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Printed in the United States of America
DOI: <https://doi.org/10.1166/asl.2018.12416>

Advanced Science Letters
Vol. 24, No. 10 Oct, 2018

THE STATUS OF WILAYAT AL-HISBAH INSTITUTION IN THE CONSTITUTIONAL LAW ORDER (A Socio-Historical Analysis of the Application of Islamic Law in Aceh, Indonesia)

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The issue of a number of laws and by-laws to the Islamic sharia implementation in Aceh does not guarantee the effectiveness of this implementation. This is highly related to the fact that Islamic sharia in Aceh has been so long not implemented. It is also due to the impact of prolonged conflict and global culture, religious life, religion education, and the decline of tradition in this area that has reached the critical point. The constitutional law principally is to govern the power of a state organization and all of its aspects related to the organization of the state. Al-Qur'an as guidance for mankind illustrates that each Moslem acts as a caliph in which one of his/her duties is to spread the goodness and to reject the wrongdoings. Also, al-Qur'an acts as a legal protection to the state with an authority to institute the preparation of regulation towards the implementation of this order. Hence, the Government requires a formal legal institution as a means to manage the attitude of human beings, namely Wilayat Al-Hisbah institution. The status of this institution in the positive law in Aceh can be traced to the legal basis in the form of laws and regional regulations. Based on the context of the Islamic sharia implementation in Aceh Province, the institutional format of Al-Hisbah concerns with the ideal format of Islamic Sharia that might be implemented in the daily life of the community in accordance with the setting and the overall condition of the Acehnese people who have philosophical-juridical values corresponding to the social setting of Aceh people in the reform era. This essay attempts to discuss the status of Wilayat Al-Hisbah institution in Constitutional Law Order with Socio-Historical analysis in the Implementation of Islamic Sharia in Aceh in consideration to that the imposition of Islamic law is an integral part of the vision and mission of the life of the Muslim community in this area.

Keywords: Status of Wilayat al-Hisbah, Constitutional, Islamic Sharia.

1. INTRODUCTION

As a legal-based country, Indonesia must necessarily have its own national law as a guideline to run the government wheels. This country forms its national law based on three legal systems - customary law, Islamic law and the ex-West law. It is inevitable that Muslims in Indonesia are the most dominant elements. At the international Islamic world level, Muslims in Indonesia can even be referred to as the greatest Muslim community gathered in one territorial limit of the state. Indonesian society mostly following the Islamic teachings must always implement those teachings but, as the people following the philosophical system of Pancasila (five basic principles), should also still be capable of accommodating all interests of national components.

The Law of Indonesia Republic No. 44/1999 on the Special Status of Aceh Province refers to the evidence about the Islamic universality containing a number of rules that govern the relationship of human and God, and human and universe

which are then conceived in the term of "Islamic Sharia".¹ The conceptual term of Islamic Sharia in Law No. 44/1999 also proves the particularity of Islamic teachings and law

Looking at Aceh in the current context, all attempts to format the Islamic Sharia implementation, in fact, is not as easy as imagined. The issue of a number of laws and bylaws for this implementation in Aceh does not automatically make the sharia in all parts of Aceh effective later on. It is due to the prolonged deactivation of Islamic sharia in Aceh coupled with the effect of prolonged conflict as well as the influence of global culture,

¹ Syari'at is a path or guide for human life. It includes Allah SWT's statutes and provisions of His Messenger, either in the form of commands executed by humans or any restrictions that must be abandoned. From a legal perspective, Syari'at means the basic legal norms established by Allah and must be followed by Muslims either in relationship with Allah and with human beings and the universe (see in Muhammad Daud Ali, 2000: 41). As stated by Mahmud Syaltut (1966: 12), syari'at refers to the laws established by God to human both in relationship with Allah or human relationships with others and the universe. Hereinafter it is referred Syaltut: al-Islam. Compared with Muhammad Mustafa al-Zuhaily (nd: 19) and Yusuf Qardhawiy (tt: 18-19)

religious life, religious education, and customs in this area that has been declining and reached the critical points.

