

THE POLITICS OF CONSTITUTIONALISM AND ITS IMPLICATION ON SHARIA IMPLEMENTATION:

Efforts to Execute and Legalize Islamic Penal Code in Indonesia

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INTRODUCTION

In the era of reformation in which Indonesia entering the era of democracy, Indonesian people who more than three decade under oppression of New Order authoritarian regime likely find momentum to voice and express all ideas and notions that had been kept for a long time. One of them is the wishes of part of Muslims to implement Islamic law in Indonesia which according to them is not completely implemented yet/kaffah.

Although Islamic law has long been practiced in Indonesia, for some of Muslims it is not completed yet, because what is related to criminal law, particularly its sanction like *rajam* (stoning to death) and cutting hand not yet accommodated in criminal law system in Indonesia. Since the era of reformation, at least there are three accidents that described the effort to impose *rajam* sanction and legalized it. Despite controversial, *rajam* ever implemented in Ambon.

Effort to legalize this penalty and others that occurred in *Fiqh Jinayah*, later conducted by Suryani, the citizen of Banten province, through his request to Constitutional Court. Suryani demanded Constitutional Court to accept his plea to increase Islamic Court Jurisdiction, so it has an authority to proceed and ruled cases related to Islamic criminal law or *Fiqh Jinayat*. Suryani' request was refused by Constitutional Court.

Through *qanun jinayat* that was approved by DPRA, Aceh also want to implement this sanction. But this qanun also faces rejection from many parties including from Aceh people themselves. Therefore it is interesting to study or review how execution of *rajam* be done, why this act able to materialize. Why Suryani has a need to request additional authority of Islamic court and why the DPRA able to legalize *qanun* that later invite controversy.

Through this paper I will try to analyze the position of three accidents viewed



from the theory of relation between sharia and constitution or the politics of constitutionalism and I also will to explain why some norms of Islamic law, although it has been supported and legalized by legislative body, cannot be implemented in Indonesia. This writing will be ended by offering the models of sharia implementation that suitable for Indonesia condition.

Efforts To Implement Islamic Criminal Law

Execution of Rajam in Ambon

Rajam case in Ambon, despite pros and cons, constitutes one of Islamic penal law implementation in Indonesia. How *rajam* execution is processed against Abdullah (not the real name), is reported by numerous mass media like Kompas, Pikiran Rakyat and Gatra magazine.

Kompas daily on Thursday, May 17, 2001, reported a news entitles: "Rajam punishment in Ambon is sharia enforcement: Ja'far Umar Thalib".

It is said that Laskar Jihad Ahlus Sunnah wal Jamaah (ASWJ) has executed or imposed *rajam* penalty against its member in the late of March, 2001. It is said that the implementation of *rajam* is a continuation of sharia imposition in Ambon that has been declared by Ambon Muslim community since January 4, 2001.

According to Ja'far, the January 4 declaration is agreed after some of Islamic figures conducted a meeting to maintain security and upholding sharia. The meeting is initiated by Chairman of Ulema Council in Maluku, H. Sanusi and Maluku Police Chief. "At least, there are twelve groups participated in the meeting. And it means that all segments of Muslim in Maluku are represented." Ja'far said.

"After January 4 declaration that read before Muslims in the front of Al-Fatah grand mosque in Ambon, Muslim community through their Jihad task forces, there are more than 120 Jihad task forces that represented villages, initiated to conduct movement in order to combat the vices, prostitutions, alcoholic drinkings, forbidden drugs, stealing, and ect." Ja'far said.

According to Ja'far, in the mids of heated campaign and movement by Muslims to eradicate the vices, there is adultery incident or precisely a rape. This raping conducted by a member of Laskar Jihad ASWJ against female maid, 13 years old, in Diponegoro village. "After being captured, the perpetrator then interrogated and confessed what he was done thereby asking to be processed by Islamic law." Ja'far said.

