

Adat Court Vs Syar'iyah Court: Study of the Legal Culture of Aceh Communities Completing the Khalwat Cases

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Abstract: This study found that structurally there was a lack of clarity about legal institutions and institutions, their police, judges, prosecutors and their lawyers and judges in the adat court. All of that must be arranged in a systemic structure. Substantially seen, it creates uncertainty about how the rules are, whether they have fulfilled a sense of justice, are not discriminatory, responsive or not. So it is necessary to rearrange the material of the legislation. In a legal culture, it is necessary to focus on efforts to establish community legal awareness, shape public understanding of the law, and provide legal services to the community in the case of resolving khalwat cases.

I. INTRODUCTION

Aceh is one of the provinces within the Republic of Indonesia which has privileges and specificities. Among the privileges and specificities given by the state to the province of Aceh is the implementation in the field of religion and custom. Based on the provisions of Article 18B paragraph (1) of the 1945 Constitution above, it can be seen that the state recognizes the existence of special or special regions. However, the definition of special or special regions is not explained in detail in the 1945 Constitution. Special words have a broad scope, partly because it is possible to form regional governments with special autonomy (Aceh and Irian Jaya).

In the context of administering the privileges of Aceh in the field of religion, one of them was given the right and opportunity to form the Syar'iyah Court as an Islamic Sharia Court. In relation to the implementation of the adat field, several Aceh Qanun have been issued, including Qanun Number 9 of 2008 concerning Adat Development and Qanun Number 10 of 2008 concerning Customary Institutions. Based on Article 13 of the Aceh Qanun Number 9 of 2008 concerning Indigenous Life and Customary Fostering, there are 18 (eighteen) types of disputes / disputes / cases that can be resolved customarily through adat courts. Khalwat / mesum is one of the cases that can be resolved customarily through adat courts at the village level.

This study found that the community considered the actions taken by men and women to be khalwat, even though the act was not only alone in a quiet place, but the act of making love between men and women and even to intercourse according to the community was classified as

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khalwat. Such understanding of the community has legal consequences, where in the case of khalwat it can be resolved through the customary court, so that people who clearly commit adultery are resolved through customization. Supposedly for adultery and ikhtilat do not become the authority of the adat court, but the authority of the Syar'iyah Court. Based on the explanation above, there are some interesting things to study, namely: why is there a dualism of judicial authority in resolving khalwat cases that occur in Acehese society? What is the legal culture of the Acehese people in completing the khalwat case?

II. RELATED RESEARCH

Various studies have been carried out related to khalwat, among others, Zaki Ulya, Bustami, Faisal, [13] Azzubaili et al., Have revealed that the resolution of the khalwat case can affect the lack of khalwat cases, but in its implementation it is still considered not effective, discriminatory, and there are still various weaknesses in the qanun and its implementation. So in their conclusion they argued the need for changes in various qanuns that govern the khalwat.

III. THE METHOD USED

This research is a qualitative research, using a socio-legal approach assuming that customary law and dispute resolution practice through customary court may already be a major player in overcoming the increasing number of disputes in the community as well as opening access to justice especially for the poor and other marginal groups who have difficulty to access the judiciary. Moreover, research on customary law is a very important part in the developing of national law, especially when it is associated with a sensitive legal field. The data in this research obtained through literature research by referring to a number of books, articles, journals, research reports, and legislations. While, empirical research was conducted by direct observation of customary settlement practices and interviewing geuchik, village elders, dispute parties to explore their views regarding customary dispute resolution on khalwat, which practiced by the community and exploring their legal considerations which used in their dispute. Interviews with police officers, prosecutors and judges of syar'iyah court were also conducted to get an overview of their respective views on the reality of adat



justice implementation.

IV. RESULTS AND DISCUSSION

Article 34 of ILO Convention No. 169 of 1989 concerning the Rights of Indigenous Peoples that indigenous peoples have the right to promote, establish and maintain specific institutional structures and customs, spirituality, traditions, procedures and practices in which they are located, the judicial systems or habits in accordance with internationally recognized human rights standards.

The provisions of the ILO Convention are in line with Law Number 11 of 2006 concerning the Government of Aceh by giving roles to traditional institutions. This is stipulated in Article 98 paragraph (2) which states that the settlement of social problems in custom is taken in custom.