Islamic Sharia contains the rules of God for humanity that is, at least, reflected in the aspects of faith, worship and mu'amalat (Syaltut, 1966: 12 and Azyumardi Azra, et al., 2002: 167). The first is the most principal aspect to be imbued by human as a statement of attitude and commitment to God.² Meanwhile, the second one is about the realization of human attitudes and statement in the form of readiness to do service to God through ways or Amaliah that has got justification in sharia. The third (mu'amalat) is the most widespread aspect as it contains a number of humanistic themes such as the importance of creating a beneficial sense to humans and the need to reject any wrongdoing or distress and other ordinances in the form of the interaction among people and nature surroundings (Baqir Hasani, 2002: 27). These three aspects in their application necessitate the existence of the institution controlling and supervising the Islamic Sharia implementation. Institution in the history of Islamic law is termed as "Wilayat al-Hisbah".³

2. CONCEPT OF WILĀYAT AL-ĤISBAH IN ISLAMIC CONSTITUTIONAL LAW

Constitutional Law principally is the law governing the authorized organization of a state and all aspects related to the organization of the state.

The concept of Constitutional Law directly or indirectly becomes hegemony in which the constitutional order based on Positive Constitutional Law at the time strictly and consistently was the implementation of Pancasila and the Constitution 1945. Hence, the discussion in the theoretical side of Constitutional Law is still abandoned and even restrained for being viewed as the "anti-establishment" mind and can disrupt national stability.

In a classical theoretical order, Al-Mawardi (tt: 240) defined hisbah as an act of goodness if it is proven that the goodness is left behind and to forbid any wrongdoing if it is proven to be done.⁴ Ma'ruf (in Ibrahim Dasuqi al-Syahawi, tt: 361) is defined as an action against the whole words and actions judged as a good thing by Syara' (personality). While the munkar (wrongdoing) refers to an order to not carry out all the words and deeds considered as bad according to syara'.

Hisbah in Islamic constitutional law is a controlling concept rooted from the Islamic teachings

institutionalized in an Islamic governance system that has emerged since the beginning of Islam. The reflection of hisbah existence in the Islamic constitutional law can be traced since Muhammad was being prophet (state), Khulafaurrasyidin, Islamic Daulah to the time of the Ottoman caliphate. Hisbah is a major judicial institution of three judiciary Islamic constitutional laws implemented during the rules of the Umayyad (Daulah Umayyah) and Bani Abbas (Daula Abbasid).

Today, it is hard to find the development of the Wilayat al-Hisbah concept, but the expansion of coverage of hisbah concept was commissioned by Al-Ghazali, medieval Ulama who again elaborated the result of al-Mawardi formulation. By using the fiqh approach, al-Ghazali widened the concept of supervision as required by the formulation of al-Mawardi. The method of al-Ghazali is by systematically formulating the pillars and terms of hisbah. The principal tasks of Wilayat al-Hisbah are to do amar ma'ruf nahi munkar. Muhtasib (executor of hisbah) is authorized in his duties to admonish, exhort, rebuke, threaten, hit, and quell any evil things using arm forces against the evil doers.

3. THE STATUS OF WILĀYAT AL-ĤISBAH IN ITS CORRELATION WITH LEGAL INSTITUTIONS AND SOCIAL STRUCTURE IN ACEH

a. The status of Wilayat al-Ĥisbah in legal institution

Wilayatul Hisbah (WH) is an institution reintroduced to Aceh people. This institution has so long been unknown to the public conterminous to the advance of modernization era. Historians mention that Wilayatul Hisbah is a popular institution in the glory days of Islam. Then, the term of WH (the present context) is embedded in the books of Fiqh, especially as-Siyasatusy Syar'iyyah, al-Ahkamus Sulthaniyyah or an-Nuzhumul Islamiyah.

The position of Wilayat al-Hisbah institution in the positive law in Aceh Province can be traced to the legal basis in the form of Law and Regional Regulations. The Law No. 44 of 1999 and Act No. 18 of 2001 are the legal basis for the issue of the Regional Regulation (Qanun). The Law No. 44 of 1999 regulates the substance of the implementation of privilege in Aceh and the Law No. 18 of 2001 sets the institutions implementing the substances of Act No. 44 of 1999.

