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Legal Obligation of Notary in Complying with Witness Requirements in Notarial Acts

[1] Syifa Hasvia Putri, [2] Azhari Yahya, [3] Muhammad Zaki
[1, 2, 3] Faculty of Law, Syiah Kuala University, Indonesia

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Corresponding Author: **Syifa Hasvia Putri**

Abstract
Aceh is one of the provinces in the State of Indonesia that has been granted special status. Legally, Aceh's special status is regulated under Law Number 44 of 1999 concerning the Implementation of the Special Status of the Province of the Special Region of Aceh. One of Aceh's special privileges is the enforcement of Islamic Sharia, stipulated in Law Number 11 of 2006 concerning the Government of Aceh and reinforced by Qanun Number 8 of 2014 concerning the Principles of Islamic Sharia. Islamic Sharia also applies to Notaries in Aceh. One of the most important provisions in the creation of Notarial deeds is the presence of witnesses. However, according to the provisions of Islamic Law, which guide the implementation of Islamic Sharia in Aceh, the requirements for witnesses in the Qur'an differ from the witness requirements stipulated in the UUJN. This study employs a normative juridical research method utilizing statutory, conceptual, and historical approaches. Data was collected through library research and analysed using a prescriptive analysis method. The research findings indicate that the regulation of witness provisions for creating Notarial deeds in Aceh is deemed crucial due to the absence of specific rules governing it. Notaries are obligated to present witnesses in accordance with the command of Allah SWT in Surah Al-Baqarah, Verse 282. This verse stipulates the requirement of two male witnesses for every non-cash *muamalah* (transaction), with preference given to males. If two male witnesses are unavailable, then one male witness and two female witnesses are permissible.

Keywords: Provisions, Regulation, Witness, Deed, Notary

Introduction

Aceh is one of the provinces in the State of Indonesia that is granted special status and is also given special authority, also known as special autonomy, to regulate and manage its own governmental affairs and the interests of its community independently. Legally, Aceh's special status is regulated under Law Number 44 of 1999 concerning the Implementation of the Special Status of the Province of the Special Region of Aceh. Article 3, paragraph (2) of this law states that one of the four aspects of Aceh's special status implementation is the enforcement of Islamic Sharia as a manifestation of religious life, alongside the implementation in the fields of customs and traditions, education, and the role of the *ulama* (Islamic scholars).

Furthermore, the enforcement of Islamic Sharia in Aceh is also legally regulated under Law Number 11 of 2006 concerning the Government of Aceh. This is further reinforced by Qanun Number 8 of 2014 concerning the Principles of Islamic Sharia, Article 7 of which states: "Every person of the Islamic faith in Aceh is obliged to obey and practice Islamic Sharia. Every individual or legal entity domiciled or residing in Aceh is obliged to respect the implementation of Islamic Sharia." This signifies that Islamic Sharia is part of the state policy implemented in Aceh.

Islamic Sharia also applies to Notaries in Aceh. A Notary is a public official vested with the authority to create authentic deeds. With the increasing variety of Islamic transactions, there is a need for Notaries who understand Sharia concepts and their application, as well as forms of agreement that require the proper incorporation of Islamic rules. Notaries must possess the understanding, skills, and capability for deed creation, ensuring that as authorized officials, they carry out their duties with professionalism and adhere to the provisions of the code of ethics. In this regard, when creating deeds, Notaries must comply with Sharia principles founded on the values of justice, utility (benefit), balance, and universality (*rahmatan lil alamin* - mercy for all creation). These Sharia principles must be based on the Qur'an, Hadith, Ijma' (consensus), and Ijtihad (independent reasoning) to ensure that deeds created by Notaries are valid not only under applicable secular law but also according to the

provisions of Islamic Law.

