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## The Effectiveness Of Qanun Aceh No. 6/2014 Of Jinayat Law In Order To Prevent Jinayah Khalwat In Law Territory Of Sabang Municipality

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### CORRESPONDENSE

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### A B S T R A C T

Article 23 paragraph (1) of Aceh Islamic Criminal Law No 6 of 2014 tells about Indecency (Jinayat) law which regulates the criminal punishment for the perpetrator of jarimah khalwat. This article is expected can minimize the crime rate of the indecent (jinayah) behavior perpetrator. However, in fact the number of jarimah khalwat perpetrator increase steadily as what happened in Sabang Municipality law area. It proves that there were two legal issues, what is the causes of the ineffectiveness of the indecency (jinayat) law in minimizing the number of jinayat perpetrator in Sabang Municipality? This research was aimed to know the obstacle of the increasing jinayat khalwat issue which make jinayat law become ineffective in minimizing jinayat khalwat perpetrators in Sabang Municipality, and to know the efforts conducted by the Civil Service Police Unit, Sharia Policy, and Office of the District Prosecutor General of Sabang Municipality and to know the factor which causes the number of jinayah khalwat perpetrator in Sabang Municipality. The research method used in this research was empirical juridical empirical using case approach, historical approach, comparative approach, conceptual approach, and statute approach). The research result shown that there were 3 effectiveness obstacle factors of jinayat law in Sabang Municipality, the first obstacle of jinayat law is the bad regulation because the punishment is an alternative not a cumulative and for those who deal with the jinayat law is potentially punished with canning punishment in public, the application of jinayat law normatively is in contrary with the basis of personality and territoriality which causes this law contrary with the fair legal system (due process of law). The second factor which becomes the obstacle related to quality and quantity of the human resource of the law enforcement, law understanding and the number of personnel investigator of the Civil Service Police Unit and Sharia Police of Sabang Municipality was limited. The third factor, there is no special jinayah prison cell in the Civil Service Police Unit and Sharia Police of Sabang Municipality

## 1. Introduction

Nowadays, Indonesia as a Law Country has been in a good progress related to law, by using a refined law with unity values not only respect the similarities but also the differences caused by tribe, religion or culture. As a result, the term of these differences has changed to diversity and resulted in value of speciality. Furthermore, in order to unite the diversity of this nation, it has been defined as a united symbol which well-known as *Bhineka Tunggal Ika*. The state recognition of this diversity has mentioned on article 18b the constitution of Republic Indonesia 1945 which state:

(1) The state has admitted and respect the local government with the speciality which regulates based on law.

(2) The state has admitted and respect the united of customary law communities including their traditional rights as long as it still up date with the community development and the principal of Republic Indonesia, which regulated by the law.<sup>1</sup>

Aceh Province which located on the western part of Indonesia, has a special value by implement in the *Syariat Islam*. This law has rooted from the past even before the independence of Indonesia. The evidence of this *syariat* could be found from the culture of Acehneese community. Even the culture is more dominant than the *syariat*. The Islamic *Syariat* which understanding by the community not only from the law perspective, but also from other aspects for example education, economy (ownership and land used, water management for irrigation purpose, regulation of fishing, etc, government (at least on village stage), kind of social services, art, and culture, and sport. However, because of the limitation of this journal, then it will be focused on law and justice.<sup>2</sup>

During reformation era, the demand of implementing of *Syariat Islam* in Aceh has

grown rapidly. This demand has responded by national parliament (DPR RI) which resulted in Act No. 44/ 1999 about the implementation of the speciality. It contains of regulation of Aceh speciality implementation that has been given in 1959. Next, along with DPR RO initiative, another act has been passed that is Act No. 18/2001 about special autonomy of Aceh as Nanggroe Aceh Darussalam Province.<sup>3</sup> This time the consideration of this Act has related to special character of Acehneese people which is life perspective, social character and powerful Islamic culture which resulted in Aceh as a modal area in Indonesia independent history.<sup>4</sup>

The mandate of Act No 18/2001, the central government should give a big authority to regulate the government for Aceh. This regulation then becomes an Act No. 11/ 2006 about The government of Aceh. By issuing this act, the *syariat islam* implementation has been stronger.