As commander of Laskar ASWJ, Ja'far initially has persuaded him, so he could be avoided from *rajam* punishment, of course, through mechanism available in sharia. But the boldness attitude of perpetrator make his effort has no avail. Considering the status of perpetrator has been married, in sharia law, the adulterer like this should be stoned to death.



Ja'far sees, in sharia law there is a norm, if somebody suspected of committing adultery, it should be proved by one of two ways. The first is by confession of the perpetrators themselves. But this confession can be canceled if they retract it. Secondly, if they are captured in hand by four witnesses who directly see the act of perpetrators. "If the four witnesses have been sweared and they are considered trustworthy enough by sharia court, there is no need of confessions from perpetrators. And the law can be enforced," Ja'far said.

Such as what will be explained later, the enforcement of sharia law in Laskar Jihad version is awkward viewed from the Indonesian system of law. Ja'far Umar Thaib eventually prosecuted and facing trial in Bogor district court.

Effort to Extent Islamic Court Jurisdiction

More than seven years after the execution of *rajam* in Ambon, at national level, effort to implement Islamic criminal law in this country was raised through judicial review in Constitutional Court.

On June 24, 2008, Suryani, a worker, who reside in Tubui village, Waringkuring, the District of Serang, Banten province, proposed judicial review of Islamic Court Law that known as Undang-Undang Peradilan Agama (UUPA) to Constitutional Court concerning the competency of this court in Indonesia.

Suryani requested judicial review on article 49 verse (1) of UUPA No.7/ 1989/ UUPA No.3 / 2006. This Article 49 stated: Islamic Court has the authority to proceed and to judge, in the first level, a dispute among Muslims concerning a) marriage b) inheritance c) grant (hibah) d) endowment (wakaf) e) compulsory almsgiving (zakat) f) donation(infaq) g) voluntary almsgiving (shadaqah) and h) Sharia economics.

According to Suryani, this article (49 verse 1) was in conflict with article 28E verse (1), article 28I verse (1) and (2), article 29 verse (1) and (2) of 1945 Indonesia constitution. While articles in the constitution assured every citizen to embrace and carry out his or her religion and faith, article 49 verse (1) restricted the right of Muslim only on eight areas that are entrenched in the competency of Islamic court.

In Islamic teaching, Suryani argues, Muslims not only obliged to comply with sharia law related to private or personal law, such as what is mentioned in the jurisdiction of Islamic court, they are also obliged to obey sharia law related to penal or public law. The Qur'an, al-Maidah chapter, verse 38, for instance said :"As to thief, male and female, cut off his or her hands: a punishment by way of example from Allah, for their crime; and Allah is Exalted in Power, Full of Wisdom."

So, it is clear that Law on Islamic Court, particularly article 49 verse(1) disadvantages all Indonesian Muslims, including plaintiff. It restricted Muslims to implement sharia totally (*kaffah*). Or at least it is potentially suffering Muslims because



if Muslims as social community intented to comply with injunction of Al-Maidah verse 38, they will be accused of enforcing the Law by neglecting the existing law. Based on the rule of law positively recognized by Indonesia, this action will be categorized as violation. For Suryani, implementing sharia in totality (*kaffah*) is a form of ritual or submission to God (*ibadah*) that should be protected by state.

Judicial review requested by Suryani that intended to search legal base to implement sharia law related to public affairs, such as cutting off hand of thieft or stoning to death for adultetery, is refused by Constitutional Court. Nine judges of constitutional court; Jimly Assiddieqy, Moh.Mahfud MD, HM.Arsyad Sanusi, Muhammad Alim, H.Harjono, Maruar Siahaan, H.A.S.Natabaya, I Dewa Gede Palguna and H. Abdul Mukthie Fadjar, on Friday August 8, 2008 unanimously refused this request. One of the reson to refute Suryani request is bacuase Constitutional Court has no authority to add or redraft law (positive legislator), this court only behave as negative legislator by omitting some clauses in law that contradict to constitution.

