Implementation of the Concept of Islamic Criminal Responsibility in Indonesian Positive Law

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Abstract
The positive legal system of Indonesia is not in line with the idea of accountability from Jinayah. Criminal responsibility according to Islamic criminal law is based on the awareness and intention of the perpetrator (mens rea) and proof of the unlawful act (actus reus), which is in line with the principles of sharia. The purpose of this study is to study how the concept of Islamic criminal responsibility can be applied to Indonesian law by considering the principles of justice, humanity, and uniformity in accordance with the country's constitution. The research method used is normative, by looking at various laws in Indonesia and reading literature on Islamic criminal law and its implementation in countries with Islamic law. The results of the study indicate that, although there are fundamental differences between Islamic law and Indonesian positive law, some elements of the concept of Islamic criminal responsibility can be exploited, especially in cases containing certain crimes such as qisas, diyat, and ta'zir. By considering Pancasila as the philosophical foundation of the state, these elements can be exploited. It is hoped that this implementation will help strengthen the national legal system by providing space for the religious values that live in it.

I. INTRODUCTION

In the context of the legal system in Indonesia, the study of criminal liability from an Islamic perspective is relevant considering that the majority of the population is Muslim. Islam stipulates that every individual who commits a crime must be responsible for their actions by fulfilling certain elements. This is in line with positive Indonesian law which also stipulates that a crime must fulfill the element of error, either in the form of intent or negligence. However, there is a fundamental difference in the application of criminal liability between Islamic law and positive law. In Islamic law, the basic principle of criminal liability is not only based on the elements of action and error, but also on moral and spiritual aspects, which are rooted in a servant's obedience to Allah(Syamsu & Sh, 2018).

One of the striking differences between Islamic law and positive law in terms of criminal liability is the scope of legal subjects who can be held accountable. In Indonesian positive law, criminal liability does not only apply to individuals, but also legal entities such as companies or institutions that are considered legal subjects.(Mawaddah et al., 2023). This is contrary to the principle of Islamic law which states that only living individuals can be held criminally responsible for their actions. In Islam, there is no concept of criminal responsibility for legal entities because every individual is personally responsible for their actions, both in this world and in the hereafter. Therefore, efforts to harmonize these two legal systems are a challenge for the Indonesian legal system.

On the other hand, Islamic law has a more diverse system of sanctions compared to Indonesian positive law. Islamic criminal law recognizes three main categories of criminal sanctions, namely hudud, qisas, and ta'zir.(Sari, 2023). Hudud is a sanction that has been determined by the Qur'an and Hadith with strict provisions, such as the punishment of cutting off the hand for a thief or the punishment of stoning for a married adulterer. Qisas is a form of retaliation that is commensurate with the act committed, such as murder which can be punished with the death penalty, unless the victim's family forgives and replaces it with diyat (ransom). Meanwhile, ta'zir is a form of punishment that does not have specific provisions in sharia and is entirely left to the discretion of the judge or leader of the country.(Sari, 2023). In Indonesian positive law, the sanction system is more oriented towards guidance and punishment with imprisonment as the dominant form of

punishment. This difference shows that the application of the principle of Islamic criminal responsibility in the Indonesian legal system requires in-depth study so as not to conflict with applicable legal principles.

Although there are various differences in the aspects of criminal liability between Islamic law and Indonesian positive law, there are also similarities that allow for common ground between the two. One of the principles recognized in both legal systems is the principle of legality, which states that a person cannot be punished except based on previously established rules. In Islam, this principle is known as the principle that every punishment must be based on provisions that have been established in the Qur'an and Sunnah. On the other hand, Indonesian positive law also recognizes this principle as stated in Article 1 paragraph (1) of the Criminal Code which states that an act cannot be punished except based on applicable statutory provisions. With this similarity, the opportunity to integrate the principle of Islamic criminal liability into national law becomes more open, especially in the context of developing a more just criminal law based on religious values.