The special autonomy has bring some changes in law and justice where the religion justice has changed to *Mahkamah Syari'ah* as mentioned in article 25 Act 18/2001 including the authority of *Mahkamah Syariat* to adjudice *Jinayah* case. For this statement, article 15 Act no. 24/ 2004 also make it more strong which stated that *Syariat Islam* justice in Aceh is the special justice for religion justice and special justice in public justice. Beside it, Act No 16/2004 stated that attorney has an authority to judge the criminal case and send it to *Mahkamah Syariah*.<sup>5</sup>

After discussing the base law of the institution, then it will discuss about kind of criminal case (*jinayah*) which can be send to *Mahkamah Syariah*. From 2002 to 2004 there are 5 (five) *qanuns* (local regulations) which has been passed by Government of Nanggroe Aceh Darussalam and the local parliament (DPRA) about *Jinayah*.

<sup>1</sup> Kaelan. (2004). *"Pendidikan Pancasila"*. Yogyakarta: Paradigma. P. 275.

<sup>2</sup> Al Yasa Abubakar, *"Sekilas Syariat Islam di Aceh"*. Dinas Syariat Islam Provinsi Aceh, P. 3.

<sup>3</sup> Ibid, P. 5-6.

<sup>4</sup> Dinas Syariat Islam Nanggroe Aceh Darussalam,, Himpunan Undang-undang, Keputusan Presiden, Peraturan Daerah/Qanun, Instruksi Gubernur, dan Edaran Gubernur. (2005). Banda Aceh: CV.Hardyan. P.1

<sup>5</sup> Op.Cit. P. 6.

Furthermore, Qanun Jinayah has classified based on the action of the differences:

1. Qanun Aceh No. 11/ 2002 about the implementation of Syariat Islam in Aqidah, Ibadah and Syiar Islam;
2. Qanun Aceh No. 12/ 2003 about Khamar drinking and its kind;
3. Qanun Aceh No. 13/ 2003 about gambling (Maisir/ Perjudian);
4. Qanun Aceh No. 14/ 2003 about adultery (Khalwat/ Mesum);
5. Qanun Aceh No. 7/ 2004 about management of Zakat.

The justice insitution formation, regulations, and the punishment implementation is only the initial step which has to be followed by more important, well-planned and sustainable steps. As a result, the judgement of Mahkamah Syariah is a representative of community justice,<sup>6</sup> However, sometimes, the reality is contradict with the hopes and followed by strong critical started from the case element that will be decided in every qanun, the punishment/ uqubat which contained of wip punishment and becomes new thing in criminal system of punishment in Indonesia and contradicted by the human right until the growth number of Jinayah actors. The main core is if the law officers is weak, the judgment of justice could not represent the justice of community needs. These issues has encourage the DPR and the governor to revise the Jinayah qanun in order to answer the problems. It is expected to reduce the criminal actions among the community.

For a period of time, the new Qanun of Jinayah has passed, Qanun Aceh No. 6/2014 which contains of kind of Jinayah in one regulation.

Kind of Jinayah which regulated in Qanun No. 6/2014 has stated under article 2 verse 3 as followed :

1. Khamar,
2. Maisir,
3. Khalwat,
4. Ikhtilath,
5. Zina,
6. Sexual Abuse (Pelecehan Seksual),
7. Rape (Pemeriksaan),

<sup>6</sup> Ibid, P.8.

