



## THE OTHER SIDE OF THE HISTORY OF THE FORMULATION OF ACEH JINAYAT QANUN

*Salma, Almuh Fajri, Taufik Hidayat, and Edi Safri*

**Abstrak:** Dalam konteks fikih, ketentuan hudud telah disepakati baik jenis perbuatannya maupun sanksi-sanksinya. Akan tetapi, tidak semuanya tercantum sebagai materi hudud dalam Qanun Aceh No. 6/2014 tentang Hukum Jinayat, seperti hukuman rajam, hukuman mati dan hukuman potong tangan. Ketiga jenis hukuman ini diperdebatkan dengan sengit selama pembahasan Qanun dan akhirnya ditiadakan. Melalui pendekatan sejarah hukum, diketahui setidaknya ada beberapa faktor problematik yang mewarnai perumusan Qanun Aceh No. 6/2014 tentang Hukum Jinayat. Pertama, adanya penilaian internal tentang kesiapan pemerintah dan masyarakat yang belum maksimal untuk melaksanakan hukuman-hukuman itu. Kedua, materi rajam, hukuman mati bagi pelaku *riddah* dan potong tangan yang tidak sejalan dengan hukum acara yang telah ada sebelumnya. Ketiga, adanya pengaruh perbedaan pendapat ulama (disparitas) dalam konteks fikih tentang hukuman-hukuman itu dalam proses perumusan qanun. Keempat, adanya keyakinan para pembahas bahwa penegakan hukum pidana Islam dalam Qanun Aceh memerlukan pentahapan (*tadarruj*).

**Kata kunci:** Aceh; jinayat; qanun; *tadarruj*

**Abstract:** In the context of *fiqh*, the provisions of *hudūd* have been agreeable in terms of the actions and punishments. However, some of them are not mentioned in Aceh Qanun No. 6/2014 on Jinayat (Criminal) Law, such as stoning, death sentence, and hand amputation. These three types of punishment were harshly debated during the formulation of the qanun and subsequently abolished. Using the historical legal approach, this study finds out there were some issues that came up during the formulation process. First, the assessment of the local government and people's readiness to implement those punishments has not been sufficient. Second, stoning, the death penalty, and hand cutting are not in accordance with the Indonesian procedural law. Third, the qanun formulation was affected by the disparity of Islamic legal scholars' opinions regarding the mentioned penalties. Forth, the discussants in the forum believed that the implementation of Islamic criminal law needs phasing (*tadarruj*).

**Keywords:** Aceh; *jinayat*; qanun; *tadarruj*

## Introduction

It is believed that the Aceh province Aceh would immediately improve following the ratification of Law No. 18/2001 on the Special Autonomy for the Province of Aceh Special Region as the Province of Nanggroe Aceh Darussalam. However, the application of Islamic law in Aceh is deemed less ideal after the enactment of Law No. 11/2006 on the Government of Aceh (Fahmi, 2012). Mujib considers that local wisdom was critical for Aceh's recovery following the past conflict and tsunami in 2004 (Mujib, 2014). Aceh's restoration was carried out through the reactivation of public spaces such as mosques, Islamic study centers, *meunasah* (traditional Acehnes Islamic educational institution), and *gampongs* (villages) to build an Acehnes identity. This was also followed by the implementation of Islamic criminal law. The law, ideally, consists of punishment covering *hudūd* (punishments specified in the Quran), *qisās* (retaliation)/*diyat* (monetary compensation), *ta'zīr* (punishment left at judges' discretion), and *kaffārāt* (compensation for sinful acts) (Audah, 1963). Certain aspects of the four elements of *jīnāyāt* have been regulated in the Indonesian legislation. Even though different terms are used, the principles are similar. For example, the Indonesian Criminal Code determines the death sentence for persons committing premeditated murder. Some those types of punishments such as *kaffārāt* are applicable in the Indonesian context. Article 28 of Law No. 23/2011 on Zakat Management states that *kaffārāt* can be paid through the National Zakat Institution (BAZNAS). However, many others punishments, especially with *hudūd* elements, cannot be implemented within the Indonesian legal system.

Discussions on the application of *hudūd* in various parts of the world, including Indonesia, constantly bring up pros and cons, particularly when it comes to human rights. For example, when Pakistan passed the Hudud Ordinance, officials from six religious and political parties threatened to leave parliament if the ordinance was passed. They oppose the implementation of *hudūd* in that country because they view some of the *hudūd* materials are contrary to human rights. Even so, they still could not do much when the Hudud Ordinance was passed (Rauf, 2019). Likewise, human rights activists talk about the implementation of the death penalty in many countries around the world, including Indonesia, which is almost the same as the concept of *qisās* in Islamic criminal law.

They see the death penalty as cruel and inhuman, and degrades human dignity. Besides, the death penalty breaches two fundamental human rights: the right to life and the right to be free from torture (Ichsan, 2020). Some studies found that the sharia, especially lashing criminals in Aceh, is not against human rights (Muhammadin et al., 2019) and (Yahya, 2014). Considering the institutionalization of Islamic criminal law in Indonesia, Fuad investigates the perspectives of numerous Indonesian Muslim intellectuals on human rights. In general, the Muslim thinkers strove to identify common ground between Islamic human rights and human rights developed in modern countries, according to Fuad. These Muslim intellectuals tend to understand that human rights are part of the Islamic teaching values and tend not to see the difference between them. This means that Islamic criminal law and human rights can be implemented simultaneously (Asmawi et al., 2019). However, some Muslim thinkers believe that the Islamic concepts of human rights should be codified at the state level (more precisely, under the rule of law) to bind all citizens (Fuad et al., 2007). In this case, any laws or other regulations issued by the state are binding its citizens. Thus, the people of Aceh are bound together when the Provincial Government of Aceh issued a qanun based on the special autonomy granted by the Law of the Republic of Indonesia No. 18/2001 respecting Special Autonomy for the Province of the Special Region of Aceh.

