as long as there was an element of doubt in it (ادرأوا الحدود بالشبهات). Caliph Ali also postponed the investigation into the murder

³⁸ Ibnu Hajar Al-’Asqalani, *Fath Al-Bāri*, VI, vol. I (Kairo: Dar al-Hadis, 2004)., p. 224; *Ṣāḥīḥ Muslim* 9/88,90, *Musnad Imām Aḥmad* 6/106. 176,179.

of Caliph Usman because of the unfavorable situation in the country due to the rebellion.

From the events above, the *uṣūl* scholars then formulated several legal theories or *fiqh* rules which became the principles and reasons for many other cases such as the principle of *Dār‘u al-Mafāsīd Muqaddamun ‘Ala Jalb al-Maṣāliḥ*, the principle of *Tasarruf al-Imām ‘ala al-Ra‘iyyah Manutūn bi al-Maṣlahah*, the principle of *Irtikāb Akhaffu Ḍararayn*, and so forth. All of these principles and theories of Islamic law, apart from being used in *fiqh*, are more often used in the field of Islamic politics and statutory policy (*siyāsah shar‘iyyah*).

In some *fiqh* literature, there are three opinions concerning the law of delaying a *ḥudūd* punishment, as discussed below:

The first opinion argues that the postponement of the *ḥudūd* sentence shall be carried out if the convicted person is ill which may cause harm on the person. The condition for this is the illness is assumed to be curable; however, if the illness is severe and there is no hope of recovery, the convict may be punished with a light whipping. This opinion is held by the Hanafī school, one opinion from the Shafi‘i, and one narration from the Hanbali.³⁹ Their reasoning was that the punishment for the sick would aggravate the pain and could destroy the convict, and therefore it was postponed until recovery.⁴⁰

The second opinion is of the view that punishment should not be postponed, but should still be carried out with a light whip or in a non-destructive manner. This opinion is held by the Hanbali, Dhahiri, and one side of the opinion of the Shafi‘i.⁴¹ Their argument is based on the Qur‘an (2:286) which implies that there is no *taklīf* beyond one’s ability.

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا اكْتَسَبَتْ

They also reason with the authentic hadis narrated by Ibn Majah, Ahmad and Baihaqi, which reads:

³⁹ Syams al-Din Abu Bakr Muhammad bin Abi Sahal al-Sarakhsi, *Al-Mabsūt*, vol. 10 (Bayrūt: Dar al- Ma‘rifah, 1989), p. 100; *Al-‘Ināyah ‘Ala al-Hidāyah* (Bayrūt: Dār al-Kutub al-‘Ilmiyah, n.d.), p. 387; Abu Ishaq al-Syirazi, *Al-Muḥaḏḏab*, vol. 2 (Dār al-Qalām, 1996), p. 271; Al-Ghazali, *Rawḍah Al-Ṭālibīn: Majmū‘ah al-Quṣūr al-‘Awālī*, vol. 7 (Cairo: Maktabah al-Jundī, 1964), p. 316; Abu Muhammad ‘Abdullah bin Ahmad bin Muhammad Muwaffiq al-Din al-Jama‘ili al-Dimasyqi Ibn Qudamah, *Al-Mughnīy*, vol. 12 (Riyād: Dār ‘Alīm al-Kutub, 1997), p. 329. ‘Alāuddin Abū al-Hasan ‘Ali bin Sulāimān Al-Mardāwī al-Hanbalī, *Al-Inṣāf*, vol. 10 (Dār Ihyā‘ al-Turaṡ al-‘Araby, 1955), p. 159.

⁴⁰ Ahmad bin Ghaniim bin Saalim al-Nafraawii al-Azharii al-Maliki, *Al-Fawākih al-Diwānī ‘Ala Risalah Ibn Aby Zayd al-Qirwaani* (Bayrūt: Dār al-Fikr, 1995), p. 232.

⁴¹ Al-Ghazali, *Rawḍah Al-Ṭālibīn: Majmū‘ah al-Quṣūr al-‘Awālī*.

ما روي أن رجلاً ضعيف الخلق قد وقع على أمة فذكر ذلك لرسول الله صلى الله عليه وسلم، فقال: "اضربوه حده" فقالوا يا رسول الله: إنه أضعف من ذلك لو ضربناه مائة سوط مات، قال: "فخذوا له عُثْكالاً فيه مائة شِمْراخٍ فاضربوه ضربةً واحدة".⁴²

Meaning: It is narrated that a man who was weak in body had committed zina with a female slave. Then, the incident was reported to the Messenger of Allah saw. The Prophet said: "Carry out ḥadd for him." The companions replied: "Indeed he is weak to be able to accept the punishment, if we lash him 100 times, he will die." The Prophet said: "Take a branch consisting of 100 branches, and then lash him with one lash."