Solving cases through customary justice in Aceh has always been the main basis for the principles of justice and harmony. This is manifested in the *hadih maja*, "yang rayek ta peu ubeuet dan yang ubeuet ta peugadoeh" (the big ones are reduced and the small ones are eliminated), the expression meaningful, the resolution of disputes in customary law does not leave a mark, meaning that every case that occurs in society must be able to be removed without leaving stains. Obviously, here is different from the criminal law adopted in the Criminal Code, where the legal process is complete and there is legal certainty but not necessarily a sense of revenge for the perpetrators of crime or the heirs of both parties even though the case has been settled through legal channels in accordance with the applicable legislation still leave a sense of revenge in his heart, but different from the settlement with customary law, where the settlement process is always put forward on the principle of harmony, peace, kinship, and bound back to a good relationship.

The authority of the adat institution in the settlement of the khalwat case in Aceh Province is to reconcile the case with the *gampong adat* meeting, led by the *Geuchik*. If the case cannot be resolved within two months, then the case can be forwarded to the *mukim* level headed by the *Mukim Mukim* and so on if the *Mukim* document cannot be completed within one month, the case can only be forwarded to the legal apparatus, namely the *Shari'ah Court 'Ah*. The procedure and conditions for completion are carried out in accordance with the customary provisions in each district / city / sub-district / *mukim* and *gampong* area.

The *Syar'iyah Court* in Aceh has broader powers than the authority of the Religious Courts. The authority of the Religious Courts is limited to only a few aspects of Islamic law, namely marriage, inheritance, will, grant, endowments, zakat, *infaq*, and *sadaqah* and the sharia economy. The *Shariah Court* in Aceh has broader authority in carrying out Islamic laws, against family law cases (*al-akhwal al-syakhshiyah*), *mu'amalah* (civil law) and *jinayat* (criminal) law which are further regulated by the *Qanun Aceh*, both material and formal law (procedural law).

The expansion of authority is in accordance with the development of the law and the legal needs of the community, especially the Muslim community. Changes or adjustments are not only limited to legal principles and rules. Changes and adjustments also include law enforcement agencies, such as the judiciary. As Eugen

Ehrlich stated that "... good law is a law that is in accordance with the law that lives in society." Ehrlich also stated that positive law would only be effective if it was in harmony with the law that lived in society, in terms of anthropology known as cultural patterns (culture pattern).

Therefore, in the perspective of legal sociology, it is not surprising that today, the *Mahkamah Syar'iyah* has expanded its authority to remember "... there must be symmetrical continuity between the development of society and the regulation of law, so that there is no gap between the problem in the way and the place of settlement." In a sense, the development of society which requires the emergence of problems can be resolved through legal channels, not by vigilantism.

The expansion of the authority of the *Syar'iyah Court* is also in accordance with Friedman's theory of the three elements law system, especially concerning legal substance. Friedman stated; legal substance is the rules, norms, and patterns of real human behavior in a system. Substance also means the product produced, including decisions issued, new rules compiled. Substance also includes living law, and not only rules that are in the law or laws in books.

Based on the aforementioned theoretical studies, the expansion of some of the authority of the *Syar'iyah Court* is a necessity, considering all that is the authority of the *Mahkamah Syar'iyah*, both regarding marriage, inheritance, endowments, zakat, to the *shari'ah* economic issues, all of which are something that has been attached to Muslim society. That is, Islamic law which is part of the authority of the *Syar'iyah Court* has so far become a living law and practiced by the Muslim community in Aceh. In fact, the authority of the *Syar'iyah Court* is not only limited to these issues, but also concerns other Islamic legal issues that have been practiced by people in their daily lives.

However ideally a product of legal substance (rule of norms) is supported by a reliable, honest, and firm legal apparatus structure, but the two components are no more than a blue print if they are not supported by the legal culture of the citizens. Community legal awareness is a reflection of legal culture. The settlement of the khalwat case in Aceh can be done in two ways, namely: (a) Settlement through peace and coaching of the khalwat perpetrators who are resolved by the adat court and the *Wilayatul Hisbah* institution. Guidance by the adat court (*Keuchik*, *Imeum Mukim*, *Imeum Gampong*, *Tuha Peut* and *Tuha Lapan*) is carried out through customary deliberations to reach consensus by involving the families of both parties (male and female khalwat perpetrators). Whereas the coaching carried out by the *WH* institution aims to prevent the perpetrators of *jarimah khalwat* from repeating the act because the act is hated and prohibited in the Islamic religion. (b) Settlement with *ta'zir* punishment in the form of caning which is decided by the Judge of the *Syar'iyah Court*.