One of the most important provisions in the creation of Notarial deeds is the presence of witnesses. The requirement for the presence of witnesses in Notarial deeds is stipulated in Article 40, paragraph (1) of the Law on Notarial Positions (UUJN), which states: "Every deed read out by a Notary must be attended by at least 2 (two) witnesses, unless statutory regulations stipulate otherwise." It is therefore very clear that the presence of witnesses is crucial in the creation of Notarial deeds. However, according to the provisions of Islamic Law, which guide the implementation of Islamic Sharia in Aceh, the requirements for witnesses in the Qur'an differ from the witness requirements stipulated in the UUJN. The fundamental difference relates to the provisions concerning the comparative value of witnesses based on gender, specifically the ratio where one male witness is equivalent to two female witnesses. This contrasts with the UUJN, which does not regulate such provisions regarding the comparative value or gender of witnesses.

In the Qur'an, a witness is referred to as *syahid*, derived from the root word *syahida* (related to *al-syuhud* and *al-syahadah*), meaning to be present and to witness, whether physically (with one's own eyes) or through intellectual understanding (knowledge). This is in accordance with the command of Allah SWT in Surah Al-Baqarah, Verse 282. This verse generally serves as the legal basis for the requirement of two witnesses in every non-cash *muamalah* (transaction). Preference is given for these two witnesses to be male; if two male witnesses are unavailable, then one male witness and two female witnesses are permissible. The verse also emphasizes the need for parties to record their transactions in writing as evidence of the transaction or agreement undertaken. This involves the role of the Notary and the presence of individuals acting as witnesses to that transaction or agreement, referred to here as Notarial witnesses.

The implementation of Islamic Sharia in Aceh, particularly concerning witness provisions in Notarial deeds, has not been fully comprehensive, although some aspects have been implemented. Furthermore, Aceh still lacks specific regulations governing witness provisions in Notarial deeds that align with and fulfil the requirements of Islamic Law. The current regulations in Aceh concerning the enforcement of Islamic Sharia, as stipulated in Qanun Number 8 of 2014 concerning the Principles of Islamic Sharia, are considered too general and insufficient to ensure the comprehensive implementation of Islamic Sharia in Aceh. This is particularly evident regarding witness provisions in Notarial deeds, demonstrated by the fact that some Notaries still do not adhere to Islamic Law's witness requirements during the deed creation process. Based on this background, further research is needed regarding the importance of regulating witness provisions for the creation of Notarial deeds in Aceh.

Research Method

This study employs normative juridical research, a type of library-based legal research conducted by examining library materials or secondary data. The approaches utilized in this research include the statutory regulations approach (also referred to as the *statute approach*), the conceptual approach, and the historical approach.

The sources of legal materials used in this research consist of primary legal materials, including the Qur'an and Hadith, the Indonesian Civil Code, Law Number 30 of 2004 concerning the Office of Notary, as amended by Law Number 2 of 2014 (*UUJN*), Law Number 44 of 1999 concerning the Implementation of the Special Status of the Province of the Special Region of Aceh, Law Number 11 of 2006 concerning the Government of Aceh, and Qanun Number 8 of 2014 concerning the Principles of Islamic Sharia. Secondary legal materials include reference books, reports, law journals, scholarly articles, and relevant findings from previous research. Tertiary legal materials comprise general dictionaries, legal dictionaries, encyclopaedias, and relevant periodicals.

The data collection technique employed in this research is library research. This library research involves collecting secondary data, such as applicable statutory regulations, documents related to the research subject, and relevant legal theories and principles. Subsequently, the legal materials obtained through library research will be processed and analyzed qualitatively. This involves analyzing, interpreting, and drawing conclusions relevant to the research problems addressed in this study. Finally, all data gathered through library research will be thoroughly and systematically analyzed using the prescriptive analysis method.

Results and Discussions

A. The Role of Witnesses in the Creation of Notarial Deeds

The scope of duties for a Notary involves creating instruments of proof desired by the parties for specific legal actions. These instruments of proof take the form of written evidence embodied in a deed. In addition to the written evidence constituted by the deed, witness testimony is also required should a future dispute arise concerning the deed created by the Notary.