Several Qanun have been developed in the history of Aceh Qanuns to govern various aspects, such as Qanun No. 12/2003 on Khamar, Qanun No. 13/2003 on Maisir, and Qanun No. 14 /2003 on Seclusion. Aceh Qanun No. 6/2014 on Jinayat Law (herein after called Aceh Jinayat Qanun) was developed more than a decade later and was viewed as contentious by many circles. Ismail looked at this qanun from two perspectives: the legitimacy of its construction and the standpoint of the Republic of Indonesia as a unitary state (Ismail, 2018). According to him, Aceh Jinayat Qanun was developed legally and procedurally by people and parties experts in their professions. Therefore, only the Constitutional Court may overturn it if a judicial review is filed. From the standpoint of Indonesia, Aceh Jinayat Qanun has also been accepted. This is because the formation of this qanun is based on Law No. 11/2006 on Aceh's Special Autonomy. Therefore, this law cannot enforce repressive supervision of the qanun that implements sharia. However, other qanun

aspects, such as the differences in punishment for Muslims and non-Muslims, still need to be amended.

Nonetheless, the Acehnese have taken steps forward in Indonesian Islamic law implementation (Yasa, 2015). Kamarusdiana (2016) also agrees with this opinion. According to him, Aceh Jinayat Qanun has become a national law because it has reformed criminal law based on local wisdom (Acehnese people) so that this qanun can serve as an example for all heterogeneous Indonesians. Even if it still contains elements of discrimination against non-Muslims, Zainuddin believes that Aceh Jinayat Qanun legislation has paid respect to the same principle before the law (Zainuddin & Sahban, 2018a). Danial calls it the pseudo-personality principle (Danial, 2012). Nurdin, on the other hand, holds a different viewpoint on this qanun. According to him, there has been a dualism of criminal law in Indonesia since the ratification of Aceh Jinayat Qanun. However, the existence of this qanun can be a reference in finalizing the Criminal Code draft that is currently being discussed. Finally, it is believed that this qanun could be incorporated into national criminal legislation (Nurdin, 2019).

The materials for Aceh and Brunei Darussalam Jinayat Qanun are modifications to the notions of Islamic criminal law that exist in *fiqh* with a more modern context, and *fiqh* is based on the Qur'an and Sunnah (Aziz, 2014). Aceh Jinayat Qanun is a way of adapting the notion of Islamic criminal law in *fiqh* that is also assembled more moderately and has characteristics of the local people of Aceh. Scholars' opinions on the existence of Qanun Aceh as well as the Criminal Code continue to diverge.

Candraningrum (2007), for example, believes (even before issuing the Jinayat Qanun) that the sharia regional regulation (including the qanun) has abandoned the Indonesian nation's founders' idea because not all were Muslims. On the other hand, Indonesia is not an Islamic state even though its population is dominated by Muslims. Despite these differences, the people of Aceh have accepted Aceh Jinayat Qanun as a part of everyday life, especially when the qanun began to be applied in the community, amid objections from outside observers (Zainuddin & Sahban, 2018b). Its implementation has also been supported by sharia institutions, including the Ulama Representative Council (*Majelis Permusyawaratan Ulama/ MPU*), Sharia Service (*Dinas Syariah*), religious

leaders and the community (Suma et al., 2020). Based on the preceding context, this research uses the historical legal method to examine the process of developing the Aceh Jinayat Qanun through field research. In addition to collecting numerous documents related to the formulation process, interviews with different people involved in the formulation of the qanun were conducted to gather more accurate data. The data obtained were analyzed and presented qualitatively using several steps, including data reduction, display and verification.

### **From *Fiqh* to Qanun**

According to the developed legal philosophy theory, the legal positivism concept considers the law identical to the constitution (Darmodihardjo & Shidarta, 1995). In the formation of today's modern constitutional system, a norm that exists amid society must first be created as a positive law for it to have binding, coercive, and sanctioning capabilities. To do this, the provisions of these norms must go through the legislative procedure. The provisions of these standards are merged into laws and regulations through this procedure, resulting in positive laws applied in a country. Most countries that employ this flow of legislation are members of the Continental European or Civil Law stream established by the Dutch.

Meanwhile, this process is called *taqnīn* in Islamic constitutional terms. *Taqnīn* is the process of compiling, separating, and gathering all of the opinions, thoughts, norms, and laws in Islamic law into a singular formulation that applies to everyone in a country (al-Zuhaylī, n.d.). In a nutshell, *taqnīn* is a collection of rules that are used to regulate the state principles and social relations, both in written (constitutions) and unwritten (conventions) form (Dahlan, 1996). According to al-Qaradawi, quoted by Bahar, the formulators of the qanun can be classified as persons who practice *ijtihād* in this modern period. *Ijtihād* that evolves in this manner can be classified as *ijtihād inshā'ī* (innovative, creative *ijtihād*). According to him, the patterns and forms of the legislation drafting would be considered in the *ijtihād* process, *inshā'ī*. The codification of Islamic law, in the form of the qanun, can be a positive law commonly acknowledged in every country, especially those with Muslims as the majority. The government in the country is responsible for preparing Islamic law in the shape of modern legislation (Bahar, 2009).

Indonesia is one of the countries adopting the European Continental (Civil Law) legal system. In this country, every law must go through the legislative process to become a set of rules and regulations, especially in the case of Islamic law. Islamic law must first be turned into Indonesian legal products. In Indonesia, efforts have been made to merge Islamic law into the structure of modern laws. The birth of Law No. 1/1974 on Marriage is documented in Indonesia's history of Islamic law (Rifai et al., 2015). This law's entire content is derived from *fiqh* with its legal diversity. One of the figures involved in the development of Law No. 1/1974 on Marriage, Syarifuddin (still alive in Padang, West Sumatera), indicated that the materials for the Law were *fiqh* books collected from across Indonesia. Generally, the *fiqh* books are based on the Shafi'iyah school of thought. The scholars and other scientific experts were assigned to collect the marriage material in the *fiqh* books to serve as the foundation for the law. Currently, this basic concept may be better known as an academic paper. Before the *fiqh* material was accepted and listed as part of the Marriage Law, the government had put forward several proposals. It is just that the Islamic parties rejected the proposal. In the end, an agreement was reached that the material derived from the government's proposal could be accepted if it did not conflict with the *fiqh* (Mubarok, 2012). Syarifuddin added that one of the most widely contested polemics during the formulation process was the two-to-one inheritance rights ratio between men and women. The polemic split the drafting team into two camps. One supported full adoption of *fiqh* with the portion of two for men and one for women. This is because the foundation is the Quranic verses and the Sunnah, which are *qat'i* (and cannot be changed by humans). Another camp proposed that men's inheritance rights are similar to women's. Syarifuddin went on to say that despite the heated argument that appeared to go on forever, the marriage legislation was eventually adopted, stating that men and women have equal inheritance rights. This is mentioned in classical *fiqh* books (Syarifuddin, interview, December 2019). Similarly, the material for the Compilation of Islamic Law (KHI), which is based only on *fiqh*, was eventually validated through Presidential Instruction No. 1/1991, as well as a slew of additional legislation published in the State Gazette. For example, Law No. 41/2004 on *Waqf* (charitable endowment), which is also sourced from *fiqh*, and Law No. 23/2011 on Zakat Management describes *zakāh* as in *fiqh*.