8. Qadzaf,
9. Liwath,
10. Musahaqah.

For those 10 kind of Jarimah above, the discussion of Jinayah Khalwat is very interesting to analyse, especially in Sabang Municipality based on the fact that since the implementation of Qanun No.6/2014 the Khalwat case in Sabang Municipality didn't reduce significantly. Moreover, based on the evidence from The State of Prosecutor's Office, the Khalwat case has increase. The next table reveals number of Jinayah Khalwat perpetrators in Sabang Municipality from June 2015 to February 2017:

Table I  
The State of Prosecutor's Office  
Number of Jinayah Khalwat Perpetrators in  
Sabang Municipality

Year	Number of Perpetrators	Explanation
Jun-15	0 (No) people	Executed
2016	4 (Four) peoples	Executed
Feb-17	20 (Twenty) peoples	18 peoples has been executed
Total	24 (Twenty Four) peoples	

Based on the table, it reveals that since the implementation of Qanun No. 6/ 2014, from 2015 to early 2017 there is a significant increase of Khalwat perpetrators number with total number is 24 peoples. It is very surprising because in new Qanun of Jinayah No. 6/ 2014, the punishment threat has increased and also the criminal threat has been added which means, the perpetrators not only faced the main uqubat tazir but also additional punishment of uqubat tazir.

The law effectiveness theory becomes an analysis tool which has been used to answer the constraints of why Jinayah Khalwat case in Sabang Municipality has increased. Furthermore, there are 5 (five) factors which become the indicators of law effectiveness, for example:

1. The law factor itself (Act);
2. The factor of law officer which means the stakeholder of the formation and implementation of law;

3. The factor of facilities that support the law justice;
4. The factor of community, which means the environment of law implementation;
5. The factor of culture, as a creativity and tasty sense of human.<sup>7</sup>

## 2. Method

The research method that will be used is the empirical jurisdiction by using field data source as a primary data including the interview data with the stakeholders. The secondary data has collected from books, journals, Acts and internet. Some of approaches that will be used in this journal for example, case approach that is an approach by using special cases that has direct link with the research; historical approach used to find out the history of Jinayah Law in Aceh from the period of time to understand the philosophy of Syariat Islam in Aceh (Qanun No.6 Tahun 2014 Tentang Hukum Jinayat) and the satae approach which used to search the regulations that could be condusive for Khalwat Jinayah implementation<sup>8</sup>.

### 3. The Effectiveness Of Qanun Aceh No. 6/2014 Of Jinayat Law In Order To Prevent Jinayah Khalwat In Law Territory Of Sabang Municipality

The implementation of Jinayat Law in Aceh comprehensively has been done since middle of 2015 until now, and the punishment implentation has anounced the Syariat Islam in Aceh. However, the nature of of Jinayat Law in Aceh is not using as a ceremony tool of Syariat Islam inauguration only, but also for another objective to reduce the criminal case and to build the awareness of community to form Islamiyah characteristic. It needs a long process for sure<sup>9</sup> and also strong support from the stakeholders and community awareness for better future.

Jinayah law which becomes one of tools to form the Islamiyah Character in Aceh community not only become a social control tool but also a social

engineering tool to develop a strong character of islamiyah. This mechnism is expected to implement optimally to create strong Aceh with islamic values because the basic of the formatiion is Al-Quran and Al hadist. For this statement, it has mentioned in Act No. 11/ 2006 about Jinayat Law under article 23 verse (1) ; Everyone who doing Jarimah Khalwat intentionally, will threatened by U'qubat Ta'zir of 10 (ten) times of whip optimally or fine of 100 (hundred) gram of pure gold or jailed for 10 (ten) months maximal. This article considerate weak from punishment aspect point of view because the attorney have to choose one of kind of main uqubat.

The limitation of the attorney in this case has an effect into eradication process of Jinayah Khalwat perpetrators, as it is expected to give dterrent efect for the perpetrators but it seem hard to happen.<sup>10</sup> The opinion stated by Yunadi S.H represent the weakness of Uqubat of Jinayat Law in Aceh. He stated that the implementation of Jinayah law in Aceh will nonoptimal because the implentation couldn't achieve none of the islamic criminal objectives such as revenge, prevention, the means of loss for the victims, and sin rebellion.