When performing legal acts, the Notary is obligated to present witnesses, as stipulated in Article 16, paragraph (1), letter m of the UUJN (Law on Notarial Positions), which states: "In executing their office, the Notary must read the deed aloud in the presence of the appeared(s), attended by at least 2 (two) witnesses, or 4 (four) specific witnesses for the creation of a private will, and it must be signed at that time by the appeared(s), the witnesses, and the Notary." This is further reinforced in Article 40, paragraph (1) of the UUJN, which states: "Every deed read out by a Notary must be attended by at least 2 (two) witnesses, unless statutory regulations stipulate otherwise." Article 40, paragraph (4) of the UUJN clarifies that the identification or statement concerning the identity and capacity of the Notarial witnesses must be expressly stated in the deed, particularly in the closing section of the deed.

From the preceding explanation, it can be concluded that witnesses play a crucial role in the creation of Notarial deeds. Their existence is a requirement stipulated by the UUJN (Law on Notarial Positions) to confer authenticity upon notarial deeds. Witnesses are physically present during the creation process of an authentic deed by a Notary, and their presence serves as evidence that all information contained within the authentic deed is accurate and legally valid.

Furthermore, evidence of the crucial role of witnesses in the creation of Notarial deeds is that witnesses constitute one of the formal requirements. A notarial deed is considered complete only when all formal requirements are fulfilled, thereby granting it perfect evidentiary value and force.

Consequently, the role of the witnesses, being one of these formal requirements within a Notarial deed, ensures its legal accountability.

In a legal context, witnesses bear significant responsibility concerning authentic deeds. The responsibility of witnesses in the creation of Notarial deeds includes maintaining the confidentiality of the deed's contents learned while acting as a witness. Additionally, witnesses are responsible for verifying that the appeared(s) are present before the Notary and that their identities match the description read aloud by the Notary. They must also verify that the deed is read aloud by the Notary in the presence of the appeared(s) *before* it is signed, and subsequently signed by the parties, the witnesses, and the concerned Notary.

B. The Concept of Witness testimony in Islam

In Arabic, the concept of witness testimony is referred to as *"syahadah"*. A person who acts as a witness is called a *"syahid"* (male witness) or *"syahidah"* (female witness). These terms are derived from the root *syahida* (verb forms include *yasyhadu*; related nouns *syahdan*, *syahadatan*), which means to convey information based on one's knowledge through testimony, to provide certain (accurate and credible) information, and to witness firsthand (with one's own eyes). Similarly, *"syahadah"* (testimony) implies anyone who observes an event and can report what they have witnessed.

As testimony constitutes a form of knowledge, experts define it, among others, as follows: According to Muhammad Salam Madzkur, "Testimony involves a person's truthful declaration before the court, using the words of testimony, to establish a right concerning another person." Ibn al-Humam defines "Testimony as a truthful declaration, using the words of testimony before a court session, to establish a right."

Based on the preceding definitions, it is understood that a witness is someone capable of providing definite information or statements because they have knowledge of the actual event. Consequently, the testimony provided can serve as strong evidence. Indeed, some experts assert that revealing the truth requires more than just written proof; it must also be supplemented by witness testimony. Another meaning derived from the above definitions is that a witness is someone requested to be present to observe an event. Such a person requested to act as a witness must fulfil the necessary requirements and be deemed to have a good understanding of what they have witnessed.

C. Witness Requirements in Islam

For testimony to be admissible, Islam, through the *ijtihad* (independent legal reasoning) of Islamic legal scholars, stipulates several criteria that a person must fulfil to qualify as a witness. These criteria include the following:

1. Being Muslim

Most Islamic legal scholars, including Imam Malik, Imam Shafi'i, and Imam Ahmad ibn Hanbal, concur that a witness in a contract or transaction must be Muslim. This requirement for a witness to be Muslim is agreed upon by most of the scholars. Therefore, if a contract or transaction is witnessed by a non-Muslim, their testimony is deemed invalid as it fails to meet this prerequisite.