Effort to Implement Rajam in Aceh through Qanun Jinayat

Aproximately nine years after the execution of *rajam* in Ambon, or about one year after Constitutional Court refused Suryani request, or precisely on September 14, 2009, Regional Council of Aceh (DPRA) passed a *qanun* (bylaw) that possibility allow adulterer to be punished by *rajam* (stoning to death).

Article 24 verse(1) of the draft of this *qanun* imposed 100 lashes for adultery committed by person who not bound in marriage and *rajam* for adulterer bound in marriage.

Although for some of Acehese, this *qanun* is has long been awaited this *qanun* is problematic. It is refused by both government as well as some of people of Aceh. The imposition of this *qanun* was colored by the waves of rally by both proponents and opponents of this bill. "We are firm in defending that *rajam* punishment cannot be included in *qanun*," vice governor Muhammad Nazar said. According to Nazar, the *qanun* that has been legitimized by DPRA still able to be reviewed by ad hoc team made by legislature and government of Aceh such as mandated by consensus of Panmus (Deliberating Committee).

"It is right that all regulations that have been approved by legislature should be implemented by government. But our stance is firm in refusing this *qanun*, let alone this is imposed by some notes." Nazar added. Activists of civil society also demanded legislature to rewrite this *qanun jinayat* to be adjusted by universal values of Islam and human rights, as well as to ensure its harmony with other regulations. They also demanded the involvement of ulema, intellectuals from university, law enforcers, law practicians as well as civil society including female groups.



On the other side, Muhariadi, politician from PKS (Prosperous Justice Party) said that points that have been approved in *Qanun Jinayat* cannot be disturbed again. "If there is a review it should be limited only on language editing" he said.

DISCUSSION AND ANALYSIS

The Position of Sharia in Constitution

In the modern history, when many Muslim countries declared their independence from colonialism, they need to formulate constitution in a written form. Because of there aren't any exact model of government in Islamic teaching, when they write their constitution many models adopted in formulating the relation between sharia and constitution in Muslim countries. At least there are four types of constitution.

The first is state that its constitution recognized Islam as a state religion and placed sharia as a primary source in drafting legislation such as Saudi Arabia, Iran and Pakistan. Secondly, state that its constitution denote Islam as state religion but not mentioned sharia as a primary source of legislation. It means that sharia treated only as one source of many sources used to make legislation such as Malaysia. The third, state that not made Islam as a state religion and also not mentioned sharia as a primary resource in formulating legislation but acknowledged sharia as a living law in society and considered it as one of many source in drafting legislation such as Indonesia. The fourth, state that declared itself as secular state and try to make sharia not influenced its legal system such as Turkey.

In Indonesian history, discourse on the position of sharia in constitution, at least has been discussed five times in parliament; at the Council and Committee for Independent Preparation (BPUPKI-PPKI) in 1945, the Constitution Council in 1956-1959, Temporary of People Consultative Assembly (MPRS) in 1966-1968, annual meeting of People Consultative Assembly (MPR) in 2000, and annual meeting of MPR in 2001.

Each time, when sharia will be formally included in Indonesian constitution, it always invited pros and cons. The proponents of formalization of sharia, commonly argue that since the majority of Indonesian is Muslims it is understood if the law imposed in Indonesia particularly for Muslims is sharia. Secondly, the assurance of sharia in constitution actually part of gentlemen agreement of founding fathers expressed by their acceptance to Jakarta Charter (Piagam Jakarta). This charter is a compromise choice between secular and Islamic state. Thirdly, the formalization of sharia not affected non Muslim because sharia law will gave blessing to humankind.

The opponent of sharia formalization in constitution exposed arguments, among other; firstly, the inclusion of seven words of Piagam Jakarta will pave the way of state



intervention in religious domain that eventually will affect religion as well as public domain. Secondly, the inclusion of seven words of Piagam Jakarta will raises old prejudice from non Muslim on Islamic state in Indonesia. Thirdly, the inclusion of Piagam Jakarta also contradict with national system that treated all group in society as equal citizen, including religious groups.