Another problem of Uqubat in Jinayah Law is the implementation og whip punishment for kids, this issue has contradicted with Act No. 35/ 2014 about Children Protection which mentioned that every children has their own right to live, growth and develop also has right to self protection from discrimination and abusement as statetd under the 1945 constitution. Moreover, the implementation of whip punishment in front of public area will give negative impact for their growth period because of the trauma effect that will be hard to be cured. This is the reflection of Jinayah Law regulation that put the problems children in unfair position in front of the law. <sup>11</sup>

<sup>7</sup> Soerjono Soekanto. (2008). *"Faktor-Faktor yang Mempengaruhi Penegakan Hukum"*. Jakarta: PT. Raja Grafindo Persada P. 8.

<sup>8</sup> Peter Mahmud Marzuki, *"Penelitian Hukum"*. Jakarta: Kencana Prenada Media Grup. P.166.

<sup>9</sup> *Ibid*, P. 337

<sup>10</sup> Yunadi. (2017). *"Ajun Fungsional Kejaksaan Negeri Kota Sabang"* Wawancara 23 Agustus 2017.

<sup>11</sup> Moh.din, Dosen Hukum Pidana Fakultas Hukum Unsyiah, Wawancara 15 Januari 2017.

A good law is a representative of sense of justice, benefit, and the certainty of law, because this law has been formed to regulate public needs and also has its functioned to organise the life order of community.<sup>12</sup> The way of law to maintain the public need by using the written rules has defined in Legality Principle as follow: *Nulla poena sine lege* which means no criminal without the criminal regulation based on the act, *Nulla poena sine crimeartinya* no criminal without the action itself, *Nulla crimen sine poena legali* which means no criminal without the criminal action based on the act,<sup>13</sup> In contrary there is a difference in Qanun Aceh No. 6/ 2014 about the Jinayah Law article 5 letter b and c:

b. Everyone who not a moslem who did Jarimah in Aceh together with the moslems and choosing to defeat his/her self to Jinayat Law voluntary;

c. Everyone who not a moslem who did the Jarimah in Aceh that not regulate under Kitab Undang-Undang Hukum Pidana (KUHP) or any criminal regulations outside the KUHP, but it rules in this Qanun;

The above article is seem to implement the personality principle which menas that kind of protection form for Indonesia citizen who did the criminal things in overseas because they didn't know the regulation of the criminal in that country, however, it seems unfair for the citizen if they will judge based on the foreign rules in that country philosophically. In practical, this principle is hard to protect the Indonesia citizen without the extradition memorandum with the foreign country, the definition of the personality principle above didn't has correlation with Qanun Aceh No. 6/ 2014 about Hukum Jinayat Pasal 5 huruf b dan c, as mentioned for subject

of law, law position in personality principle has a goal to protect Indonesia citizen who didn't know about the foreign law meanwhile, in the article above a protection has given to non moslem to choose to defeat his/her self under the Jinayah law or KUHP, while as a moslem have to defeat his/herself under Jinayat Law.

Qanun Aceh No. 6/ 2014 about Jinaya Law article 5 letter b and c also contradict with the principle of equality before law. It stated that everyone has a same position in front of law without any differences. The result of the implementation of this principle is the essence of law power will be reduced because some of community group is free to choose the law option of their criminal actions, both of the explanation has shown that the good due process of law is unwell reflected under Qanun No. 6/ 2014 of Jinayat Law.

From normative point of view, Jinayah law also has some problem if correlated with Sabang Municipality condition as one of tourism destination in Aceh. In fact, the implementation of Sabang as a tourism destination din't use Jinayah law as a basic rule. Moreover, the reality is the growth of Sabang as tourism area has a contradiction of Jinayah law implementation. This is becomes one of the factorw why the Jinayah Law is more cmplicated to implement in Sabang than any others districts in Aceh. Related to 10 (ten) kind of Jinayah whih regulated in Qanun No. 6/ 2014, Jianayh khalwat is the most Jinayah which is hard to prevent and increase every year.

