



## **Solidaritas Perempuan Submission for the Universal Periodic Review of Indonesia September 2016**

### **REPORT ABOUT LOCAL LAW IN ACEH NUMBER 6 YEAR 2014 ABOUT CRIMINAL LAW (QANUN JINAYAH – ISLAMIC CRIMINAL LAW)**

#### **A. PREFACE**

1. The report made by Solidaritas Perempuan (SP), an organization since 1990 that had been fighting for women's rights in various contexts. SP have experienced in organizing and working together with grassroots women in various areas in Indonesia, including women in Aceh – in the context to end all kind of discriminations against women, either discrimination through policy, regulation, and even social practices.
2. The report is also part of follow-up agreement in workshop<sup>1</sup> on Qanun Jinayat held by SP on October 6<sup>th</sup> 2016 along with CSO networks, religious leaders, and academics from Aceh and National. Through this workshop, SP had gathered various data and situation that occur in Aceh which had been influence by the implementation of Qanun Jinayat.
3. The report also made to follow-up several UPR recommendations in 2012, where Indonesia had been ask to eliminate discriminate policies. But the fact is that even Indonesia as one of countries that signed for ratification, but in various region/areas in Indonesia still establish discriminative policy and the numbers of discriminative policy are increasing each year.
4. In Concluding Observation for Indonesia that state in August 21<sup>st</sup> 2013, United National Human Rights Committee also regret with the existence of corporal punishment, including flogging (whip) in Aceh through Qanun Jinayah. The Committee also recommend for Indonesia government to eliminate those kind of punishment.<sup>2</sup>

#### **B. LEGAL FRAMEWORK**

1. The Convention on the Elimination of all forms of Discrimination Against Women had been ratified through Act number 7 year 1984. The convention regulates state's obligation to eliminate all forms of discriminations against women, both in policy and practices. In Article 2 letter f and g, the state party is obliged to (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.
2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had been ratified through Act number 5 year 1998. The Convention obliges for

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<sup>1</sup> Workshop attend by several organizations, namely; LBH Jakarta, LBH Aceh, KontraS Aceh, KontraS Jakarta, Aliansi Jurnalis Independen Aceh, Sejuk, HRWG, Aliansi Nasional Bhineka Tunggal Ika, LBH Bogor, YLBHI, CWGI, PSHK, ICJR, Aceh Youth Group

<sup>2</sup> Concluding Observation Number 15: The State party should take practical steps to put an end to corporal punishment in the penal system and in all settings. In this regard, the State party should repeal Acehese Criminal Law (Qanun Jinayah), which permits the use of corporal punishment in the penal system. The State party should act vigorously to prevent any use of corporal punishment under this law as a form of punishment for criminal offences until it is repealed.

the states to prevent (in any territory under its jurisdiction) acts of cruel or other cruel acts, inhuman, or degrading (to prevent in any territory under its jurisdiction other acts of cruel, Inhuman or degrading treatment or punishment.<sup>3</sup>

3. International Covenant on Civil and Political Rights had been ratified through Law number 12 year 2005, in Article 7 state that *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.* In addition, in Article 10 also confirmed that *all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

4. Indonesia Constitution 1945 (UD 1945) is state foundation that contain Human Right's principles. In the Article 28 G paragraph (1) expressly states that *Every person shall have the right to be free from torture or inhumane and degrading treatment, and shall have the right to obtain political asylum from another country.* Freedom from torture is a nonderogable rights, as stated in Article 28 I (1), *The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.*

5. Act number 39 year 1999 about Human Right's is national policy that further regulates on Human Rights. In article 33 paragraph; (1), *guarantee people rights to be free from torture or cruel punishment, inhuman, degrading the dignity of humanity.*

6. Act number 23 year 2002 about Child Protection, as amended by Act number 35 year 2004 and Act number 11 Year 2012 on Child Criminal Justice System; Article 16 (1) on Act on Child Protection had states that every child have the rights to be protected from mistreatment, torture, or inhuman punishment. Meanwhile, in article 71 paragraph (1) and (2) on Act of Child Criminal Justice System, asserts that the sentence (criminal) imposed on the child are not violate their rights and dignity. In the article also arranged on some types of crime, such as crime principal in the form of warnings, guidance at outside the community agencies or supervision, job training, coaching in institutions and prisons, as well as additional penalty, such as deprivation profits from the crime or fulfillment of customary obligations. From these provisions, it is clear that the caning (whip law) was not included in it so it should not be applied to children.