However, the main challenge in efforts to harmonize Islamic criminal liability with national law is the difference in paradigm in the objectives of criminal law itself. Islamic criminal law aims to uphold justice in a broader sense, not only in the context of worldly law, but also in the context of the afterlife. Meanwhile, Indonesian positive law is more oriented towards protecting society and legal certainty. Therefore, efforts to harmonize these two legal systems require a comprehensive approach, both from normative, sociological, and philosophical aspects. One approach that can be used is to apply the principles of Islamic law that are in accordance with universal values that are also recognized in positive law, such as the principles of justice, balance, and protection of human rights.

In addition, in the context of the Indonesian legal system that adheres to legal pluralism, the application of the principle of Islamic criminal responsibility can be further studied in specific regional regulations. Several regions in Indonesia, such as Aceh, have adopted several aspects of Islamic criminal law in their regional regulations. This shows that although Islamic law is not fully adopted in the national legal system, there is still room to accommodate its principles in the context of regional law. Thus, further study of the concept of Islamic criminal responsibility in national law can make a significant contribution to the development of criminal law that is more responsive to religious values and the needs of Indonesian society.

II. RESEARCH METHODS

The data used in this study is secondary data, namely, exploring and examining theories.(Arifin, 2012). The data used is library data and the source is secondary data, namely data from various references related to this problem. Furthermore, the data collection method is a literature study. Then analyzed descriptively qualitatively, which means analyzed thoroughly and systematically.

III. RESULTS AND DISCUSSION

A. The Concept of Criminal Responsibility in Islamic Law

According to Islamic criminal law (Fiqh al-Jinayah al-Islamiyah). According to A. Hanafi, responsibility in Islamic law is a burden borne by a person because of an act he did of his own will when he knew the intent and consequences of the act.(Hanafi, 2024). In Islamic law, obligations are based on: 1. The commission of an act that violates or ignores an obligatory act. 2. The act is done of one's own free will, meaning that the perpetrator has the freedom to choose whether or not to do the act. 3. The defendant knows the consequences of the act committed. There is no responsibility if these three things are not done.(Sari, 2023). Because the basis of responsibility does not provide a guarantee of responsibility, the insane, minors, and people who are forced are not responsible. Islamic law only punishes young and mudallaf people in terms of criminal responsibility. In addition, children are not punished like adults unless they have reached maturity (puberty)(Ali, 2007). This is based on verse 59 of the letter An-nur:

وَاِذَا بَلَغَ الْاَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَاْذِنُوْا كَمَا اسْتَاْذَنَ الَّذِيْنَ مِنْ قَبْلِهِمْۗ كَذٰلِكَ يُبَيِّنُ اللّٰهُ لَكُمْ اٰيٰتِهٖۗ وَاللّٰهُ عَلِيْمٌ حَكِيْمٌ

"The stipulations are removed from three things; from a sleeping person until he wakes up, from a mad person until he recovers and from a small child until he becomes an adult."

There is no criminal liability if the crime is not committed. Punishment is used to maintain the peace and security of the community or to protect the interests of society. The amount of punishment must be appropriate and not exceed what is necessary to protect society. One of the main principles of Islamic law is that anything that is not prohibited can be done; however, if an Act

is prohibited, then the punishment will be imposed from the moment the violation is known.

Forgiveness includes Actions that occurred before the prohibition. Types of Criminal Acts according to Islamic Law: Qisas, Hudud, and Ta'zir.

Qishash is a punishment given to people who commit acts that violate the honor of the body and soul.(Sari, 2023). Qishash, which comes from the Arabic word "qashsha", which means "to cut" or "to follow the footsteps" of the murdered person, means a punishment that is equal to murder. The murderer must receive the same punishment as his actions, namely killing himself as well as his victim.

QS. Al-Baqarah verse 178-179 states, in translation:*O you who believe, qishash is prescribed for you regarding those who are killed, free people and free people, slaves and slaves, and women and women. So whoever gets forgiveness from his brother, let (the one who forgives) follow it in a good way, and let (the one who is forgiven) pay diyat to the one who forgives in a good way. This is a relief from your Lord and a mercy. Whoever transgresses the limit after that, there will be a very painful punishment for him.*

Qisash means the same consequences for those who eliminate another person or body part as they did. Therefore, intentional murder is punished by death.(Sari, 2023). In relation to the verse above, most scholars are of the opinion that the qisas ruling must be applied to someone who has committed murder or injury to another person. It will be clearer that the act of intentionally killing a fellow Muslim is the only murder that can be punished by death.