Based on data from The State of Prosecutor's Office the implementation of Jinayah Khalwat has increased as shown in Table 2:

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<sup>12</sup> Teguh Prasetyo. (2010). *"Hukum Pidana"*. Jakarta: Raja Grafindo Persada.P. 29-30.

<sup>13</sup> Laden Marpaung. (2012). *"Asas-asas Hukum Pidana"*. Jakarta: Genta Publishing. P.7.

**Table 2.** The State of Prosecutor's Office Number of Jinayah Khalwat Perpetrators in Sabang Municipality Period of June 2015 S/D June 2017

Tahun	Kasus Jinayah Khalwat	Sanksi yang diterapkan	Keterangan
Juni 2015	-	-	Tidak ada penindakan
Periode 2016	4 kasus	4 kasus eksekusi cambuk	Telah dieksekusi
Juni 2017	20 kasus	18 kasus eksekusi denda	2 kasus berkasnya dikembalikan
Total	24 kasus	22 kasus di eksekusi	

The table shown that, every year the number of Khalwat case has increased, from June to December 2015 there no sanction for the perpetrators. Along 2016, the case has increased to be 4 cases and until June 2017, the case increased significantly to be 20 (twenty) cases while 18 (eighteen) cases of it found when the local police and syariah police doing the integration operation at the end of the year.

Based on this explanation, there are some moments (the peak seasons of tourist) which has a potential period to increase the volume of Jinayah case in Sabang. And for this reason, the officer should increased the awareness and warning in every season of tourism period. The State of Prosecutor's Office as one of the law and justice officer has do some actions started from preventive action to repressive action in order to reduce the number of Jinayah Khalwat case. However, it didn't success yet.

Based on the head of The State of Prosecutor's Office opinion, the khalwat perpetrators eradication couldn't effective if its only from the punishment side, without guiding the moral and character of the actors. And also good coordination between the stakeholders becomes an important things to do in Sabang.<sup>14</sup> One of the constraints is the wrong implementation that given by the Jinayah law officer, for example case No. 01/Nov/ WH/SAB/2016 on behalf of Mirzan Fuadi, ST Lahir di Samalanga, 17 April 1974 No. Identitas: 1172021704740002, Pekerjaan: Karyawan Swasta, Tinggal di Jl. Tgk Abdurrahman Lr. H.M Juned, Lampoh Daya

<sup>14</sup> Rohim, Kajari Kota Sabang, Wawancara 23 Agustus 2017

<sup>15</sup> Zainal, Warga Gampong Cot Ba'u, Wawancara 12 September 2017

Kec. Jaya Baru Kota Banda Aceh dan Masniati Lahir di Sigli, 1 November 1981 No. Identitas: 117202411820000, Pekerjaan: PNS Dinkes, Tinggal di Jr.Lhok Igeuh Gp. Ujong Kareung Kota Sabang, both of them has found jinayah khalwat on 25 November 2017 in a cafe jalan elak in front of panglong kayu (Gampong Cot Ba'u), and saved by people around 02.30 WIB, then the actors sent to Kantor Satuan Polisi Pamong Praja dan Wilayahul Hisbah for the next<sup>15</sup>

During the process its found that the case has met the requirement of the investigation process, then by the investigator it sets as a suspect. Unfortunately, after set as a suspect, both of them has a right to send their home and the officer didn't used his right as mentioned under Qanun No. 7/ 2013 Tentang Hukum Acara Jinayah article 21 verse (2) that stated : for the investigation purpose, the investigator has a right to put the suspect in a jail.