7. Act Number 12 year 2011 about The Establishment of Law Regulation, where the Act had state that law and regulation must not contradictive with the higher Law.

8. In Aceh context, there is Peace Agreement for Aceh (MoU Helsinki), which state that: *“Aceh Legislature will redraft the legal code (regulation and law) for Aceh based on the universal principles of Human Rights as it state in the International Convention of United Nation on the Rights of Civil and Political Rights and on Economic, Social and Culture Rights (Paragraph 1.4.2 MoU Helsinki)”*

Through Act Number 11 year 2006 about Aceh Government form by Indonesia Government and Indonesia Parliaments as a special legislative frame that given by the state for particular region based on Article 18B (1) of Indonesia Constitution. In addition, the Act also establish as a follow-up of MoU Helsinki. Based on this ‘special’ status, Aceh was given special authority (based on Act related to Aceh Government), one of it are the implementation of Islamic Syari’ah values for local community that organized by Qanun. The position of Qanun in Indonesia Law system is the same level with area regulation that governing area administration and Acehnese people. Although Aceh Government has the right to regulate Aceh regions autonomous and exclusive based on the Law on Aceh Governing, but it should

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<sup>3</sup> Article 16

be remembered that the authority is not absolute. There are corridors of national laws and humanitarian values, including international agreements on human rights that have been ratified by the Indonesia government which become limitation for the implementation of Aceh government authority. In addition, the regulations should also reflect from Aceh peace agreement, which is based on the universal principle of human rights.

### C. QANUN JINAYAT AS DISCRIMINATIVE POLICY IN INDONESIA

1. In 2015, Indonesia has 389 discriminative policies and in 2016 the number are increase to 421 discriminative policies<sup>4</sup>. Qanun Jinayat or Aceh Local Regulation Number 6 Year 2014 are one of the above discriminative policies. This Qanun is a policy in the name of Sharia Law with single Islam interpretation and do not consider diversity and pluralism within Islam or even Aceh people. As a result, Qanun create a potential discrimination and even criminalize the people who have different interpretation in understanding and live in Islam way.

2. Through single interpretation, Qanun also regulate various criminal acts such as *Khalwat* (relation and meeting between women and men) and sex outside marriage, these acts are not crimes based on Indonesia National Criminal Code. This situation is not only discriminate but also violate people rights to privacy.

3. In addition, the regulation in Qanun is not only applies for Muslim people but also non-Muslim people – they also become the subject in the implementation of Qanun policy. There are two situations related, namely (1) Every non-Muslim people who commit and perform acts that prohibited by Qanun, together with Muslim people and chose and subject themselves, voluntary, to Jinayat Law (Qanun Jinayat), and (2) Every non-Muslim people who conduct acts that prohibited by Qanun and not regulated in KUHP (Indonesia National Criminal Code) but regulated in the Qanun. Through the regulation, it is clear that Qanun is not consider diversity values in the society, and even tend to impose single interpretation of Sharia (Islam values) in Qanun which applied for all parties.

4. In the other hand, the policy also failed to give justice for women, for example in rape case where the victim have to give preliminary evidence to file their case.<sup>5</sup> Not only that, the proving and evidence process is only use vow from offenders which allowing the offenders to be free after they declare vow five times. As we know that in rape case, the process to prove the case is a challenge and difficult for the victim. So with the regulation contained in Qanun Jinayat, women rape victims will not receive justice.