Regulations issued by the Governor of Aceh reinforce the authority of Wilayat al-Hisbah officials against the existing regulations (Governor Decree No. 01 of 2004). These provisions consist of: (1) The authorities of Wilayat al-Hisbah to (a) supervise the implementation of regulations and legislation in Islamic sharia, (b) warn, advise, prevent, and prohibits any person suspected to have, is being, or will commit the violations of legislation

² Akidah (faith) is a fundamental principle in religion in the form of declaration to God through the kesaksian (*syahadat*) to Allah and His Prophet Muhammad SAW. This is becoming the main key of Islam for individual (Syaltut, 1966: 20).

³ As stated by Māwardi, al-Hisbah is an institution authorized to do Amar Ma'ruf (if proven good) and Nahi Munkar (if proven wrong). (see: al-Māwardi, 2000: 398).

⁴ Also see in Abu Ya'la al-Farra' (196: 284); Al-Ghazali, 1970: 435); Sa'd 'Abdullah Sa'd al-'Arifi, *al-Hisbah* (2001: 23).

in Islamic sharia (Chapter II, Article 5, Paragraph 1); (2) Muhtasib is authorized to (a) receive reports on public complaints, (b) to stop a person suspected as the perpetrators of violations, (c) to identify each person reasonably suspected to have and are being committed violations, and (d) stop any actions suspected to violate the legislation (paragraph 2); (3) Muhtasib is authorized to ask for help from the local Keuchik and Tuha Peut in the coaching process (Paragraph 3); (4) Muhtasib in coaching against a person allegedly to commit the violations is given maximum 3 times of opportunity within a certain period (paragraph 4); and (5) any person who had received coaching from Muhtasib officer, but still violate will be taken to the investigator (verse 5).

4. WILĀYAT AL-HISBAH CONCEPT THAT CAN BE APPLIED IN ACEH

The historical series of Wilayat al-Hisbah development as an institution in charge of supervising the implementation of Islamic Sharia is the basis of the milestone to reformulate the institutional concept of completely controlling Islamic sharia.

Institutionally, Wilayat al-Hisbah has its juridical basis, both in its historical development in Islam, and in the concept of the sharia enforcement in Aceh. From the institutional aspect, Wilayat al-Hisbah in action has a working mechanism, administrative bureaucracy and policies that must be run by the management and staff.

The institutional format of Wilayat al-Hisbah in the context of the implementation of Islamic Sharia in Aceh Province is under discussion among various elements, especially regarding the ideal format of Sharia, which may be implemented in the daily life of the community based upon the settings and conditions of Acehnese society as a whole. The involvement of various parties in the conversation indicates that Islamic Sharia has some unique and universal values and characteristics and is able to face the today global challenges as a common challenge for Muslims.

One of the reviews of Regulation No. 5 of 2000, as revealed by Muhammad Ali Rusjdi (2003: 134) reveals several problems in which some experts viewed that it implies a rather vague and ambiguous essence, as seen in the following expression:

The vague and ambiguous provisions are also seen in Article 2 paragraph (3) which states; "The provisions stated in regional regulation serve as the Basic Guidelines in applying the Islamic Sharia points in the region". What is meant by "basic guidelines"? Is the regional regulation just made as further elaboration of Act No. 44 of 1999 on the Privileges of Aceh Province, isn't

it? It means that Law No. 44 is the basic guidelines and the regulation is as its implementation and elaboration.

It is not proper if a basic guideline is outlined by other basic guideline.

In this context, the principle of Wilayat al-Hisbah institution is the part of the aspects of Islamic Sharia implementation, as outlined in Chapter IV Article 5 (2) (e) of the Education and Dakwah Islamiyah / amar ma'ruf nahi munkar. Thus, Wilayat al-Hisbah institution is obliged for the task of educating and dakwah (giving teaching about Islam) performed by the appointed officers. It is in line with the Article 13 of Regulation stating:

- 1) The local government needs to establish and promote educational institutions that can produce intelligent, faithful, devoted and noble human.
- 2) Everyone is free to organize and implement the Islamic da'wah (teaching) to grow and develop the Islamic teachings, strengthen the unity and integrity of the people and strengthen ukhuwah Islamiah (brotherhood among Moslems).
- 3) The local government is obliged to grow and develop institutions of miyah to produce the Islamic cadres that have Islamic insight and knowledge.
- 4) Every society shall implement and support the implementation of amar ma'ruf nahi munkar based upon their capabilities (see the Department of Islamic Sharia, Association ..., 2003: 58).