Based on sarwadi as an investigator of Satpol PP and WH, there is 3 main consideration of law of this case why there is no jail for the suspect: firstly, the suspect is cooperative, secondly, Mirzan Fuadi, ST is a political actor in Sabang and Masniati is a government official, and thirdly there is no jail room in Satpol PP and WH office.<sup>16</sup> As a result, one of the suspect (Mirzan Fuadi, ST) has run away from Sabang and didn't find out until now. The law consequence is the

<sup>16</sup> Sarwadi PPNS Satuan Polisi Pamong Praja dan Wilayahul Hisbah Kota Sabang, Wawancara 5 September 2017

case couldn't send to Mahkamah Syaeriah Sabang.<sup>17</sup>

Based on the experience, a direct detention has been done for 18 suspect of Khalwat at the end of 2016. Sarwadi as the investigator of Satpol PP and WH has his own initiative to detain all the perpetrators in Jail of Satpol PP WH Aceh. This is not only because of the lack of jail room but also lack of investigators in Sabang. Until now, Satpol PP and WH Sabang only has 1 investigator and it couldn't enough to do 18 cases of Khalwat<sup>18</sup>

Khalwat's problems in Sabang is very complicated. For better implementation, there are five things that should be done in Sabang for law effectiveness, such as:

1. The law factor itself;
2. The officer factor who run the law;
3. Facility factor to support the implementation of law;
4. Community factor, the environment where the law has been implemented;
5. Cultural factors as a result of creativity and sense of human art.<sup>19</sup>

Based on these factors, there are three has been identified as a constraints in the implementation process, firstly is from the law factor itself/ regulation in the criminal aspect still weak based on the attorney officer (because it didn't cumulative/ sum of the main sanction), as a result it didn't give the deterrent effect for the actors, on the other hand jinayah law is not a product of law which didn't give protection for children who has a problems with law and the law maker is false in order to implement article 5 letter b and c of Qanun Aceh No. 6/2014 about Jinayah Law as personality principle because there is no correlation between verse in that article with personality principle definition, even the use of that article has made denial of legality principle and the principle of equality before the law. Second constraint is the law

officer factor who has an authority to run the law or the level of quality of human resource which become one of the weaknesses on the effectiveness of law implementation in Sabang. For example, the process of unexact law decision which resulted in unclear some of cases and also another constraints due to the number of investigators where Sabang only has 1 (one) investigator which affected on the progress of the administration process. Thirdly, facility factor, currently, Satpol PP and WH in Sabang didn't has a jail room which result in every person who do the khalwat have to send to Banda Aceh.

#### 4. Conclusion

The implementation of Qanun No. 6/2014 about Jinayah Law didn't run effectively in Sabang, because the law itself has some weaknesses in terms of uqubat/ criminal punishments that didn't well regulated to give deterrent effect for the perpetrators of jarimah, the differentiation of law subjects based on the religion has shown that material law didn't give justice for Indonesia citizen and jinayah law also didn't give protection for childrens who has problems with law where there is no mechanism in Jinayah law related to whip punishment for children in front of public. Beside the weakness of regulation, the quality and quantity of human resources especially for the investigators need to be increased to avoid the mistaken in decision process and also to accelerate the process of khalwat administration. Lastly, the facility factor becomes the worst one as currently there is no jail room to put the suspect of Jarimah Khalwat.

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<sup>17</sup> Yunadi, Ajun Fungsional Kejaksaan Negeri Kota Sabang, Wawancara 23 Agustus 2017

<sup>18</sup> Sarwadi, PPN Satuan Polisi Pamong Praja dan Wilayahul Hisbah Kota Sabang, Wawancara 5 September 2017

<sup>19</sup> Soerjono Soekanto. (2008). *"Faktor-Faktor yang Mempengaruhi Penegakan Hukum"*. Jakarta: PT. Raja Grafindo Persada. Jakarta. P. 8

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## Peraturan Perundang-undangan

- Undang-Undang Dasar Negara Kesatuan  
Republik Indonesia Tahun 1945.
- Undang-Undang No. 44 Tahun 1999 tentang  
Pelaksanaan Keistimewaan Propinsi  
Daerah Istimewa Aceh.
- Undang-Undang No. 18 Tahun 2001 tentang  
Otonomi Khusus Bagi Propinsi Daerah  
Istimewa Aceh Sebagai Nanggroe Aceh  
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Kekuasaan Kehakiman
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Perlindungan Anak