5. At JPA 231<sup>6</sup> annual report done by the women's movement in Aceh also mentioned that "*The application of discriminatory policy (Qanun Islamic Sharia and Qanun Jinayah) imposed in Aceh does not guarantee the elimination of violence against women, but instead makes violence against women to be increase*" (annex 1)

### D. WHIP PUNISHMENT AND EXECUTION

1. The punishment implementation of Qanun Jinayah in Aceh is consists of 3 punishments, as follows; jail, pay a fine with gold, and whips (from 10 to 200 times). In of the chapters in Qanun Jinayah, almost all chapter related to sanctions and punishment are also include caning/whip punishment. Of course this kind of punishment is contrary with the

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<sup>4</sup> Report of National Commission of Anti-Discrimination Against Women

<sup>5</sup> Article 52 Qanun Jinayat: *Every people who confessed to be rape can file the case to the investigator about the perpetrator who rape her by including preliminary evidence*

<sup>6</sup> JPA 231 is special raporteur for women situation in Aceh. This raporteur is inisiated by women's right organization in Aceh and Indonesia Women Comission (KOMNAS Perempuan)

Convention Against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment (CAT) which Indonesia has ratified through Act Number 5 in 1998. In addition, the form of caning/whip law in Qanun Jinayat also contrary to (a) 1945 Constitution Article 28G (1) (b) Law Number 39 Year 1999 on Human Rights, (c) Law Number 12 Year 2005 on the Ratification of Covenant on Civil Rights and Politics,<sup>7</sup> and (d) Law Number 1 Year 1946 about the Book of Criminal Law Act (Criminal Code).

2. Since the validity of Qanun Jinayat in October 2015 there are 33 cases documented by Solidaritas Perempuan, where the vast majority of cases are executed is "*Khalwat*" or meeting between women and men<sup>8</sup>. The executions are carried out in public and usually watched by many people. This execution is a form of violence, not only physical, but also psychological, which impacts on the psychological trauma for the person who receive punishment. Executions were carried out in public and clearly show the faces of the person who were executed, this situation will also have an impact on social exclusion, stigma and stereotypes. In addition, there aren't any actions done by Aceh government in recover/rehabilitate the people who receive the punishment, or even a recovery from any charges if proven not to be guilty.

3. In the Qanun Jinayah execution, it is often for local officials such as *Wilayatul Hisbah* (Sharia Police) to use their own measure in interpreting Qanun Jinayah contents without seeing the aftereffects of the victim who receive the punishment. For example in case of 2 women to be arrested in one of the beaches in Aceh and accused to be lesbian.<sup>9</sup>

4. Not only contrary with CAT, but the regulation related to whip punishment in Qanun Jinayat is also contradict with Law Number 11 Year 2012 about the Children Juvenile Justice System and Law Number 23 Year 2002 about Child Protection. In Qanun Jinayat, children under the age of 18 may receive 1/3 punishment from adult sentence, which means that the child can still be subject to caning/whip punishment. This punishment will certainly impact on children's future, especially the executions is done in public. In addition, there aren't any recovery and rehabilitation (impact from post punishment) for the children who receive the punishment.

## E. PARTICULAR IMPACT ON WOMEN

1. From the case findings compiled by Solidaritas Perempuan, state that in the implementation of Qanun Jinayat the majority people arrested were women. Over the years, cases of violence against women in Aceh continues to increase. Data from Aceh Monitoring Network (JPA) 231, shows the number of violence in 2014 are 205 cases which increase from 2013 with 151 cases. The figure includes 1,114 kinds of violence, which means that women subjected to layered of violence, where women experienced more than one type of violence. This shows that the implementation of sharia law, through Qanun, are not be able to protect women from violence but it is only strengthens the potential for criminalization and discrimination.