In this study it was found that the people of Aceh at the time of completing the khalwat case often did not

distinguish between the cases of khalwat, ikhtilath and zina.

As an example of a khalwat case that occurred in Gampong Ingin Jaya, Rantau District, Aceh Tamiang Regency. The case of khalwat (wanted to be the same) was carried out by the perpetrators with the initials AR and ER, both of whom were residents of Ingin Jaya village and the two perpetrators were given customary sanctions. The perpetrators of AR were fined 1 (one) goat and 2,000,000 in cash, and were expelled from the Want Jaya village, while the ER perpetrators were not fined for speech. In the Khalwat case in Gayo Lues Regency, the Satpol PP and WH members handled mostly by adat, even though in the Qanun Jinayah, the perpetrators of the Khalwat and Mesum had to be whipped in public in accordance with the results of the trial.

From the 2 (two) examples of the above cases it can be seen that in the settlement of the khalwat case, the community still chooses to be resolved through the adat court. In addition to the existence of formal justice law institutions namely the Shariah Court which deals with violations of Islamic shari'ah, there are also informal institutions namely traditional institutions which are very influential on the pattern of life of the Acehnese people. Customary institutions have a legal basis, namely the Local Regulation Number 7 of 2000 concerning the Implementation of Indigenous Life and the Aceh Qanun Number 09 of 2008 concerning Indigenous Life and Customary Fostering.

Syari'at khalwat violations committed by the residents of the gampong can be resolved first through the Traditional Village Meeting (TVM). This provision should be known by the investigators, namely the Wilayatul Hisbah officers, and the general public, so that any of these three elements make arrests, so he gives the perpetrators to the village officials, whereas if the khalwat is not a gampong, then it is handed over to the investigator.

However, in the settlement of the khalwat case in the city of Banda Aceh, adat institutions play an active role, in which cases of khalwat are mostly resolved only by adat institutions, without involving the Sharia Court. This is a fact that occurred in the city of Banda Aceh, as if there was no formal institution that was more authorized in handling khalwat cases and became the main problem in this study.

The khalwat perpetrators who were given punishment by the Shariah Court, only a few cases received corporal punishment in the form of caning, the rest of the khalwat only received punishment in the form of reprimand, advice, and marriage. Furthermore, the head of the Wilayatul Hisbah of the Office of Islamic Law of the City of Banda Aceh stated that many khalwat cases were only resolved by the gampong Customary Institution alone without involving them so that they were overwhelmed to obtain data on the khalwat perpetrators in Banda Aceh City.

The role of the Gampong traditional institution in handling khalwat cases in their Gampong is still large and many khalwat perpetrators are given direct punishment by the Gampong customary institution both in the form of advice and directly married to the khalwat without reporting to the Wilayatul Hisbah or other authorized parties, from their roles and functions in accordance with what is stated in the Aceh Qanun Number 09 of 2008 concerning Indigenous Life and Traditional Life Guidance is explained

that there are no customary law rules which regulate the permissibility of customary institutions to decide / sentence the khalwat either punishment in the form of lashes or mating, so that in the adat gampong meeting decided like the habit that had been done in the gampong.

But here it can be seen that traditional institutions have begun to play a role in giving / punishing the khalwat, while in the Qanun there is no single article that regulates the permissibility of adat institutions to give / impose penalties for khalwat perpetrators.

V. CONCLUSION

The settlement of the khalwat case that occurred in Acehnese society is now the authority of the adat court and also the syar'iyah court. This is stipulated in Article 24 of the Aceh Qanun Number 6 of 2014 concerning the jinayat law also mentions Jarimah khalwat which is the authority of customary courts to be resolved according to the provisions in the Aceh Qanun concerning customary life guidance and customs and / or other laws and regulations concerning customs. While Article 23 paragraph (1) of Qanun Aceh Number 6 of 2014 mentions that anyone who intentionally does Jarimah khalwat, is threatened with 'Uqubat Ta'zir cambuk no more than 10 (ten) times or a fine of no more than 100 (one hundred) grams of pure gold or prison for a maximum of 10 (ten) months.

In this study it was found that the people of Aceh at the time of completing the khalwat case often did not distinguish between the cases of khalwat, ikhtilath and zina. In resolving the khalwat case, the community still chooses to be resolved through customary justice. In addition to the existence of formal justice law institutions namely the Shariah Court which deals with violations of Islamic shari'ah, there are also informal institutions namely traditional institutions which are very influential on the pattern of life of the Acehnese people.

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