This hadis provides the argument that punishment cannot be postponed, but technically it can be conditioned according to the circumstances of the ḥadd convict. The third opinion is of the Maliki school that views a ḥudūd sentence can be delayed only in the case of the convict who is ill until he/she recovers.

From the three views, it can be seen that the techniques and procedures for implementing the ḥudūd punishment are within the study of *ijtihad* (independent reasoning) in which the *fuqahā'* dispute. There is no one standard method that can be used as a reference in the technique and time for whipping. In the hadith of the Ghamidi woman who admitted to *zina*, the Prophet even had time to postpone her sentence to two years and nine months after her child was born and was fully breastfed.

In light of the arguments, events, *fiqh* theories, and opinions of the *fuqahā'* of the schools, it can be said that the Aceh Government's decision to not carry out the *jināyah* sentence in Qanun No. 6 of 2014 has sufficient reasons and is a very appropriate policy. The current condition of the Qanun Jinayah shall be seen as one of the stages in the re-implementation of Islamic law in Aceh. In our opinion, the Muslims of Aceh at present can be described as "sick" due to religious ignorance, ignorance of Islamic law, moral decadence, and challenges as well as public scrutiny from various parties, both from within and outside Aceh. All of these factors are sufficient to state that the condition of the Acehnese people is "sick" and therefore the maximum punishment for *jināyah* cannot be conducted.

⁴² Albani, *Ṣaḥīḥ ibn Mājah* 2/85 hadis 2087, Aḥmad, *al-Musnad* 5/222, Baihaqi, *al-Sunan al-Kubrā* 8/230.

Efforts to improve the community such as by socializing, educating the people, training of law enforcement officers, and media framing in the context of strengthening Islamic law need to be continued until eventually the Qanun Jinayah can be revised into a Qanun whose implementation is *kāffah*.

At this point, the urgency of understanding *Fiqh al-Siyāsah*⁴³ is highly needed, especially by policy makers in the Aceh Government. Islamic sharia policy makers should be able to combine all views in the Islamic *fiqh* schools and then take which opinion is best for current conditions and most appropriate for the socio-cultural circumstances of the Acehnese people, and within the framework of the Unitary State of the Republic of Indonesia (NKRI). After all, the application of Islamic sharia in Aceh is the delegation of the mandate of Law No. 11 of 2006 concerning the Governance of Aceh.

Implementation of the Flogging ‘*uqūbah* in a Confined Space

Prior to the issuance of Aceh Governor Regulation No. 5 of 2018, the ‘*uqūbah* of flogging in Aceh Province was executed openly and witnessed by the public. Such a practice is referred to the Aceh Qanun of Jinayah Law No. 7 of 2013 article 262 paragraph (1) which states “‘*uqūbah* of flogging is carried out in an open place and can be seen by people present.”⁴⁴

In actuality, however, the implementation of ‘*uqūbah* of caning has received a lot of attention from various parties, especially from human rights and child protection activists. The issue under concern is that the people who are present to witness the ‘*uqūbah* are not only adults, but also children. However, paragraph (2) article 262 of Qanun Jinayah Code of Procedure No. 7 of 2013 has expressly prohibited the presence of children under the age of 18 to witness the ‘*uqūbah*. Paragraph (4) of the same article has also stipulated that the closest distance between a caning convict and a community of witnesses is 12 meters, yet in practice this has been difficult to implement.

Head of Islamic Sharia Office of the Aceh Province, Munawar, emphasized that Governor Regulation No. 5 of 2018 concerning the Implementation of the Jinayah Procedural Law does not conflict with Qanun No. 7 of 2013 as the regulation is in fact to strengthen the previously existing rules,

⁴³ *Fiqh al-Siyāsah* is the regulation of public affairs in realizing benefit and avoiding the risk of harm as long as it does not deviate from the legal limits and its basis in an integral way even though there are no rules in the texts (Qur’an and Hadith) or are not in line with the views of the *mujtahid* imams. Adapted from: Abdul Wahhab Khallaf, *Politik Hukum Islam* (Yogyakarta: Tiara Wacana, 1994), p. 7.