2. On September 3<sup>rd</sup> 2012, in Langsa City, Aceh, a 16 years old girl become victim of false arrest by 'Sharia Police' with charges of Sex Worker.<sup>10</sup> This accusation had resulted for

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<sup>7</sup> Article 7: *No one should be subjected to torture or degrading treatment or other punishment that is cruel, inhuman or degrading dignity. In particular, no one shall be made as an object of medical or scientific experimentation without given freely consent.*

Article 10: *Every person who taken their liberty and freedom shall be treated with humanity and respect for the inherent dignity of human being*

<sup>8</sup> The description of execution process capture by ABC news in this following link: <http://www.abc.net.au/news/2016-06-11/public-humiliation-after-friday-prayers-in-aceh/7499048>

<sup>9</sup> <http://habadaily.com/polhukam/5946/pasangan-lesbian-tertangkap-yang-bikin-gempar.html> and <http://www.voaindonesia.com/a/aceh-rehabilitasi-2-terduga-lesbian/2991671.html>

<sup>10</sup> <http://ajibanda.org/2012/09/sikap-aji-banda-aceh-terhadap-kasus-pemberitaan-bunuh-diri-remaja-di-langsa/>

the victim to become object of discriminative behavior from the media and society, and eventually the girl commits suicide. This case had shown that the implementation of Sharia law is broadly impacts on layered of violence experienced by women. The above case for example, women not only experienced criminalization but also stigma and exclusion from the society that have an impact on psychological and resulting the victim to commit suicide.

3. Qanun Jinayat had been official implemented on October 23<sup>rd</sup> 2015 and potential to increase the numbers of violence and discrimination against women. It can be seen from the Articles in Qanun, for example on Article 52 (1) regulate about rape victim to provide preliminary proof and evidence. Whereas, in rape case it is difficult to provide evidence and witnesses. Moreover, rape victims also suffered psychological impact and trauma that resulting the victim to have trouble in expressing and describing what happened to them. In addition, in proving process, rape offenders can be free from punishment only with a vows<sup>11</sup>. This of course will be extremely difficult for rape victims to get justice. Not only that, the victims are also vulnerable to be reported back from the offender with charges of defamation.

4. The Qanun Jinayat execution in public also gave layered of impacts for women. In social construction that tends to blame on women where women are often experience stigma and discrimination larger than men. This will also impact on deep trauma and depression.

5. In addition to contents issue, the Qanun Jinayat - making process is not participatory by not involve people, especially women who will be affected by Qanun implementation. Based on the monitoring results of Women situation done by Solidaritas Perempuan related to Qanun Jinayat, only 8.8% of people know and understand about Qanun Sharia Islam but there only 5.7% of people know but do not understand the Qanun as well as Qanun jinayat. Based on Solidaritas Perempuan data, only 2.4% people obtain the information from local government while 48.6% people did not get any information and explanations<sup>12</sup>.

## **F. CIVIL SOCIETY EFFORT TO PUSH FOR JUDICIAL REVIEW**

1. Various efforts had been done by civil society in Aceh and national to push the repeal of Qanun Jinayah. The efforts are through various dialog with government institution, both local and national, namely to Aceh Sharia Department, Aceh Governor, Ulama Consultative Assembly (Islam Religious Leader), Member of Aceh legislative, the Ministry of Domestic Affairs<sup>13</sup>, as well as to Presidential Affairs staff, to deliver a range of issues/problems related to Qanun Jinayat. In the dialogues, people are explicitly submits a recommendation to repeal the discriminatory policy. From these efforts, appear some responses to follow-up the civil society recommendations. On submission of analysis results to push the "review" on Qanun Jinayah, Vice of MPU Aceh even revealed that there are still many articles in Qanun Jinayah that discriminate women<sup>14</sup>. Unfortunately, until now this commitment has not been followed up, which results for Qanun Jinayat to still continue to be implemented.

2. In the process of documenting the problems of Qanun Jinayah, civil society also devised various studies, monitoring, and analysis by involving various stakeholders such as grassroots women, lawyers, academics, religious leaders, and others. The results from the study, mapping and analysis has also been submitted to various authorities to strengthen civil society recommendations regarding the repeal of Qanun Jinayat, either through dialogue, public discussion, as well as other forums.