The phrase implicitly necessitates the existence of the institution, in this case, Wilayat al-Hisbah⁵ as an institution that has the task of Amar ma'ruf nahi munkar in the form of an organization as the mandatory of local government of Aceh to implement Islamic sharia with the rights and obligations set out by local government. In this context, Wilayat al-Hisbah in a formal structure should be independent as an institution that should be given an authority to play an important role as the spearhead in the application of Sharia in Kaffah (devout) manner in the people daily life.

⁵ This department has a strong root in Islamic history. Its task is to enforce amar ma'ruf if it is clearly left behind (zhara fasadukuhu) and prevent any wrongdoings if it is clearly done (zhahara filsafat'luhu). The objective of this institution is to maintain the public order and the superiority of moral and custom in society. However, other equivalent institutions so far with such exclusive task is not established yet in the history of Aceh or at least never been established since the independence day of Indonesia. Now, it is an opportunity to soon think about the establishment of this new institution to implement some tasks that today are not managed or the body in charge of this is unclear. At least, there are two points that can be used as an example: (1) supervision on the implementation of syi'ar, worship, fasting, tithe and so on; and 2) Supervision towards any violence of ethics that can lead to the negative and doubtful assessment (see Rusjdi Ali Muhammad, 2003: 136)

In the duties to supervise the implementation of Islamic sharia and Qanun, similar with the Qanun No. 11 of 2002 in Aqidah (faith), worship and syi'ar (teaching about) of Islam, it is needed to regulate the Organizational and Working Structure of Wilayat al-Hisbah, as mentioned in Chapter 14 Qanun of Islamic sharia that:

- a) To implement Islamic Sharia in Aqeedah, worship and Islamic syi'ar, the government at provincial and district/city level establishes Wilayat al-Hisbah authorized to supervise the implementation of this Qanun.
- b) Wilayat al-Hisbah can be formed at the level of gampong, settlement, district or other region/environments.
- c) If the results of monitoring conducted by the Wilayat al-Hisbah as referred to by paragraph (2) of this Article have sufficient reasons for the violence in the Qanun, the supervisory authorities (Wilayat al-Hisbah) is authorized to reprimand / advise the violators.
- d) If after the attempt to advise in accordance with paragraph above, in fact, the attitude of the violator is not changed, then the supervisory authority submits these offenses to the investigation authorities.
- e) Organizational Structure, authority and working procedures of Wilayat al-Hisbah are regulated by Governor Decree after consultation with MPU (see in Al Yasa Abubakar, in Heb Nur Fairuz M. (2002: 135).

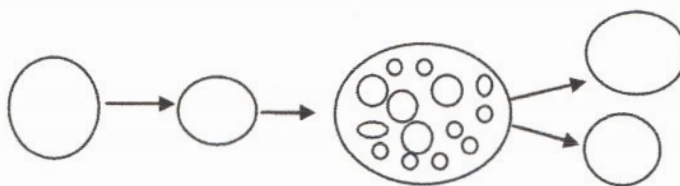
Based on the expressions above it can be seen that the existence of Wilayat al-Hisbah as an integral part of the Sharia implementation in Aqeedah, worship and syi'ar Islam, acts as the controlling institution from the provincial level to the village level and other environments. In its action and operation, it is institutionally regulated by Decree of the Governor of Nanggroe Aceh Darussalam that specifically regulates the Organization and Work Procedure of Wilayat al-Hisbah.