⁴⁴ Qanun Aceh Nomor 7 Tahun 2013 tentang Hukum Acara Jinayah.

which is Qanun No. 7 of 2013. His response addressed the pros and cons among the public regarding the Governor Regulation No. 5 of 2018.⁴⁵ He also said the governor regulation was not intended to eliminate the substance of the Qanun, but instead to strengthen the rules as stated in the Qanun.

Further, Deputy Governor of Aceh Nova Iriansyah who read out written answers to additional questions and responses submitted by several Council Members in the special Plenary Session of the DPR on Thursday (28/6) stressed that materially, the Aceh Governor Regulation No. 5 of 2018 concerning the Implementation of the Jinayah Procedural Law is a delegation rule as an elaboration of the Aceh Qanun, whereas formally, the stipulation of the Governor Regulation becomes the authority of the Governor as the Executive to put the Qanun into effect.⁴⁶

In relation to the Law of the Republic of Indonesia No. 12 of 2011 concerning the Establishment of Legislation, the Governor Regulation (Pergub), in principle, is also one type of legal regulation. Pergub can be recognized as having binding legal force as long as it is ordered by a higher statutory regulation (including a Provincial Perda/Qanun), or is formed based on the authority.⁴⁷ It can be concluded, therefore, the existence of Governor Regulation No. 5 of 2018 is in accordance with the authorities and laws and regulations in force in Indonesia.

On the other hand, from the perspective of *Fiqh al-Siyāsah*, the *'uqūbah* of stoning or whipping for *muḥṣān* or *ghayr muḥṣān* fornicators shall be performed in front of a group of people in which the word طائفة is used in the Qur'an, as in the Surah an-Nur (24:2) that states:

وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ...

Meaning: "...and let a number of believers witness their punishment."

The meanings of the word طائفة in various types of *tafsīr bil ma'sūr* (commentary on the Qur'an using traditional sources) and *tafsīr bi al-ra'y* (commentary on the Qur'an using independent rational reasoning) are varied that the *fuqahā'* and *mufasssirin* (authors of Qur'anic exegesis) have not agreed on a certain number to interpret this word.

⁴⁵<http://harianandalas.com/aceh/pergub-hukum-acara-jinayah-tak-bertentangan-qanun> accessed on July 18, 2018.

⁴⁶<https://www.acehprov.go.id/news/read/2018/07/02/5703/pemerintah-aceh-beri-jawaban-lanjutan-hak-interpelasi-dpra.html> accessed on July 18, 2018.

⁴⁷ See Law No. 12 of 2011, Article 8 (2).

Imam Hasan al Bashry, as quoted by Ibn Kathir, interprets that the punishment for *zina* shall be executed openly in order to manifest the purpose of punishment and maximize its effect on both the convict and the people who witness it.

In terms of the number of people who witness the *'uqūbah* for *zina* convicts, Ibn Kathir in his book *Tafsīr al-Qur'ān al-'Aẓīm* cites several opinions of companions on the interpretation of the word “الطائفة”:⁴⁸

1. Ali ibn Abi Talhah from Ibn Abbas ra states the meaning of the word طائفة starts from the number one, and so forth. Mujahid and Ikrimah note that طائفة can mean one to a thousand. On that basis, Imam Ahmad ibn Hanbal is of the opinion that the *'uqūbah* is valid if it is witnessed by one person.
2. Other *mufasssir* such as 'Atha ibn Abi Rabah and Ishaq ibn Rahawaih state the word طائفة means two people, and so on.
3. Az Zuhri describes it as three people because the word *jama'* starts from the number three.
4. Ibn Wahab, citing Imam Malik's opinion, perceives that the word طائفة means four people, and so forth, referring to the four witness requirements that must be fulfilled in a *zina* case. Imam Shafi'i also agrees to this opinion.
5. Rabi'ah views it as five people.
6. Hasan al-Bashry argues it as ten people.
7. Qatadah is of the view that there is no certain limit to the number of people who witness it because in that verse Allah swt only orders it to be witnessed by a group of people without mentioning any limitations, so that it becomes a teaching as well as a lesson for all.

In addition, the author of *Tafsīr al-Jāmi' li Ahkām al-Qur'ān* Imam al Qurtuby quotes Ibn Zaid's opinion that *'uqūbah* shall be attended by a minimum of four people on the basis of the obligatory testimony of four witnesses in cases of *zina*. He describes that this view is followed by Imam Malik, Imam Lais, and Imam Shafi'i.⁴⁹

Imam al Qurthuby also cites two views of the *fuqahā'* regarding the purpose of witnessing the punishment/*'uqūbah* for convicts of *zina*. The

⁴⁸http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=49&surano=24&ayano=2 accessed on July 17, 2018.