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11 Article 55 Qanun Jinayat

12 <https://indonesiasp.elva.org/rasa-aman-di-aceh>

13 Article 250 Law Number 23 year 2014 gives authority to Ministry of Domestic Affair to conduct executive review of Local Laws, to ensure those Local Laws is not contradictive with higher Regulations (Laws), including principle of Human Rights and Women's Rights.

14 <http://lintasgavo.co/2015/03/26/tidak-dilibatkan-kaji-qanun-jinayah-ketua-mpu-aceh-ada-pasal-tidak-berpihak-perempuan>

3. Effort for Judicial Review through courts also had been done by civil society organization. Judicial Review was submitted by Solidaritas Perempuan and the Institute of Criminal Justice Reform (ICJR) to the Supreme Court that have the authority to conduct a judicial review for all legislation (Regulations, Local Law, etc) under the National Law, to see if these policy/regulation are consistent or contrary to the Law/s. However, the Supreme Court had decided that the Judicial Review is inadmissible (*Niet Ontvankelijk Verklaard*) because the appeal is not substantive where one of the Acts which is used as a center touchstone is still in the petitioned for Judicial Review in the Constitutional Court (Annex 2).

4. In addition, in the 10th anniversary of the MoU Helsinki signing, together with Europe-Asia civil society networks in Helsinki EU office, Solidaritas Perempuan and one of Aceh scholars (Academics) had convey the situation occur in Aceh after the signing of MoU. On that occasion, SP also address the issues related to Qanun Jinayah as an attempt to get the attention from international community against discrimination and human rights violations that occurred in Aceh through the policy (Qanun Jinayah).

## G. SUMMARY

1. Lines of violence that most of the victims are women, is an indication that the government has failed to give citizens right for safety, security and justice. Meanwhile, the government are actually strengthens violence through its policies, including Qanun Jinayah. This resulted in the violation of women's right for safety and security set out in the 1945 Constitution Article 28G paragraph 1.<sup>15</sup>

2. The implementation of Qanun Jinayah is contrary with the principles of human rights and women's rights as contain in various International Human Rights Convention, Constitution, and Law, as follows:

- a) Law No. 1 Year 1946 about The Book of Criminal Law;
- b) Law No.39 Year 1999 about Human Rights;
- c) Law No. 12 Year 2005 on the Ratification of International Convention about Civil and Politic Rights;
- d) Law No. 5 Year 1998 on the Ratification of Convention against Torture and Degrading Treatment or Other Punishment (Cruel, Inhuman, or Degrading Human Dignity);
- e) Law No.12 Year 2011 on Establishment of Regulations;
- f) Law No. 11 Year 2012 about Child Criminal Law System;
- g) Law No. 23 Year 2002 about Child Protection, as amended by Act No. 35 Year 2004;
- h) Law No.8 Year 1981 about Criminal Proceedings;
- i) Law No.48 Year 2009 about Judicial Authority; and
- j) Law No. 7 Year 1984 on The Ratification of Convention Anti-Discriminative against Women

## H. RECOMMENDATION

Based on the above situations, Solidaritas Perempuan recommend for:

1. Indonesia government, through Ministry of Internal Affairs, to review and repeal Qanun Jinayah

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<sup>15</sup> Every people has the right on protection of self, family, honor, dignity and property under his/her control and are also entitled for the rights to safety and protection from threat that force to do or not do something that is a basic right

2. Indonesia government, through Ministry of Internal Affairs to review Qanun and as well as local regulations and other laws products, to ensure that there are no policies that discriminate against women and violate human rights
3. Indonesia government to develop strict mechanism in the drafting process of regulation/policy in national and local, to ensure there aren't policy that discriminate against women and violate human rights
4. Indonesia government, national and local, to involve civil society organization, human rights and women rights, in the process of policy making (include drafting), monitoring and evaluation process, up to revision and review the policy/regulation that are consider to be discriminate