In the current era of regional autonomy, several regency and city governments have attempted to make sharia-nuanced regional regulations (Fanani, 2017). However, particularly at the national level, these laws are generally limited to civil law, excluding criminal provisions, except those mentioned in Law No. 44/1999 on the Special Status of the Province of Aceh Special Region. The law states that this province has been given special autonomy in its administration. Among the specialties given to Aceh is the authority to implement Islamic law, which has been integrated and has strong historical roots with the Acehnese people. The implementation of the sharia mandated in the law includes its application in all aspects of life. This law has become a robust legal basis for the Aceh Province. It signifies that the application of Islamic law in Aceh is part of state policy (Abas, 2015). Article 3 of Law No. 44/1999 states that implementing Islamic law is a privilege for Aceh. Article 1 (7) of Law Number 44/1999 also states that Islamic law guides Islamic teachings in all aspects of life. So, Islamic law enforced in Aceh is not only in the aspect of *mahḍah* (pure) worship but also in the field of *mu'āmalah* (social relationship) in a broad sense, including in the area of *jināyah*.

Following the law, the Aceh administration set out to draft regional rules (qanun) in order to execute Islamic law. The Qanun of the Province of Nanggroe Aceh Darussalam No. 11/2002 on the Implementation of Sharia in the Field of *'Aqīdah* (theology), Worship, and Sharia was the first qanun of Islamic law issued by the Aceh Government. This qanun's main topic is the application of Islamic law, which is restricted to the fields of *'aqīdah*, worship, and Islamic symbols. The aims of regulating the implementation of Islamic law in those realms, as specified in Article 2 of Qanun No. 11/2003, are as follows: first, to nurture and maintain individual and community faith and devotion from the influence of heretical teachings; second, to improve the understanding and practice of worship as well as the availability of the facilities; and third, to revive and revitalize activities to create an Islamic atmosphere and environment.

In order to realize the goals proclaimed, the qanun material contains various provisions, including the prohibition of spreading heretical beliefs or sects, leaving the Islamic creed (apostasy), and/or insulting or harassing religion. These restrictions are part of an effort to protect Aceh's Muslims' beliefs. Then there's the obligation to worship, including obligatory prayers, Friday prayer, and fasting. This is also



part of an attempt in Aceh to enhance Muslim worship practices and commitments. There are numerous provisions in this qanun regulating Islamic attire. According to the official explanation of Article 13, Islamic attire is clothing that covers the genitals, is not see-through, and does not reveal the body contours. This arrangement is part of a more significant endeavor to resurrect and create an Islamic setting and ambiance. Gender substantive values are an in-depth consideration in formulating this part (Saiful, 2016: 235). Even after the implementation of this qanun, the people of Aceh have come under criticism from various elements (Taylor, 2015), even from Langsa women who express their resistance (Ansor, 2015). In this case, the qanun is considered a threat to the existence of the Indonesian state (Isra et al., 2019).

As a result, for these laws to function properly, the qanun has provisions for punishing violators. People who disseminate deviant views or sects can face *ta'zīr*, which has a maximum sentence of two years in prison or 12 lashes in public (Article 20, Paragraph 1). Violators of this provision will be subject to *ta'zīr* sanctions. This is placed on individuals who purposefully do not pray on Friday and openly declare that they do not pray on Friday (Article 21). This is similar to the regulation of the Malaysian State of Perak (PEKAP) Criminal Crimes, 1992). Similarly, those who break the rules of Islamic attire face repercussions (Persatuan Penguat Kuasa Agama Islam Negeri Perak, 1992). After going through the coaching procedure and receiving a warning from Wilayatul Hisbah, violators are given the *ta'zīr* penalty (Article 23). Wilayatul Hisbah, described in this qanun (Article 1, Paragraph 11) as the organization tasked with overseeing the implementation of Islamic law in Aceh, is in charge of executing the regulations of this qanun (Abubakar, 2006).

The regular raids by Wilayatul Hisbah, to the exclusion of numerous comments and critiques directed at the Aceh Regional Government, show efforts to execute the provisions of this qanun. This raid was conducted to take stern action against anyone who disobeyed the qanun's provisions. Among the provisions that are most frequently violated are the provisions for Islamic attire. Generally, tens of violators who breach the qanun are usually linked to the need to wear Islamic attire. This is apprehended in every raid undertaken by Wilayatul Hisbah. For example, on 5 August 2019, the Municipal Police and the Wilayatul Hisbah launched a raid on Jalan Merdeka in Lhokseumawe. They arrested 42 drivers wearing

clothing that did not conform with the qanun's rules, with details of 20 men and 22 women (Masriadi, 2019).

After those qanuns, the Aceh Regional Government also attempted to formulate more specific Islamic laws, notably Islamic criminal law, into the form of qanun. The birth of three qanuns at the same time demonstrates this, with the substance of the qanun comprising Islamic criminal provisions. More qanun will continue to be produced in Aceh (Yuswalina, 2016).

Following these qanun, the Indonesian government and the Free Aceh Movement (*Gerakan Aceh Merdeka*/GAM) signed an agreement in Helsinki, Finland, on August 15, 2005. This agreement is also known as the Helsinki Memorandum of Understanding (MOU Helsinki). The agreement contains that the Indonesian government must establish a new Law on the Administration of Aceh Government (MOU Helsinki). Then, on August 1, 2006, the Government of Aceh published Law No. 11/2006, offering greater acknowledgment of sharia application in Aceh. Article 125 of this Law states that: 1) the sharia enforced in Aceh encompasses '*aqidah, sharia and morals*, and 2) the sharia, as referred to in Paragraph (1), includes worship, *al-aḥwāl al-shakhshiyah* (family law), *mu'āmalah* (civil law), *jināyah* (criminal law), *qadā'* (judicial), *tarbiyyah* (education), *da'wah, shi'ār*, and the defence of Islam, and (3) further Provisions regarding the implementation of Islamic law as referred to in Paragraph (1) are regulated by Aceh Qanun. As a result of this law, Islamic law has now become national law. On the other hand, this law necessitates the establishment of organic laws, particularly qanuns, that will execute Islamic law. As a result, in the framework of administering Islamic law in Aceh, the qanun becomes both material and formal law (Abas, 2015).