2. Being an 'Adl'

As explained previously, the term *"syahid"* used for a witness represents a form of emphasis (*li al-mubalaghah*), signifying that such a witness fully provides testimony. This implies they are genuinely known as a good person, consistent and strong in their faith, and even known This implies they are genuinely known as a good person, consistent and strong in their faith, and furthermore, known as an 'Adl' person. Possessing this quality of being 'Adl', a witness can be balanced and impartial towards the disputing parties.

Being 'Adl' includes reporting exactly what was observed concerning the legal event, without addition or subtraction. Consequently, according to Ibn Hazm, the testimony of any man or woman who is not 'Adl' is inadmissible.

3. *Baligh*

Baligh means being able to distinguish between right and wrong, and between good and bad. Children are not subject to *taklif* (legal responsibility) because their intellectual capacity (*'aql*) to understand matters is not yet fully developed.

Most scholars reject the testimony of children. However, Imam Hanbali permits children to testify if no *baligh* (adult) person witnessed a particular legal event, especially in cases specifically involving children.

4. Being of sound mind

Being of sound mind, means having the capacity to think and provide testimony while conscious, not while intoxicated or insane. Scholars of Fiqh (Islamic jurisprudence) hold that individuals who are insane are exempt from legal accountability. Consequently, their testimony is rejected. According to Al-Jauhari, this rejection stems from the fact that testimony is intrinsically linked to responsibility: *"A witness is someone who takes responsibility for their testimony and presents it because they witnessed an event that others did not."*

D. The Status of Male and Female Witnesses in Islam

Allah SWT has ordained in Surah Al-Baqarah verse 282:

"O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation [i.e., the debtor] dictate. And let him fear Allah, his Lord, and not diminish anything from it. But if the one who has the obligation is of limited understanding, or weak, or unable himself to dictate, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs [forgets], then the other can remind her."

This verse generally serves as the legal basis for the requirement of two witnesses in every non-cash *muamalah* (transaction). Preference is given for these two witnesses to be male; if two male witnesses are unavailable, then one male witness and two female witnesses are permissible. From this, it is commonly concluded that the testimony of a woman is valued at half that of a man.

Sayyid Qutb explains that, fundamentally, testimony in *muamalah* (transactions) involves two 'adl' (just) male witnesses respected by the community. Subsequently, Allah SWT provided a facilitation by permitting women to be witnesses, albeit with a different number, namely four women. In this verse, the provision regarding testimony is primarily directed towards men, as historically, they were the ones predominantly engaged in transactions within

Muslim society. In that context, women were generally not expected to undertake economic activities to support themselves or their families. Consequently, women were less frequently involved in economic transactions, potentially leading to less familiarity with the details of *muamalah*. It was therefore considered that if women acted as witnesses in such matters, there might be a greater tendency towards forgetfulness or oversight due to their potentially limited knowledge and experience compared to men, given their lesser involvement in these transactions. This is presented as the wisdom behind female testimony being valued at half that of male testimony in the context of these *muamalah* transactions.

According to Rasyid Ridha, female testimony being valued at half that of male testimony is due to two reasons. The first reason is that female testimony is considered weak, and the second is the lack of public confidence in women. This perceived weakness in female testimony is attributed to their lesser involvement in managing financial or property matters. Rasyid Ridha adds that the *'illat* (effective legal cause/ratio Legis) for the ruling equating the testimony of two women with that of one man is explicitly stated in the verse [2:282]: "...so that if one of the women errs [forgets], then the other can remind her." Al-Khatib adds that the perceived weakness of female testimony stems from physical and psychological factors.