The opponent of sharia formalization also presented reason about the possiblity of nation disintegration because people who reside in eastern part of Indonesia threatened to separate from Unitary State of Indonesia if sharia law inserted in constitution. On the other side, the proponent of sharia formalization questioned government for their reluctant to accommodate sharia law. This reluctant caused the emergence of dissatisfaction that manifested in *Darul Islam* rebellion. Firdaus AN one of Islamic figure that actively engage in various Islamic mass organization, for instance, regretted the omitting of seven words which according to him triggered the emergence of rebellion in many regions. Beginning with *Darul islam* lead by Kartosuwiryo in West Java 9 August 7,1949), then continued by Kahar Muzakar in South Sulawesi (1952), Daud Beureuh in Aceh (1953) and Ibn Hajar in South Kalimantan (1953).

Of course, the way a state positioned Islam or sharia in its constitution, at least in formality, will affect how this state treated Islam or sharia. For instance, a state that placed Islam or sharia at a high place, commonly will use many terms derived from Islam or sharia tradition. But, since the way of Islam or sharia be implemented is much more related to the model of how sharia be implemented, as well as the politics of law, the effect of sharia position in constitution can be analyzed from the model adopted by Indonesia or political dynamic surrounding the demand of sharia law.

Models of Sharia Implementation

At least there are three models that can be used to assess the application of sharia in one region; exclusive, inclusive and mixed or combination. The first model tried to implement sharia such as it is mentioned literally in the text of holy books. This model is based on assumption that sharia is a complete norms for Muslim covering all aspect of life. After the death of prophet Muhammad, sharia no more experience a process of evolution. Therefore, Muslims just implement it, if there is a clear formulation in the text of Qur'an or Hadits. If there is no clear norm in it, Muslims can use analogy /qiyas or individual reasoning/ ijtihad. There is no need to adopt a system outside "Islamic system". Sharia is a God law that cannot be understood its goal precisely by human except Jurists or Mujtahid. Therefore, each legislation arranged by legislative body should be approved by sharia experts who had the right to assess and veto if they believe it contradict to sharia. Supporters of this model commonly embraced



Receptie in complexu theory.

The second model tried to implement sharia by seeing the concept or the purpose of sharia. If the main purpose of sharia has been captured, its implementation can be flexibel, able to accommodate traditions or "outside" resources. This model is based on assumption that each norms in sharia has its own reasoning and purpose. Therefore the proponents of this model not objected if sharia experiences a process of evolution. They are relatively easy to accept whatever system of law as long as this system adopted the principle of justice, equality, freedom, brotherhood and humanity. They able to accept system that protect five purposes defined by some Islamic scholars well known by magashid al-shari'ah such as religion (al-din) a freedom of thinking (agl), offspring or heredity (nasl), property (mal) and the soul (al-nafs). In this model, sharia can be implemented openly. It means in applying sharia, local tradition and opinions derived from "outside" can be adopted. Sharia can be called an open system because it can be interpreted by a common person. There is no monopoly in interpreting sharia therefore the existence of the "super body" who monitored and monopolized its interpretation no more needed. The role of sharia expert is only giving fatwa (non binding legal opinion). Supporters of this model commonly used *Receptie* theory to explain the transformation of sharia law in Indonesia. This theory developed by Snock Hurgronje in the late of nintienth century. This theory said that for the indigenous people the law applied to them is customary law. Islamic law can be applied only if it has been accommodated in customary law. This theory based on assumption that not all Islamic law that originally from "Arab" is suitable to Indonesia therefore local or customary agent has the right to select and chose what element of Islamic law that suitable or not suitable for them. This causes plurality among Muslims or what Azyumardi Azra calls cultural pluralism.

The third model tries to combine both of two models. Regarding sharia norms that can be categorized as private or civil law they tend to use exclusive model, while on sharia norms that can be categorized as public matter, they tend to use inclusive one. Indonesia adopted mixed model of sharia implementation by using the *mashlaha* theory as the grand theory and using a mixed between *Receptie in Complexu* and *Receptie* theory as an application theory. History shows that the model chosed by Indonesia is influenced by the politics of law. The interconnection between law and politics is further discussed by Daniel S.Lev in his book.