The crime of murdering a person against his child, murdering a Muslim against his child, murdering a Muslim against an infidel, and the accidental loss of life are not subject to the law of qishash. Al-had (hudud), according to al-Ashfahani, is a boundary between two things that should not be mixed.(Arifin, 2021). With that, all religious regulations and rules, whether related to criminal law or not, have been established by Allah SWT. as legal limits, including had (hudud).

Al- Ashfahani also explained that all of Allah's hudud fall into four categories: (Arifin, 2021)

1. Norms that cannot be added or reduced, such as the total number of rakaats of obligatory prayers;
2. Norms that can be increased or decreased, such as the zakat rate;
3. Norms that can be reduced but not increased, such as polygamy cannot have more than four partners; and
4. Rules that can be added or reduced, such as the total number of rakaat of the Dhuha sunnah prayer.

Forms of hubud crimes:(Sari, 2023)

5. Adultery
6. Qadzaf
7. Sariqah (stealing)
8. Khamar (intoxicating drink).

The word ta'zir comes from the word azzara, which means man'u wa radda, which means to prevent and reject. Ta'zir comes from the term "addaba", which means "to educate," or "azhamu wa waqra". which means honor and reverence(Ali, 2007). Al-man 'u wa raddu, which has the meaning of preventing and rejecting, is the most common meaning of ta'zir, and ta'dib is the second meaning, which means to educate. Abdur Qadir Audah and Wahbah Az-Zuhaili support this understanding.

Ta'zir is defined as forbidding and opposing because it has the ability to prevent the perpetrator from committing the same evil act again. Ta'zir is also defined as educating because its purpose is to guide and change the perpetrator so that he realizes his evil actions and then stops doing them. In addition to the above, ta'zir can also be defined as humiliating the person who committed the crime because of his shameful actions.(Ali, 2007).

In other words, the meaning above, and it can be understood that ta'zir crimes include sinful acts that are not subject to hadd punishment and are also not subject to kifarat, therefore the main point of ta'zir crimes is sinful acts. While what is meant by sin is ignoring obligations and carrying out actions that are forbidden (prohibited)(Sari, 2023).

The fuqaha provide illustrations of neglecting obligations, such as refusing to pay zakat, not performing obligatory prayers, being reluctant to pay debts even though they are able, betraying trust, in the form of embezzling deposits, manipulating the property of orphans, waqf proceeds, and so on. Other examples of forbidden acts include kissing another woman who is not your wife, swearing falsely, deceiving in a sale and purchase agreement, practicing usury, protecting and hiding criminals, including consuming forbidden goods, such as blood, corpses, and so on.(Sari, 2023).

The examples above are included in ta'zir crimes. The Qur'an and Hadith do not apply the

punishment and form of ta'zir crimes specifically. According to Munajat, benefit is the basis of ta'zir law and a concept that supports social justice. According to Syarbini al-Khatib, the verses of the Qur'an from the letter al-Fath verses 8-9, which means it is the basis for ta'zir crimes(Sari, 2023).

The three hadiths generally discuss the fact that ta'zir exists in Islamic law. The first hadith relates how the Prophet detained a person who was considered to have committed an offense to make it easier, more than ten lashes can be used to distinguish hudud crimes. This limit of punishment makes it clear that hudud and ta'zir crimes are different. Scholars agree, according to al-Kahlani, that zina, sariqah, intoxicating drinks, hirabah, qadzaf, leaving Islam, and murder are hudud crimes.

Some crimes that are debated by scholars, such as liwath and lesbianism, are also ta'zir crimes. The third hadith states that the ta'zir punishment method can be applied in different ways, depending on their status and other conditions.(Arifah, n.d.).

Abd Qadir Awdah said that there are three types of ta'zir crimes. First, Qisas diyat and hudud crimes that contain subhat components. An act that is considered not to meet the requirements is considered an evil act, such as wari subhat, theft of property, murder of a father against his child, and theft that is not property. Second, ta'zir crimes whose types are determined by the text, but the sanctions are given to the ruler by the shari'a, such as perjury, false witness, cheating, breaking promises. In this case, the moral aspect is the main priority.(Audah, 1992)For example, government regulations on the environment, traffic, and others.