These are some perspectives indicating differences concerning the testimony of men and women. Such differences may depend on the specific legal case being witnessed. It all depends on the subject matter of the testimony provided. Islam establishes equality between men and women, but this does not imply that men and women are identical or equal in every single aspect.

Equating them in all roles, positions, social statuses, occupations, and types of obligations and rights would violate their inherent nature. This is because there are undeniable, fundamental differences between men and women, evident even through casual observation. Biologically and in terms of physical capabilities, men and women are distinctly different. Similarly, differences also exist in terms of disposition, rational thought processes, inclinations, emotions, and individual potentials. Furthermore, women, by their natural disposition, experience reproductive processes such as pregnancy, childbirth, lactation, and menstruation, which men do not. It would be unjust to impose roles that are inconsistent with the inherent nature and fundamental tendencies of each gender.

E. Regulation of Sharia Principles in Aceh

In Aceh, regulations based on Islamic Sharia principles are stipulated in various laws and statutes that provide the legal foundation for the formal implementation of Islamic Sharia. During the *Reformasi* era, the aspiration and opportunity to implement Islamic Sharia in Aceh were accommodated within Law Number 44 of 1999 concerning the Implementation of the Special Status of the Province of the Special Region of Aceh. This law grants special status to the Province of Aceh in several aspects. Article 3, paragraph (2) states that this special status is divided into fields, with religion being foremost, followed by customs, education, and the role of the *ulama* (Islamic scholars). The manifestation of this special status in the field of religion is that Aceh possesses the authority to organize religious life based on the principles of Islamic Sharia.

Furthermore, the regulation of Islamic Sharia principles in Aceh was further solidified by Law Number 11 of 2006 concerning the Government of Aceh. Articles 125-127 of this law stipulate that Islamic Sharia implemented in Aceh encompasses *'aqidah* (creed), *shari'ah* (law), and *akhlaq* (morality). This scope of Islamic Sharia includes *'ibadah* (worship), *ahwal al-syakhshiyah* (family law), *muamalah* (civil transactions/law), *jinayah* (criminal law), *qadha'* (judiciary/adjudication), *tarbiyah* (education), *da'wah* (Islamic propagation), *syiar* (Islamic public symbols/observances), and the defense of Islam. Every Muslim adherent in Aceh is obliged to obey and practice Islamic Sharia. Furthermore, every person residing or present in Aceh is obliged to respect the implementation of Islamic Sharia. The Government of Aceh and the regency/city governments hold responsibility for organizing the implementation of Islamic Sharia in Aceh.

Based on Law Number 44 of 1999 concerning the Implementation of the Special Status of the Province of the Special Region of Aceh, and specifically Article 125, paragraph (3) of Law Number 11 of 2006 concerning the Government of Aceh, which stipulates that further provisions regarding the implementation of Islamic Sharia shall be regulated by Aceh *Qanun* (local regulation), it follows that the regulation of the principles of Islamic Sharia needed to be established in an Aceh *Qanun*. This led to the enactment of *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia.

Article 20 of *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia stipulates that every Muslim residing in Aceh must conduct *Muamalah* (transactions) in accordance with the guidance of Islamic Sharia. The legislative effort to implement Islamic Sharia via *Qanun* required the establishment of a primary or foundational legal instrument to serve as a general principle guiding the creation of subsequent *Qanun* directly related to Islamic Sharia.

F. The Importance of Regulating Witness Provisions in the Creation of Notarial Deeds in Relation to the *Maqasid al-Shariah*

The regulation of witness provisions for the creation of Notarial deeds in Aceh is considered crucial. There are several primary reasons why regulating witness provisions for Notarial deeds in Aceh is important. The first, among others, is that it constitutes a form of obedience to the commands of Allah SWT. Muslims believe that Allah's law is the true and just law. Therefore, this law must be implemented.