After the issuance of the Law on the Government of Aceh, Qanun No. 8/2014 on the Principles of Sharia followed. Article 2 of this qanun indicates that Islamic law applies to all parts of community life and the apparatus in Aceh, including *aqidah, sharia, and morals*. Furthermore, the second Paragraph of this qanun states that the implementation of Islamic sharia in the realm of sharia comprises worship, family law, civil law, criminal law, justice, education, and Islamic defence. The material in article 2 of this qanun appears to be the same as in paragraph 2 of article 125 of the Aceh Government Law. This demonstrates that this

qanun was created to commemorate the Aceh Government Law's grant of authority to the Aceh Province.

The Aceh Provincial Government started drafting new qanun on the Jinayat Law and a new Jinayat procedural Law in 2007. The qanun on the Jinayat Procedural Law was created to improve the efficiency of the previous Aceh government's Jinayat Qanun's (*khamar*, *maysir*, and *khalwat*). Since the promulgation of these qanuns, no formal law regulates explicitly the enforcement of the material laws contained in these qanuns. The new Qanun Jinayat is to unite all of the qanuns with jinayat legislation materials that the Aceh government had produced into one comprehensive qanun. Then, using a new formulation, try refining it and include some more items regarded as essential to be regulated in the new Jinayat Qanun. This is done to implement legal reforms that align with the evolving realities and needs of the Acehnese people. In addition, the drafting of the new Aceh Jinayat Qanun also aims to fill in aspects that have not been covered in the regulation of the qanun so that there is no legal vacuum (Marzuki, interview, July 18, 2019)

### **Qanun on *Khamr* (Wine) and Others**

The Qanun of the Province of Nanggroe Aceh Darussalam No. 12/2003 on Alcoholic Drinks mentions that drinking alcohol is one of the behaviors Islamic law prohibits. This alcoholic drink can harm the mind and cause it to lose function. In Islamic law, when people consume it, they become inebriated, and their drunkenness is bound to disrupt their benefit and public order. Therefore, the qanun has strict laws prohibiting anyone (subjects of the qanun, Muslims living in Aceh) from drinking alcoholic beverages. Not only consuming, but business entities are also prohibited from producing, providing, selling, supplying, distributing, transporting, storing, hoarding, trading, giving away, and promoting alcoholic beverages (Article 4-6 of Qanun No. 12/ 2003 on Alcohol Drinks). The criminal provisions in this qanun are regulated in Article 26, stating that anyone who consumes alcohol is threatened with 40 lashes of *'uqubat al-hudūd*. The same provisions are regulated in the Brunei Darussalam Qanun (Natsir et al., 2019). Furthermore, business entities that violate the qanun can be subject to sanctions such as closing and terminating their business licenses.

Based on statistical data from 2005 to 2009 issued by the Shar'iyah Court of Aceh Province, there were 53 criminal acts of alcohol cases that the Shar'iyah Court has handled throughout Aceh Province. Most cases occurred in 2006, as many as 21 cases. Banda Aceh was where the most cases of *khamr* occurred, with a total of 21 cases. The statistical data also shows that the number of *khamr*-related criminal activities has decreased yearly. This has been evident in some parties' claims that the qanun is highly effective in reducing *khamr* infractions in Aceh Province. Some scholars argue that *'uqubat al-ta'zīr* can prevent the authorities from arbitrating the punishment (Tarigan, 2017).

### **Qanun on *Maysir* (Gambling)**

Qanun No. 13/2003 explicitly regulates gambling-related issues. The emergence of this qanun is inextricably linked to the Acehese people's social situations, which are widely thought to be outside of religious norms. According to Article 2 of Qanun No. 13/2003, gambling is defined as all kinds of acts and games that allude to betting, such as domino games, billiards, soccer, cockfighting, and card games (Ritonga, 2004). According to Article 3, the presence of this qanun serves numerous reasons. First, the qanun maintains and protects the Acehese people's assets or wealth, so they are not combined with prohibited assets. Second, the qanun protects Acehese community members from the adverse effects of gambling activities. Third, the qanun strengthens Acehese people's engagement in community initiatives to prevent and eradicate *maysir* activities. Articles 4, 5, 6, 7, and 9 contain prohibitions against anyone carrying out *maysir* activities or providing facilities for others to do so, and the regulations of *'uqubat* (penalty) for offenders of this qanun are stated in Articles 23 to 27. First, a maximum of 12 lashes and a minimum of 6 lashes are for offenders who commit *maysir*-related acts. Second, repeat offenders receive a third of the weighing sanction. Third, individuals or businesses who supply facilities face a maximum fine of 35 million Rupiahs and a minimum of 15 million Rupiahs.

According to the Shar'iyah Court's statistical records, this *maysir* crime was the first criminal offence submitted before the court. The first case took place under the Kuta Cane Shar'iyah Court's jurisdiction. This case was decided on January 19, 2005, with Decision No: 01/JN.S/2005/

MSY-KC. The following case was filed at the Bireun Shar'iyah Court and was decided on June 24, 2005, with the Decision No: 01/JN/2005/MSY-BIR. According to the requirements of Aceh Qanun 13/2003 on *Maysir*, the offenders in these incidents were punished with caning (*Tim Perumus Qanun Aceh*, 2007). The Shar'iyah Courts handled many other *maysir* cases after these cases were reported.

### **Qanun on *Khalwat***

This qanun regulates the crime of seclusion, an activity, behavior, or event leading to infidelity. As stated in Chapter II, Article 3 of Qanun No. 14/2003 on Seclusion, the goals of outlawing seclusion are: first, to enforce Islamic law and practices in society; second, to safeguard the public against various types of behaviors or those that are detrimental to honor, and third, to prevent community members from engaging in behaviors that lead to adultery as early as possible, and fourth, to encourage community participation in preventing and eliminating activities that harm morals. The prohibition of seclusion in this qanun is regulated in Articles 4 and 5. It is illegal for anyone, including individuals, community groups, government agencies, and businesses, to provide facilities for people committing *khalwat* (Ritonga, 2004). Seclusion is immoral conduct not subject to *hudūd* or *kaffārāt* sanctions for the perpetrator but is classified as a *ta'zīr* crime (al-Zuhaili, 1997). Seclusion is a form of disobedience whose punishment is not regulated in the Quran and Sunnah. Seclusion is a sort of disobedience without punishment in the Quran or Sunnah. Articles 22, 24, and 25 of Qanun No. 14/2003 define the legal consequences imposed on perpetrators of seclusion and those who facilitate it. According to the laws, people who perform *khalwat* (obscene activities) can be punished with whipping up to 9 times and a minimum of 3 times, as well as a fine of at least two million five hundred Rupiahs. If the act is repeated, the penalty is increased by one-third. If it is related to a place of business, the perpetrator may face fines such as the revocation and cancelation of the business permit (Abubakar, 2006).