The Power of Arguments or the Power of Political Configuration

Although three accidents occurred in different time and location, but it can be assumed that all supporters of *rajam* execution, extending the jurisdiction of Islamic court, or *ganun jinayat*, are from particular group of Muslims who treated Islam as an



ideology. Muslims who make Islam as an ideology commonly have similar arguments in defending the exclusive and literal model of sharia implementation. The main arguments used by exclusivists are: 1) sharia is a complete norm for Muslim covering all aspect of life, so there is no need to adopt a system other than "Islamic system". Therefore good Muslims will adopt sharia totally (*kaffah*) 2) sharia is not experience a process of evolution. Therefore the development of age should be adjusted to a system of Islam that has been practiced in the past not vice versa 3) Since sharia is God law, that cannot be understood by common person, it need special body comprised of sharia experts or *fuqaha* who had the right to veto a bill if they believe it is contradict to sharia.

The first argument "sharia is a complete norms for Muslim covering all aspect of life" is clearly exposed by Suryani, a plaintiff of judicial review, who see that the implementation of *jinayat* punishment is a part of the effort to make Muslims completely conducting their duty in implementing sharia. For him, Muslims as community not able to be called embracing Islam in totality (*kaffah*) yet if they cannot apply *jinayat* sanction such cutting hand off the thieft. When Suryani requested a review on article 49 verse (1) of Islamic court law, he clearly presented the verse 38 of al-Maidah which according to him, literally, asked Muslims to cut the hand off the thieft. Islam *kaffah* is originally derived from the words *al-silmi kaffah* in the verse 208 chapter al-Baqarah in the Qur'an. While *al-silmi* has other meaning such as peace, Suryani prefer to pick Islam or precisely sharia as its meaning. So, the mean of Islam *kaffah* according to him is embracing sharia law, not only in private matter but also in public matter literally. The argument picked by Suryani, commonly, used by groups of Muslims that see Islam as exclusive religion.

The second argument "sharia is not experience a process of evolution" is also clearly used by both Suryani as well as Ja'far Umar Thalib. Both believed that the punishment of a marriage adulterer is *rajam* and the punishment of the thieft is cutting off his or her hand. It means that sharia norm particularly that regulates punishment of crime not experience evolution or change. This belief differs from other Islamic scholars who divided sharia broadly into two; *ibadah* (something related to ritual activities) and *mu'amalah* (something related to human to human relation). Many scholars believe that sharia on ritual activity not experience change, while sharia on human to human relation can experience change in line with the dynamic of human civilization. Slavery is a glare example that although it is clearly mentioned in sharia, almost all Muslim scholars in this day agree to abolish it.

The third argument is based on assumption that sharia is God law, that cannot be understood by lay person, therefore it need special body comprised of sharia experts or *fuqaha* who had the right to veto a bill "contradicts" to sharia. This assumption is clearly exposed by Ja'far Umar Thalib when he and his Laskar Jihad sought after back



up from Ulema. According to Ja'far, *rajam* punishment in Ambon is preceded by declaration approved by some of Islamic figures to maintain security and upholding sharia. When the blessing or permission from Ulema placed above the existing legal system of Indonesia, it means that Ulema likely have the veto right to abandon the existing laws or regulations that they deemed contradict to sharia. This stance is, of course, challenged by other Islamic scholars.

In commenting *rajam* case in Ambon, KH Umar Shihab, one of the chairman of Indonesian Ulema Council (MUI), said: "Implementing sharia law should follow the mechanism of legal system legitimized by the state". Umar Shihab argues that according to Qur'an, who asked to enforce law is government or the holder of power. "Sharia law should be based on what is approved" He added. Similar comment also presented by Prof.Drs.Asmuni Abdurrahman from State Islamic Institute (IAIN) Sunan Kalijaga, Yogyakarta.