According to the writer, in the ideal order of Wilayat al-Hisbah institution given the task to control and supervise the Sharia implementation in its various aspects should be shaped under the Autonomous Department under the Local Government structurally independent and having a working relationship with other law enforcement institutions such as Police Department, Attorney, and the Supreme Court of Syar'iyyah. This institution is specifically formatted both in terms of budget, personnel recruitment and field workers that must form those with the strong religious education background and have

knowledge about the detail of social life. It was intended to enable this institution not to face any sociological resistance from some people that do not understand about the formalization of Islamic Sharia which necessitates the existence of institutions assigned to control and supervise the implementation of Islamic Sharia in Aceh Province.

The institute is in its action is to perform the tasks for the implementation of sharia law as defined in the applicable bylaws. Hence, the format should refer to the concept of law enforcement with more attention to the hierarchical relationship of controlling centres of the law itself. The following is the Construction of legal enforceability is described as follows (see Lili Rasyidi, 1993: 71):

Relationship of Central organs and individuals in Legal Enactment



Description:

OP = Central Organ – central authority - central command - central energy - central control

HK = Law - command - energy - control;

SK = Communication system; consisting of individuals;

I = Individuals communication system components; considered to be always Obedient to the commands; the order violation is controlled by the sanctions;

K = Justice as a destination command (law).

Thus, the desired Wilayat al-Hisbah should refer to the concept of the ideal application of the law in the whole communication system between communities in the need of justice evenly in the frame of Islamic Sharia accepted in Aceh Province that has some religious characteristics

Through this concept, the issue of monitoring the implementation of Islamic Sharia can be properly and optimally done, given the involvement of all society elements that are not only as the objects but also as the subject. Such involvement is not only limited to the formal institutional arrangements, but also involves non-formal institutions and social elements in monitoring the implementation of sharia.

The Sketch of the Relationship of Wilāyat al-Hisbah and other related elements.

| WH Institution | Description |
|----------------|--|
| HTN RI | In the form of consultative and coordinative relationship with Police Department, Attorney and Supreme Court of Syari'yyah |

| | |
|-------------------|---|
| Qanun NAD | Foundation in the Supervision of Islamic Sharia |
| Customary Council | In the form of participative relationship |

Source: Analysis Result of Researcher

The sketch above shows the involvement of all elements, both government and non-government in the efforts to realize the implementation of Islamic Sharia in kaffah in Aceh. It is based upon that the implementation of the law in the Indonesia should be based on the existing regulations, namely:

The regulations formed by the legislative;

- 1) The regulations established by law through its decision (judge made law);
- 2) The regulations contained in the people habits as the subjects and the objects of law.

Thus, all rules can be performed if the supporting factors are fulfilled. These factors include the systematic rule vertically or horizontally. With this rule, the law enforcement officers, in this case, hisbah (muhtasib) have some guidelines in the form of written rules concerning with their work scope by determining the limits of their authority. In addition, in their work, they also must have the facility to support the implementation of any rules as well as those affected by the regulation scope. They are required to obey and adhere to the rule of law by promoting non-judicial aspects, such as social control, religion and applicable customs

5. CONCLUSION

Wilayat al-Hisbah is a special institution supervising the implementation of Islamic law in its various aspects either in faith, worship or muamalat. This institution in history has emerged and developed along with the development of Islam and the attempt of its implementation in the sharia areas.

The implementation of Wilayat al-Hisbah in Aceh Province refers to the legislation as the juridical foundation for the establishment of this institution, namely the rules becoming the basis of the implementation of Islamic law in Aceh Province such as the Law No. 44 of 1999, Law No. 18 of 2001, as well as the Qanun (regulation) of Islamic law. The higher laws such as these two laws become the legal basis for the lower regulations governing Wilayat al-Hisbah more technically such as Qanun, Governor Decree, and Governor Regulation.

The existence of Wilayat al-Hisbah in the scope of their duties as the part of the enforcement of amar ma'ruf nahi munkar are the implications of Act No. 44 of 1999 on the Special Status of Aceh as a law that provides an access for people in Aceh to implement the Islamic sharia. The law has been then followed up by the Law No. 18 of 2001 on Special Autonomy for Special District of Aceh Province. Politically, the presence of both these laws has laid a strong legal basis for the implementation

of Sharia and has given a broad access for people in Aceh to implement kaffah (devout) in daily life.

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