The crime of seclusion became the most common criminal offence in Banda Aceh in 2013. There have been numerous cases of seclusion determined by the Shar'iyah Court since the issuance of the Qanun that regulates seclusion. In addition, there were 211 cases of *khalwat* and

obscenity addressed by municipal police officers and Wilayatul Hisbah (Afif, 2013).

### **The Formulation of the *Rajm* (Stoning Sentence) in Aceh Qanun**

Issuing the Jinayat Qanun and Jinayat Procedural Law Qanun took considerable time. These two qanun began to be drafted in 2007. This was marked by the release of the academic papers on April 22, 2007. After a lengthy debate, the Jinayat Procedural Law Qanun was finally ratified on December 13, 2013. Following that, on October 22, 2014, the Aceh Jinayat Qanun was ratified. The process of debating these two qanuns took place in the Aceh House of Representatives at two different times, namely from 2004 to 2009 and 2009 to 2014. During the discussion in the first period of 2009, there was no agreement between the members of the Aceh People's Representative Council (DPRA) and the Aceh Provincial Government. This disagreement was caused, among other things, by one of the Articles in the draft of Jinayat Qanun and Jinayat Procedural Law Qanun, containing stoning for adultery with *muḥṣan* (married) status. In Article 24, Paragraph (1) of the draft of Jinayat Qanun, it is stated that: *"Anyone who intentionally commits adultery is threatened with 'uqūbat al-ḥudūd of 100 (one hundred) lashes for those who are not married and 'uqūbat of stoning or death penalty for those who are married."* Then, in the provisions of Article 244 of the draft of Jinayat Procedural Law Qanun, it is mentioned that: *"If the convict is sentenced to 'uqūbat of stoning or death penalty, the execution is carried out by an officer appointed by the prosecutor whose implementation mechanism is regulated by the Supreme Court."*

Based on the stipulations of the two Articles, it is clear that people who commit adultery while in *muḥṣan* status (married) will face stoning as a punishment. An official nominated by the prosecutor carries out the punishment, and the Supreme Court will regulate the system. However, as previously stated, the inclusion of the stoning punishment in the drafts of Jinayat Qanun and Jinayat Procedural Law Qanun did not receive the unanimous consent of all members of the Aceh House of Representatives at the time, including the administration. This can be seen from some of the general responses of the Aceh People's Representative Council members and the Aceh Government (*Notulensi/Catatan Rapat Sidang Paripurna DPRA, 2009*).

The group discussing the qanun draft was from the government, experts and members of DPRA who agreed that stoning was included in the Jinayat Qanun and Jinayat Procedural Law Qanun drafts. At that time, they argued that stoning was part of the *hudūd* punishment, which has explicit provisions in Islamic teachings. This is based on a hadith, stating that the sentence is for the perpetrators of adultery with *muhşan* status. This is consistent with the provision of a hundred lashes for adulterers with *ghayru muhşan* (not marriage) status. These two sorts of punishment have been established for each offender of adultery based on their standing when the crime was committed (Rasyid, interview, July 20, 2019).

Meanwhile, some of them who disagreed with the inclusion of the stoning penalty in the draft of Jinayat Qanun and Jinayat Procedural Law Qanun recommended that an in-depth investigation be conducted first before including such punishment in the draft. This is necessary because the stoning sentence recorded in the hadiths has features that can lead to disagreements over how it should be executed, particularly in Aceh at this time. In addition, the government (including educating the community at all levels of schooling) and the general public must be well-prepared. The purpose is for the stoning sentence to be known to the public, understood, addressed, and comprehensively applied after it is incorporated and regulated in the qanun. In his general response to the draft of the qanun, the former Aceh Governor time stated that:

“From a series of marathon discussions conducted by the Special Committee XII together with representatives appointed by the executive, team of experts, RDPU, and various other records of opinion suggestions, for perfection, we submit some additional inputs as follows. Regarding Article 24 Paragraph (1), in several meetings between the executive and the special committee XII in discussing the draft of Jinayat Qanun, the executive has officially conveyed that at this time, we have not agreed on the inclusion of the *'uqūbat* of the stoning of the *jarimah* carried out by married people. In order to implement the *'uqūbat*, we consider that it is still necessary to conduct a more in-depth and comprehensive study because its implementation is identical to the death penalty. In our opinion, the implementation of 'stoning punishment' should not be carried out in a hasty arrangement but must be carried out in stages. Likewise, for its implementation, it is necessary to have community readiness and implementing resources, supporting facilities and infrastructure as part of the national legal system. In

addition, the government and other elements of society still need to conduct an in-depth study of various texts (the Quran and Sunnah), scholars' opinions, and their application techniques” (*Notulensi/Catatan Rapat Sidang Paripurna DPRA*, 2009).

Based on the general response, it appears that the Aceh government and some Aceh House of Representatives members are at odds about whether the ‘*uqūbat* of stoning’ should be included in the new Jinayat Qanun draft. This argument dates back to when the qanun draft was being discussed. This is because the Aceh government considered the need for a more in-depth and comprehensive investigation into the implementation of stoning sentences. The Aceh government also saw the necessity for meticulous planning in the punishment's execution, both in terms of community readiness and the readiness of supporting institutions and infrastructures to include stoning as part of the national legal system. As a result, the Aceh government announced that the regulation and implementation of the ‘*uqūbat* of stoning’ should not be rushed and should be done in phases. In a further general response, the Governor of Aceh stated that Presidential Decree No. 11/2003 concerning the Shar’iyyah Court and the Shar’iyyah High Court Article 3 mentions that the powers and authorities of the Shar’iyyah Court and the Shar’iya High Court are the powers and authorities of the Religious Courts and the High Religious Court.