According to Asmuni, in implementing sharia law, the rule of game should be clear. "The government should be Islamic government, the adulterer or the perpetrator shuold be processed and ruled by the council of jugdes". Asmuni said to Sukoco from Gatra magazine. Prof. Dr. Syechul Hadi Pernomo, Islamic law scholar from IAIN Sunan Ampel, Surabaya, tries to offer solution. "If they want to have autonomy in legal affairs, at least there should be a region and *waliyul amri* (government)," he said. That is why Syechul advised, if Islamic law want to be implemented it should be collaborated to KUHP (Penal Code) that currently accepted as positive law for Indonesia.

If the arguments presented by proponent of exclusive model of sharia at national discourse are weak, why DPRA able to pass *qanun jinayat*. The unswer can be seen in the dynamic of local politics.

When Regional Council of Aceh (DPRA) passed this *qanun*, there is no single faction who explicitly exposed to it. Democrat faction is the only faction of eight that implicitly exposed its objection. The remaining others: Golkar party, United Development party, PKS, Cresent and Star party, National Mandate party, Reform Star, and Combined faction voiced their support to include *rajam* clause. Yusrizal Ibrahim, from Democrat faction, in its general review on this *qanun* only ask to revise article 24 that regulates adultery. Democrat suggested this *qanun* be adjusted to condition of Aceh and Indonesia that uphold Pancasila and 1945 constitution as the base of state. Democrat recommended the punishment mentioned in article 24 verse (1) be changed to 10 lashes and fine 100 gram of gold or 10 months in prison.

Although this *qanun* has been passed by Aceh legislative body it remains keeping numerous problems. The first problem is how to escape this *qanun* from the annulment. It is right that based on article 235 verse 3 of Law No.11/2006 on Government of Aceh, (central) government no more able to overrule *qanun* on the



reason it is contradict to higher regulation, but government still able to annul *qanun* on the reason of public interest (article 235 verse 2 a). In addition, the Supreme Court also has an authority to examine *qanun*. (article 235 verse 3 Law No.11/2006 and article 31a Law No.3/2009).

Secondly, is how to synchronize it with human rights demand. Human rights are not only a concern of International law but also adopted at national law and used as reference in Helsinki agreement signed by Indonesian Government and Free Aceh Movement. Pont 1.4.2 of Helsinki agreement stated: "The legislature of Aceh will redraft the legal code for Aceh on the basis of the universal principles of human rights as provided for in the United Nations International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights"

It is possible that DPRA neglect international human rights demand but the *qanun* that they are passed not able to escape from Law No.11/2006 on Aceh Government as continuation of Helsinki agreement. They also cannot avoid the constitution or national legal system of Indonesia.

If this fact not be considered *Qanun Jinayat* will experience blunder such as described by Kirsten E. Schulze.

Schulze in his writing entitles A Jumble of Purposes of Syari'ah Law in Aceh raised a question, whether in national level sharia law will compatible with Indonesian constitution. Completely Schulze said that: The key question at the national level is, of course, whether the syariah is compatible with Indonesia's constitution. In a practical sense this may result in cases tried under the syariah in Aceh being appealed to the Supreme Court under national law. If the Supreme Court upholds the validity of the syariah it has effectively undermined national law, and if it doesn't the syariah in Aceh isn't worth the paper it was written on.

In addition, in my mind, *qanun jinayat* also has weaknesses viewed from theological argument. Firstly, *rajam* punishment is not explicitly mentioned in the Qur'an. Secondly, as long as adultery not committed in public, it tends to become private matter that for perpetrators have a chance to ask forgiveness to God. Thirdly, *rajam* punishment can be categorized *muamalah* in a broader meaning therefore it can experience change. Fourthly, for persons who believed that *rajam* punishment is unchangeable (*qath'iy*) they should remember that sharia law can be divided into:*taklifiy* and *wad'iy*.