B. The Concept of Criminal Responsibility According to Indonesian Positive Law

In criminal law, the terms torekenbaarheid (in Dutch) and criminal responsibility or criminal liability. Criminal responsibility means punishing someone who does something that is against the law or that causes a prohibited condition.(Fadlian, 2020). Consequently, criminal liability is part of the process of transferring punishment for a crime to the individual who committed it.

If we look at Simons' formulation of Strafbaarfeit, we must see that it is a human act that is wederrechtelijke (contrary to the law), carried out by a responsible person (toerekeningsvatbaar), and that person is responsible.(Simons, 1929). In criminal law, holding someone accountable means passing objective punishment on a person who has committed a criminal act subjectively.

The responsibility of a person in criminal law means passing on punishment whose purpose is for the individual who committed the crime to fulfill all elements of the crime. As a result, guilt is considered a determining factor in criminal responsibility and not just a mental element in the crime. A person who is declared to have committed a mistake is something related to the problem of criminal responsibility.(D. Simons, 1912).

The basic principle of criminal responsibility in positive law (KUHP) in Indonesia is the Principle of Legality: The Principle of Legality in Indonesia is explicitly stated in Article 1 paragraph (1) of the Criminal Code: *"No act may be punished except on the strength of the criminal provisions in the law that preceded the act."*, which in Latin is known as adage: *"nullum delictum, nulla poena, sine praevia lege poenali".*

In relation to criminal responsibility, Article 44 of the Criminal Code regulates: paragraph (1) Whoever commits an act that cannot be held accountable for him because his soul is disabled in development or disturbed by illness cannot be punished; Paragraph (2) If it turns out that the perpetrator cannot be held responsible for his actions because of a mental disability or disturbed by illness, the judge can order that the person be transferred to a mental hospital, for a maximum period of one year as part of the probation period.

C. Mario Dandy's persecution of David Ozora from the perspective of Islamic Criminal Law in relation to the Qanun in Aceh.

If there is a relationship between the Aceh Qanun and the case of Mario Dandy's assault on David Ozora, then Mario Dandy will be subject to diyat law. On the other hand, for the punishment of Agnes Gracia who committed the crime indirectly, there is no special rule in the Aceh Qanun that links it to completing the existing Islamic law rules. It would be better if there were special legal rules to regulate perpetrators of indirect crimes. This is explained in detail in the Aceh Qanun.

Qanun Aceh is a local law (regional regulation) that applies only in Aceh Province.(Aceh Qanun Number 9 of 2008, Concerning the Development of Customary Life and Traditions, nd). If the abuse committed by Mario Dandy and several others occurred in Aceh and as we know Aceh has a Qanun (regional regulation), then the perpetrators of the abuse will be subject to

sanctions in accordance with the provisions of the Aceh Qanun. According to Aceh Qanun Number 6 of 2014 concerning the Zinayat Law, deviations can be punished with whipping, imprisonment or a fine depending on how severe the abuse committed by the perpetrator. The Aceh Qanun regulates two concepts of Islamic criminal law, Qishash and Diyat as punishment for perpetrators of murder and abuse.(Aceh Qanun Number 9 of 2008, Concerning the Development of Customary Life and Traditions, nd).

Qishash is a punishment for perpetrators of crimes that can harm or harm other parties, such as murder and assault, and the punishment is commensurate with the crime committed, while Diyat is a fine paid by the defendant as compensation to the injured party. However, more specifically, diyat refers to a combination of punishment and compensation.(Sari & Rambe, 2020). Because, if the injured party or his family forgives the accused, the diyat punishment is determined as retribution for the violation.

In addition, regional regulations (Qanun) in Aceh also regulate corporal punishment as one form of punishment for certain criminals. However, there was no physical punishment imposed in this case. According to available information, the abuse occurred at the hands of Mario Dandy's lover, Agnes Gracia and the victim's ex-lover, David Ozora. Agnes Gracia is suspected of being the cause of Mario Dandy's abuse of David Ozora. Agnes Gracia did not commit direct abuse in the David Ozora abuse case, but she was still involved in the planned abuse and can be considered as one of the indirect perpetrators of Jarimah.