Moreover, other powers and authorities related to social life in worship and Islamic symbols stipulated in the qanun. In addition, other powers and authorities, as referred to in Paragraph (1), are implemented in stages in accordance with the competence and availability of human resources within the framework of the national justice system. If the sorts of ‘*uqūbat* regulated in this material legislation are deemed insufficient to serve as a lesson for *jarīmah* violators, the Governor added, there is still a chance that the draft of this qanun can be perfected one day after a thorough review. This opinion is in line with the direction of the Supreme Court when visiting the Special Committee XII at the Supreme Court. The Governor added that the administration remains optimistic that the ‘stoning punishment’ will be implemented in Aceh when law enforcers and the community are ready to embrace it (*Notulensi/Catatan Rapat Sidang Paripurna DPRA*, 2009).



Considering the continuation of the general response, it is clear that the Aceh government remains hopeful that the stoning sentence will be incorporated in the Jinayat Qanun. This will be accomplished following a thorough examination of the material and the imposition of the stoning penalty. Furthermore, the readiness of law enforcers and the community to carry out the punishment is crucial. Thus, if the Jinayat Qanun material is refined, it is still possible to include 'uqubat of stoning'. The Governor of Aceh also put forward another argument. The application of sharia needs to be carried out in phases, along with increasing public understanding, knowledge and awareness of the *kāffah* (total) implementation of sharia.

For this reason, the application of Islamic law does not only prioritize 'uqubat. Still, it requires community education efforts, continuous socialization and da'wah that are carried out intensively, comprehensively, integrated and well-planned (*Notulensi/Catatan Rapat Sidang Paripurna DPR*, 2009). This is directly implemented in all universities by changing the curriculum (Jailani, 2019: 294). In the continuation of this general response, the Government of Aceh reiterated that the process of adopting Islamic law in Aceh Province should be done in stages. This is accomplished by considering community readiness and support for efforts in Aceh Province to administer Islamic law comprehensively.

Moharriadi, a member of the Aceh House of Representatives' discussion panel, addressed a similar perspective. He noted that in law enforcement activities, three aspects must be prepared: first, the government's readiness in terms of facilities and infrastructure, as well as the apparatus that would implement the law; second, the community's readiness to understand and follow the regulations, and third, the legal content/materials' preparedness to be regulated in the qanun. As a result, in addition to the government's readiness and the laws and regulations controlling this topic, the community's preparedness is also critical to the success of law enforcement. Comprehensive community education is the most crucial aspect of the efforts to uphold Islamic law in Aceh. It is intended that through providing continuing legal education, particularly on *hudūd* and other sharia-based laws, the community will be able to develop legal knowledge and nurture morality among its members. This will become one of the essential foundations in the law enforcement

process, particularly Islamic law in Aceh Province (Moharriadi, interview, July 16, 2019).

Based on the considerations conveyed by the Aceh Government in the general response, the Aceh Government has not agreed with some members of the Aceh House of Representatives who want the stoning to be included in the two drafts of qanun. Then, the Aceh government decided not to sign those drafts. The Aceh Government resumed its work in 2012 to draft the Aceh Jinayat Qanun and the Jinayat Procedural Law Qanun. This was marked by the issuance of the Governor of Aceh Decree No. 188/442/2012 on the Formation of the Drafting Team for the Aceh Jinayat Qanun and the Jinayat Procedural Law Qanun. After the formation of this team, the drafts of Aceh Jinayat Qanun and the Jinayat Procedural Law Qanun were issued. In Article 24, Paragraph (1) of the draft of Jinayat Qanun, it is stated that "everyone who intentionally commits adultery is threatened with '*uqubat al-ḥudūd*' of 100 (one hundred) lashes."

According to the stipulations of this Article, anyone who intentionally commits adultery is threatened with a *ḥudūd* penalty of 100 (one hundred) lashes. The punishment of stoning as a sanction for perpetrators of adultery whose status is *muḥṣan* (married) has been removed from the Article's provisions. This decision cannot be separated from the considerations raised during the previous period of qanun discussion. This is known from the explanation Abubakar as one of the experts in the qanun drafting. He stated that the stoning sentence had been removed from the Jinayat Qanun as part of the phasing procedure (*tadrij*) to establish Islamic law comprehensively in Aceh Province (Abubakar, interview, July 16, 2019). *Tadrij*, also spelled *tadarruj*, means to do anything gradually, slowly, and not all at once. Enforcing Islamic law in the society in stages is necessary due to people's lack of understanding of the Islamic legal principles, particularly *jarimah al-ḥudūd*. It could also be due to other causes that prevent sharia from being implemented simultaneously in society. At the same time, significant and continuous efforts are being made to implement the sharia completely. This strategy was once implemented by the Prophet Muhammad.

Abubakar indicated that the main reason for contemplating *tadrij* in applying Islamic law in Aceh was that the competent parties had

not yet fully prepared policies to include the punishment in the Jinayat Qanun. This unpreparedness stems from several issues: *first*, the lack of adequate academic research that can be utilized as a foundation for adding these provisions in the qanun. Scientific studies are essential. Aside from serving as the foundation for creating a statutory regulation (qanun), the study must also encompass all (complete) fields, beginning with philosophical, social, and legal elements and other issues relevant to the sentence's implementation. An in-depth and comprehensive scientific study will also be the basis for answering any criticisms raised when the material is included in the qanun. These criticisms can stem from various issues, including charges of human rights violations, the qanun's authority and capacity, the sanctions, and others.

Furthermore, good academic research can help prevent fraud when the regulations are followed. *Second*, no practical formulation can be utilized as a reference for how *fiqh* theories are translated into the development of laws and regulations. As a result, this topic must be carefully prepared for the formulation to be carried out correctly and without deviations. *Third*, facilities, infrastructure, and law enforcement authorities are not ready to carry out these provisions. Abubakar further stated that for the time being, the authorities, including *'ulamā*, scholars, and the government, concentrate on adequately administering the caning and fines contained in this qanun. When the caning and fines are appropriately implemented, and there are no more significant objections to the caning, attention will shift to the subsequent punishment, namely the death penalty, such as *qiṣāṣ* and stoning. If the death penalty has been implemented successfully, with no other errors or mistakes, attention can be focused on additional penalties such as hand cutting. That is the purpose of *tadarruj* in implementing *ḥudūd* punishment in Aceh. He remarked that there is no problem with people's awareness from a sociological standpoint. Adultery is illegal, and community members know that committing adultery will result in severe consequences. The community is actively participating in efforts to enforce the adultery law. Most adultery cases reach the court due to community reports (Abubakar, interview, July 16, 2019).