⁴⁹http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=48&surano=24&ayano=2 accessed on July 17, 2018.

disagreement arises from the answer to a basic question, namely “what is the purpose of witnessing the implementation of *’uqūbah* of whipping?”

Some of the *fuqahā’* are of the view that the goal is to intensify the punishment so that it becomes a teaching for the perpetrator, and for those who witness it becomes a lesson by telling it to others, and so it becomes a form of prevention against similar incidents. In contrast, other *fuqahā’* believe that witnessing *’uqūbah* of whipping is intended to make more people pray for the convict, asking Allah’s forgiveness for his/her sins and hoping Allah grants him/her mercy on the basis of his/her willingness to undergo the punishment.⁵⁰

However, as there are no *qat’i* arguments related to the technical procedure of *’uqūbah* of whipping for *zina* offenders, this case can be categorized as a matter of *ijtihād*. This is supported by the many views of *mufasssir* and *fuqahā’* in terms of the number of people who witness whipping, which highly depends on how these scholars interpret the word “الطائفة” in Surah an-Nur (24:2). Thus, it can be concluded that the technical procedure and application of *’uqūbah* for *zina* in Islam is very dependent on the rules and regulations that are used as the basis by the *waliyy al-amr* (legitimate authority), while still referring to one of the views of *mu’tabar* (respectable) scholars.

The conception of a rule has always had the potential to cause pros and cons due to the differences in viewing *maṣlahah* (benefit) and *muḍarat* (harm). Governor Regulation No. 5 of 2018 is also based on a study of *maṣlahah* from the government’s view, as the implementation in an open space –according to the executive– has had a relatively unfavorable impact on some groups, such as children. Paragraph (2) article 262 of Aceh Qanun Jinayah Code of Procedure No. 7 of 2013 also expressly prohibits the presence of children under the age of 18 to witness the *’uqūbah*. In this case, the governor regulation is, in fact, considered as a rule that strengthens Qanun Jinayah, and is not counter-productive to the contents of Qanun Jinayah.

Conclusion

The study concludes that first, punishment for *zina* in Islamic law is divided into several categories (stoning, whipping, and exile for one year), which depends on the status of the fornicators (*muḥṣān*, *ghayr muḥṣān*, free, or slave). Second, in the perspective of *Fiqh al-Siyāsah*, the imposition of punishment for *zina muḥṣān* offenders in the Aceh Qanun Jinayah is appropriate in the current context as one of the stages of sharia implementation. This consideration puts emphasis toward the benefit of the people who are not fully prepared to receive

⁵⁰ *Ibid.*

such sharia law, including the mental and spiritual aspects, socialization, education, law enforcement institutions, and community perspectives. Third, the issuance of Pergub Aceh No. 5 of 2018 has met the requirements in terms of laws and regulations in Indonesia as it is a delegative rule of the law and also the governor's formal authority. Fourth, the implementation of caning for *zina* offenders in a closed room such as a correctional facility in the perspective of *Fiqh al-Siyāsah* can be justified, as it is not included in the problem which is technically regulated in the sources of sharia law. The procedure and technical application of *'uqūbah* for *zina* in Islam is very dependent on the rules and regulations used as the basis by *waliyy al-amr*, while still referring to one of the views of *mu'tabar* scholars. Further, the study recommends that the Aceh government continue to strengthen the public religious awareness in order to avoid any horizontal conflict due to partial religious understanding. Discussions of *fiqh muqarran* books in the field of *mu'āmalah* and *siyāsah* need to be promoted to broaden people's religious insight; however, the practice of the majority Shafi'i school in matters of worship should still be respected to maintain harmony within the internal Muslim community. In addition, socialization and supervision of Islamic law also need to be improved by related parties in collaboration with village officials so that various social diseases and crimes can be anticipated as early as possible. Also, a strong political will from the Aceh government in carrying out sharia in all sectors is highly expected. This can be shown from the impartial budgeting, integrated program, and effective control of every element of the leadership. The *ulemas*, academics, and scholars can continue to provide any positive input to strengthen the regulation of Islamic sharia in Aceh to be in accordance with the conditions of the people and also to be recognized within the Indonesian constitutional system.

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