The act that is done indirectly is not an act that is done directly by the perpetrator, but rather an act that is included in the perpetrator's action plan. In the case of Agnes Gracia, in Aceh Qanun does not clearly regulate cases that trigger abuse and murder. But it can be connected with Aceh Qanun 2014 Number 6 above. Because, there are various kinds of crimes and acts that are prohibited according to Islamic law and can result in criminal punishment(Aceh Qanun Number 9 of 2008, Concerning the Development of Customary Life and Traditions, nd).

The principles of the state must be respected as regulated in existing laws, according to Article 18B of the 1945 Constitution, because the state recognizes a regional government structure that functions specifically regulated by law in accordance with the development of society. Law No. 4 of 1999 concerning the Aceh government also shows that Aceh's national edict refers to Islamic law. As a result, in reality it is not free from the state's obligations.

D. Analysis of Islamic Values Can Influence the Positive Legal System

In Indonesia, the meaning of the existence of Islamic law in its application is to change the law into positive law and this can only be done if it is related to personal law, namely in terms of transactions. However, in terms of public law, Islam remains the desired law (even just a draft law) such as the Islamic banking law that was made.

However, every effort made to improve the implementation of Islamic law in Indonesia must be appreciated. There will undoubtedly be obstacles, difficulties and tests that may come from various sources to hinder the better implementation of Islamic law in its various forms, such as the unification of Islamic law, the codification of Islamic law, and the compilation of Islamic law, which are incorporated into national law.(Ali, 2007).

Regarding the changes that are being made in Indonesia to implement Islamic law, there are at least two very important processes (stages). The first stage is related to the path of faith and piety. What is meant is that adherents of Islam do work related to Islamic law according to their level of understanding, their abilities, and their level of piety.

Referring to Article 29 Paragraph (2) of the 1945 Constitution, which states explicitly that it is legally valid to implement Islamic law through the path of the power of belief and piety. Furthermore, the second stage is to change the values of Islamic law by referring to existing regulations. In the case of the Marriage Law, for example, the regulations in the Marriage Law can be used to change these values. Two different examples can be used to distinguish how Islamic law enters Indonesian law.

The first model includes the application of Islamic law substantially, although it is not openly announced as part of Islamic law. The second model includes the application of Islamic law in a non-substantial manner. The first example does not use Islamic identity at all. National law, like national law in general, is non-aligned and in general terms, does not identify a particular religion or social group.

In such a situation, people who are often lulled by labels and groups that are anti-religious, as well as people who have difficulty understanding the meaning of something, may argue that certain

laws are considered national laws. One example is Law. Sharia Banking Number 21 of 2008, which according to non-Muslims only applies to Muslims.

E. Challenges and Opportunities in Integrating Islamic Law into Positive Law

The position of Islamic law as one of the sources of law applicable in Indonesian law faces challenges in the process of Islamic legal legislation in that country.(Sari, 2023). The challenges come from outside Islamic law and from within Islamic society. To provide a clearer picture, the following facts can be used to explain the challenges faced by the Indonesian government in implementing Islamic law:

1. Structural Challenges Structurally, until now Muslims in Indonesia are still debating about the actualization of Islamic law; some support it and some reject it. Several theories of the actualization of Islamic law in Indonesia describe the same thing, such as the formalistic-legalistic approach, the structuralistic and culturalistic approach, and the academic approach. There are even more extreme groups who argue that realizing an Islamic state is the best way to actualize Islamic law. However, others focus on political and cultural conflicts by improving society.
2. Substantial Challenges of Understanding Understanding Islamic law is very broad, complex, and complete. Some people see Islamic law as a strict and even terrifying legal system, especially because of the firm stance to change (jihad) shown by the majority of fanatical Muslims, who are usually referred to as terrorist groups. Because some people understand the substance of Islamic law negatively, research on the dynamic aspects and foundations of Islamic law must be focused on contextualizing Islamic legal material to be coherent with the social and contemporary context of Indonesia. For that purpose, Islamic law in national law is also needed.
3. Cultural Challenges The culture of Indonesian society also supports the implementation of Islamic law. History shows that various cultures in Indonesian society are influenced by various legal systems in force. As a result, the contribution of Islamic law to the Indonesian legal system in facing several obstacles and cultural barriers, namely; (1) The national legal system consists of three legal systems: customary law, Islamic law, and Western heritage law. Several components that contribute to the implementation of this third legal system, namely; The existence of Plularism, when many people lived in Indonesia, they created a legal system that came from the traditions and customs of the community that were believed and obeyed. The colonizers then called this legal system customary law. Second, religious factors, initially the community embraced animism and dynamism beliefs, turning to Islam when Islam began to come, so that most groups of people in Indonesia embraced Islam. Since then, Islamic law has been embraced and implemented by the community. Third, the colonial factor, for approximately 350 years, the Dutch colonized Indonesia with a colonial legal system. This is called the Western legal system. (2) just as the Christian group opposed the first principle of the Jakarta Charter, non-Muslims opposed and resisted because they believed that implementing Islamic law in Indonesia would make them second-class citizens. (3) strong political desire, or the awareness and desire that the Muslim community has to implement Islamic law in the form of Islamic law in the national judicial system in Indonesia. The awareness of the Muslim community about the support of political parties as a means of political struggle in the context of Islamic law is strengthened by this fact.

The public's lack of understanding of Islamic law, the developing jurisprudence dominated by traditional jurisprudence, the lack of funds and personnel to conduct research on Islamic law, the unwillingness of religious figures to support the reform of Islamic law, and the disagreement between these schools of thought have led to disagreements in legal awareness and political goals.

Cultural groups believe that the enforcement of Islamic law is not only necessary for the political interests of certain groups; it is also necessary to deal with the diversity of society, which if we limit it can be a frightening thing for the Islamic society itself to realize the advantages of natural Islamic legal regulations through a society with

legislature and jurisprudence.(Ali, 2007). The verdict of the judge also known as jurisprudence is a very profitable way to implement Islamic law. Because most of the Muslim population in Indonesia believes that they will obey all the commands and prohibitions of their religion. Because of this belief, people will agree that the principles of Islamic ethics and law will be applied in the operation of the country.

There are four possibilities/opportunities that Islamic law will become national law.(Ali, 2007). (1) With the law, Islamic law can be applied directly without going through customary law. (2) The Republic of Indonesia can determine something according to Islamic law as long as the regulation only applies to people who are Muslim. (3) Islamic law has the same place in the Indonesian legal system as customary law and Western law, so (4) In the future, Indonesian law will be based on Islamic law, together with traditional law, Western law, and other laws that develop in the country. In addition to these four possibilities, decisions made by religious judges or judges other than religious courts who use Islamic law as the basis for their decisions are very important for the validity of Islamic law nationally. With the application of religious justice by the Supreme Court, the principles of Islamic law can be accepted in the Indonesian legal system. Defenders of Sharia have emerged, offering legal assistance to Muslims seeking justice, even outside the Religious Courts.

IV. CONCLUSION AND SUGGESTIONS

A. Conclusion

According to Islamic criminal law, a person can only be held accountable for actions he or she does intentionally and voluntarily. This concept includes not only committing a prohibited act or neglecting an obligation, but also knowing the consequences of such an act. The three main types of punishments in Islamic law are qisas, hudud, and ta'zir. Each is applied based on the type of

B. Suggestion

1. Need for Strengthening of Regulations: If Islamic law is incorporated into positive law, as in the Aceh Qanun, more specific regulations are needed for violations that occur indirectly to provide legal clarity in handling similar cases in the future.
2. Social Approach in Law Implementation: To ensure that Islamic criminal law is relevant to society and acceptable without conflicting with other legal systems in Indonesia, a more contextual and cultural approach must be applied. used when.
3. Increasing Public Understanding: In order for the public to implement Islamic criminal law correctly and effectively, they must broaden their understanding. It is essential to spread a wider understanding of the concepts of qisas, hudud, and ta'zir, especially in areas such as Aceh that adhere to Islamic law.
4. Strengthening Collaboration Between Legal Systems: In the Indonesian justice system, Islamic law, customary law, and national law must work together well to create law enforcement that is just and in accordance with the needs of society.

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