The new Jinayat Qanun draft was debated in the Aceh House of Representatives. Following the publication of the qanun draft, the Aceh House of Representatives issued Decree No. 2/2014 on the

Priority of Aceh Legislation Programs. Thus, the Aceh Jinayat Qanun has officially become one of the drafts discussed at the Aceh House of Representatives in 2014. Some team members also expressed a desire to return to discussing the provisions of stoning and other criminal provisions that are part of the *ḥudūd* provisions in Islamic criminal law. However, based on the previously outlined factors, the Discussion Team opted to postpone the discussion of stoning and other penalties related to taking life at that time (*Notulensi/Catatan Rapat Sidang Paripurna DPRA*, 2009). Finally, on October 22, 2014, the draft of Jinayat Qanun was ratified with the present qanun's material but without the stoning, *qiṣās*, or hand-cutting punishments.

In addition to the reasons stated above, there are other reasons why stoning is not included in the Jinayat Qanun. This is due to the argument that stoning is for adultery in the *muḥṣan* category. Among the consideration is surah an-Nur (24: 2), which is the basis for the whipping punishment for adultery, and the hadith containing orders and instructions that the Messenger of Allah imposed stoning for those who commit adultery with *muḥṣan* status. Some scholars believe that the hadith ordering the stoning sentence is *takhsīṣ* (specification) to the second verse of Surah an-Nur but that the threat of stoning in the Qur'an outweighs the threat of whipping. The legal threat for adultery is *ḥudūd*, and no one can increase or decrease the number of criminal threats. The meaning of Surah an-Nūr (24) verse 2 is obvious and definite (*qaṭ'ī al-dilālāt*). As a result, the provisions mentioned in the hadith cannot be used because they go beyond the *ḥudūd* provisions set in the Qur'an (Abas & Muhammad, 2018).

### **The Formulation of Hand Cutting Punishment in Aceh Qanun**

The Qur'an al-Mā'idah (3): 33 & 38 states that people who commit theft are punished by cutting off their hands. Many hadiths of the Prophet Muhammad explain the issue. For example, the hadith narrated by al-Daruquthni that the Prophet Muhammad SAW cut off the hand of a thief on his wrist (al-Daruquthni, 1987). In another hadith, it is explained that when a thief is sentenced to cutting off his hand before stealing again, the Prophet Muhammad SAW ordered the *ṣāḥabah* to cut his ankle (al-Kasani, 1997). Based on this, the *fiqh* scholars agree that theft is one of the *jarīmat al-ḥudūd*. However, Article 3 Paragraph 2 of

the Aceh Jinayat Qanun does not include theft as part of criminal acts (*jarimah*) regulated in the qanun. Abubakar (2019) explained that the situation was the same as the punishment of *qisās* and stoning, which had not been included in the Jinayat Qanun.

Another issue faced by the difficulty in implementing cutting hands is the authorities' lack of maximum readiness to formulate the policy. As a result, *tadrij* is required to reach that stage. He indicated that proper academic research is required to develop regulations that would serve as the foundation for implementing the hand-cutting punishment. Among the primary considerations is the maximum effort so that *fiqh* can be understood and formulated in an applicable rule suitable for the Acehnese people's current situation. With an academic study and an excellent practical formulation in the future, the crime of theft may also be regulated by the provisions of the qanun (Abubakar, interview, July 16, 2019). This viewpoint is consistent with the Governor of Aceh's general response during the plenary session of the formulation of the Aceh Jinayat Qanun in 2009. Before including the stoning sentence in the qanun, the governor stated that an in-depth and complete examination and sufficient facilities and infrastructure were required. This, of course, relates to the provisions of the *jarimah* of theft, which include a *hudūd* penalty of cutting off the hands of the violators (*Notulensi/Catatan Rapat Sidang Paripurna DPRA*, 2009).

It is not debatable that the qanun's provisions would contradict higher legal provisions. Abubakar remarked that though this is a factor to consider throughout the legislative process, it is not the most critical factor. According to the Formulating Team, the qanun is a regional regulation with law authority. The qanun's power stems from a direct edict from the law (Abubakar, interview, July 16, 2019). Some constitutional experts believe the qanun's position is the same as other regional regulations (Kamarusdiana, 2016). When the material of qanuns prescribed by the Aceh Province is considered, especially with the ratification of Aceh Jinayat Qanun No. 6/2014, it is reasonable to conclude that the Aceh Province Qanun's authority is similar to the law. Apart from being based on direct commands from the Law on the Government of Aceh, the qanun's jurisdiction to impose criminal penalties equivalent to the law and the authority to impose these penalties is not shared by other regional regulations in Indonesia. As

a result, following the ratification of the qanuns containing criminal material and the execution of the crimes, it is clear that the authority that previously only existed in the law is now also present in the Aceh Province Qanun.

There is also a notion that the Aceh Qanun on theft has something to do with the Indonesian Criminal Code (KUHP). This viewpoint is another reason why the provision for the crime of theft was not included in the Jinayat Qanun. By looking at the provisions in the qanuns that have been ratified by the Aceh Province, especially the Jinayat Qanun, it can be found that there are special provisions such as sexual harassment (obscene) and rape. These are regulated in the Jinayat Qanun and have also been regulated in the Criminal Code (Azkha et al., 2020). This fact does not hinder the ratification and application of the qanun. It can be assumed that the Aceh Qanun falls under *the lex specialis derogat legi generali* (a special law derogates the general law). Also, the Jinayat Qanun prohibits other illegal offences such as adultery and gambling. This clause is more expansive than those found in the Criminal Code. For example, the adultery item in the KUHP indicates that only those bound in a marital relationship can be tried under the law. This is also included in the petitioned offence.

On the other hand, adultery rules in the Aceh Jinayat Qanun apply to anyone who has sexual intercourse outside of wedlock. This provision does not become a barrier to ratifying and implementing the Aceh Jinayat Qanun. This fact demonstrates that the authority of the Aceh Qanun is equivalent to the law. However, the implementation of most of the qanun of Islamic law uses the principle of personality. Non-Muslim violators can vote if there are two legal provisions governing them.