Taklifiy is a law related to the level of burden imposed to mukallaf (person who has mature and smart enough) such as wajib (compulsory), mubah (voluntary), haram (forbidden), makruh (not recommended) and mandub (recommended). Wad'iy is a law related to condition such as prerequisite, cause or obstacle. In condition that taklifiy law



cannot be implemented because parts of prerequisite in *wad'iy* law unfulfilled, Muslims not obliged to perform it. There are many examples that can be exposed in this regard. Pilgrim to Mecca (*hajj*) for instance is obliged to each Muslim but if situation is not conducive or there is an obstacle, this obligation was fall or delayed. In this regard, all regulations that hampered *rajam* punishment in Aceh can be seen as *mawani' syar'iy* (legal obstacles). Therefore, there is no need to Muslims in Aceh to force themselves to conduct *rajam* punishment. This punishment can be replaced by other sanction that in line with the existing law in Indonesia.

From historical and sociological argument, the objection to this punishment also voiced by Muslim Abdurrahman, noted Muslim scholar from Muhammadiyah. Muslim Abdurrahman, one of the noted scholars in Indonesia, said that experience from other countries like Sudan , Iran , Afghanistan under Taliban regime tell us that forced implementation of sharia has caused more victims especially among women , non Muslims, and the poor. According to him if we are ready to get lesson from experience of Sudan, Pakistan or other countries that have previously imposing sharia law, I think, the first people who realize the bad impact of sharia implementation are women. Because in sharia law there are many regulations directed to women such as regulation on dress and inheritance. For instance, because of poverty, woman who has deprived socially, enable to work in garment factory and so on, eventually with no choice available, sinks in the prostitution world. Meanwhile, actually there is no woman who has an ideal to become prostitute unless circumstance forces her. So, becoming prostitute is not woman choice. Then, when sharia law implemented, they are ordered, raided, captured and punished with flogging or stoning.

The second victims are non-Muslims, because they are treated as second class of citizens with limitations on political rights. The third victims are poor family or the lower class of society because when they steal chicken, for instance, it is clear that they have stole something while if the officers or rulers performed corruption or abused their power the evidence often not so clear. So it is easy for them to evade punishment.

Insufficiency support in society is also revealed by the result of surveys. Survey conducted by Pusat Studi Agama dan Kebudayaan (*The Center for Study of Religion and Culture*) UIN Syarif Hidayatullah, Jakarta in early 2009 toward 250 mosque manager (DKM) in greater Jakarta finds that only 31 % of them agree, if Indonesia implement Islamic criminal law. The remainig 56 % not agree and 13 % not answer. Other survey conducted by The Wahid Institute and Indo Barometer toward 1200 respondents from 33 provinces revealed that 88% respondent not agree using violence to overcome or to punish immoral act.

In sum the arguments presented by supporter of exclusive model of sharia implementation has no strong back up from legal, theological, or sociological arguments. This *qanun* is the result of the power of political configuration in Regional



Council (DPRA) in Aceh with PKS, such as represented by their spokesperson Muhariadi, as a diehard supporter who firmly objected to reformulate the article 24 verse (1) of *qanun jinayat* that allowed *rajam* punishment.

CONCLUDING REMARK

The politics of constitutionalism is a politics that put constitution as supreme source of law in which every law and regulation should refer to it. Viewed from its relation to sharia implementation, the politics of constitutionalism can be seen as a way a state placed sharia in its constitution. Although there are differences among Muslim countries in positioning sharia in their constitution, it is not hampering Muslims to implement their sharia norms as long as they not restricted themselves to one model of sharia implementation.

Although there are efforts by some Muslims to make *rajam* and other corporal punishment in Islamic criminal law to be included in the system of Indonesian law, nevertheless this study shows that their efforts actually has no strong support legally, theologically, politically or constitutionally.

In sum, viewed from politics of sharia law (siyasah syar'iyah), the expression of Islamic criminal law in the form of rajam and other corporal punishment is not in line with public interest (mashlaha) of Muslims or Indonesians.

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