### **The Formulation of *Riddah* and Its Punishment in Aceh Qanun**

*Jarimat al-riddah* is one of the *jarimat al-hudud* that the scholars have agreed upon in the books of *fiqh*. *Jarimat al-riddah* is commonly referred to as apostates in everyday life. In *fiqh*, *riddah* refers to a rational and mature Muslim's return to another religious belief or practice based on his own free will rather than coercion. The main punishment for the perpetrators of *jarimat al-riddah* is the death penalty. This punishment is based on the authentic hadith narrated by Imam al-Bukhari from Ikrimah, stating that any Muslim who converts from Islam to another

religion is to be killed (al-Bukhārī, 2009). Scholars interpret this hadith that an apostate's significant penalty is to be killed following an unsuccessful awakening treatment. Before the perpetrators were punished, they were given an offer and an appeal to repent and return to Islam (al-Hassun, 2001).

In Article 3, Paragraph 2 of the Aceh Jinayat Qanun regarding forms of criminal acts, the *jarīmat al-riddah* is not included in the type of *jarīmah* regulated in the provisions of the qanun. However, in the Qanun No. 11/2002 on the Implementation of Islamic Sharia in the Field of 'Aqīdah, Worship, and Sharia, apostasy (*riddah*) has been declared as one of the prohibited acts. The punishment for perpetrators of *riddah* will be regulated separately in different qanun, as indicated in the 'uqūbat requirements (Jinayat Qanun). This sentence has not been listed because of the various challenges and obstacles faces during the discussion of the Aceh Jinayat Qanun. Therefore, the *ḥudūd* provisions relating to the discussion of *jarīmat al-riddah* was postponed. Surprisingly, the most recent provisions in Aceh Qanun No. 8/2015 on the Guidance and Protection of Aqīdah includes *riddah* in the Third Chapter of Article 7 Paragraph (1). This Article states, "Every Muslim is prohibited from intentionally issuing statements and/or committing acts out of Islam." On this premise, this qanun states that *riddah* (apostasy) is one prohibited acts (*jarīmah*), despite the fact that it is subject to *ta'zīr* rather than *ḥudūd*, as mentioned in Article 18. This Article specifies that every Muslim who is intentionally issuing a statement and/or committing an act out of Islam, as referred to in Article 7 Paragraph (1), is subject to 'uqūbat al- ta'zīr in the form of lashes in public at the maximum of 60 (sixty) times and the minimum of 30 (thirty) times, or imprisonment for a maximum of 60 (sixty) months and a minimum of 30 (thirty) months, or a fine of a maximum of 600 (six hundred) grams of pure gold and a minimum of 300 (three hundred) grams of pure gold.'

In response to this, Abubakar explained that the delay in including the *jarīmat al-riddah* and the *ḥudūd* (punishment) provisions into Aceh Jinayat Qanun is due to similar issues as the stoning for adultery with *muḥṣan* status and cutting off hands for theft. This is because the perpetrator faces the death penalty under *jarīmat al-riddah*. Meanwhile, no academic study has been deemed adequate to be the foundation in the determination of death sentence for *riddah* perpetrators. Abubakar

stressed the importance of doing a philosophical, sociological and substantive academic study before incorporating the issue of *jarimat al-riddah* and its punishment into the Aceh Qanun (*Notulensi Rapat Pembahasan Komisi G DPRA Tentang Rancangan Qanun Jinayat Aceh*, 2014). This is similar to the views of former Aceh Governor conveyed when he gave his general response in the plenary session of the drafting of the Aceh Jinayat Qanun (*Notulensi/Catatan Rapat Sidang Paripurna DPRA*, 2009). In addition, the provisions for *riddah* in the Qanun on the Guidance and Protection of Aqeedah still need to be completed. According to him, there are still numerous ambiguous clauses in the qanun relating to the idea of *riddah*, ranging from the definition to the parts of the procedure proving that the act of *jarimat al-riddah* has occurred (Abubakar, interview, July 16, 2019). The former Aceh Governor argues that the Aceh administration is not yet fully equipped to implement it and that qualified specialists are not yet ready to formulate these provisions into Aceh Jinayat Qanun so that they are widely accepted. As a result, the former Governor and several other elements of society stressed the importance of *tadrij* in formulating *riddah* provisions in qanun. This *tadrij* attempt may be seen in the evolution of the *riddah* arrangement from time to time in the sharia qanun that the Aceh province has issued to date.

## Conclusion

Based on the above description, it is clear that the parties' readiness to formulate the legal drafts becomes the main reason for the exclusion of the stoning for adultery, hands cutting for theft, and the death penalty for *jarimat al-riddah* from the Aceh Jinayat Qanun. Thus, more thorough preparation is required from various perspectives to incorporate these legal provisions within the qanun material. Among the preparations are, *first*, continuous efforts to conduct in-depth and comprehensive academic studies to be used the foundation in the qanun formulation. *Second*, a serious effort must be made to comprehensively understand of *fiqh* provisions and turn them into a practical and operational formulation in the qanun. *Third*, there is a need to prepare facilities and infrastructure and the readiness of the community and law enforcement officials to carry out the qanun. As a result, *tadrij/tadarruj* or phasing is required to implement Islamic



law comprehensively, including *jarīmat al-ḥudūd*, in Aceh Province. The phrasing is also important in determining sentences. This issue can also be found in the provisions governing the *jarīmah* of seclusion and apostasy. Qanun No. 14/2003 on Seclusion determines *'uqūbat al-ta'zīr* with a maximum of nine lashes. Then, in the provisions of Aceh Jinayat Qanun, the maximum limit is increased to ten lashes. This is similar to the provisions governing the criminal act of apostasy in Qanun No. 11/2002 on the Implementation of Islamic Sharia in the Field of 'Aqīdah, Worship, and Sharia. The act of apostasy has been designated as a prohibited act (*jarīmah*) but has no specific kind of *'uqūbah* (punishment) imposed on the perpetrator. In the provisions of Qanun No. 8/2015 on the Guidance and Protection of 'Aqīdah in Article 18 Paragraph (1), it is stated that the provisions of *'uqūbat al-ta'zīr* are the minimum of 30 lashes and the maximum of 60 lashes for apostates.

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**Salma<sup>1</sup>, Almuh Fajri<sup>2</sup>, Taufik Hidayat<sup>3</sup>, and Edi Safri<sup>4</sup>**

<sup>1,2,3,4</sup>Universitas Islam Negeri Imam Bonjol Padang

E-mail: <sup>1</sup>salma@uinib.ac.id, <sup>2</sup>fajrialmuh@gmail.com, <sup>3</sup>taufikhidayat@uinib.ac.id,

<sup>4</sup>edisafri@uinib.ac.id