Several verses are commonly used as arguments in this regard, including from the Qur'an, Surah Al-Maidah, verse 44 (QS 5:44): "...And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers (*kafirun*)." Similarly, Surah Al-Maidah, verse 45 (QS 5:45): "...And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers (*zalimun*)." And Surah Al-Maidah, verse 47 (QS 5:47): "...And whoever does not judge by what Allah has revealed - then it is those who are the defiantly disobedient (*fasiqun*)." These three verses are typically used as an argument that humankind must apply Allah's law. Otherwise, they fall into the category of

wrongdoers (*zalimun*), disbelievers (*kafirun*), or defiantly disobedient (*fasiqun*).

The next reason is the crucial role the presence of witnesses plays in relation to the validity, legal force, and clarity of a deed. In addition to being commanded by the Qur'an which instructs parties undertaking a contract or transaction to present witnesses according to its command the requirement to present witnesses in Islam also stems from the status of witnesses as a *rukun* (an essential pillar or element that cannot be omitted during the execution of a contract). In Islam, witnesses, in their capacity as a *rukun*, can also serve as a means of legal proof.

The next reason presented is the need for compliance with Islamic Law in Aceh, also termed Sharia compliance. As a region implementing Islamic Sharia, Aceh possesses its own specific legal provisions that must be adhered to, including those pertaining to notarial matters. Provisions regarding witnesses in the creation of deeds must align with the principles of Islamic law applicable in Aceh, as indicated, for instance, in Surah Al-Baqarah, verse 282 (QS 2:282).

A further reason is to ensure conformity with the prevailing laws and regulations in Aceh, specifically *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia. Notaries in Aceh should be subject not only to the UUJN (Law on Notarial Positions) but also to the applicable *Qanun* in Aceh, which governs various legal aspects. As stipulated in *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia, Islamic Sharia encompasses all aspects of life for the community and the state apparatus in Aceh. One key area of Islamic Sharia implementation is *muamalah* (civil transactions), which is closely linked to the role of Notaries. Notaries facilitate *muamalah* processes and formalize them into written agreements with binding legal force, known as deeds. And every Muslim in Aceh is obliged to obey and practice Islamic Sharia. Therefore, the regulation of witness provisions in the creation of Notarial deeds must align with both these sets of regulations (UUJN and *Qanun*) to avoid conflicts between legal norms.

A further reason cited is that the legal framework provided by the Islamic Sharia *Qanun* in Aceh is considered weak, as its implementation has not been optimal and has not yet been able to effectively address the problems within Acehnese society.

The principle that Indonesia is a state based on law is well-established. Its foundation rests on mutually agreed-upon written norms. These include the constitution and its various derivative norms. However, even though Indonesia adheres to the concept of a state based on law primarily understood through positive law, this does not automatically negate the existence of Islamic law within its system. Islamic values, derived from both *shari'ah* (divine law) and *fiqh* (jurisprudence), partially persist within the legal system through legislative processes. The *Qanun* in Aceh serve as an example of Islamic values undergoing such a legislative process.

The character of these *Qanun* is heavily imbued with legal-positivist elements. Meanwhile, *fiqh* and *shari'ah* inform the ethical dimensions and address the underlying theological-metaphysical aspects related to these *Qanun*. A *Qanun* represents provisions, originating from either *shari'ah* or *fiqh*, that have been formalized through legislation. *Qanun* are proposed, deliberated, ratified, and subsequently enforced.

The implementation of Islamic Sharia in Aceh must be manifested through regulations containing Islamic Sharia provisions or principles, known as *Qanun*. This is necessitated because Article 125, paragraph (3) of Law Number 11 of 2006 concerning the Government of Aceh stipulates that further provisions regarding Sharia implementation shall be regulated by Aceh *Qanun*. Therefore, regulations concerning various other principles of Islamic Sharia need to be established through specific Aceh *Qanun* relevant to their respective fields. Efforts must be made to ensure the future implementation of Islamic Sharia in Aceh is increasingly effective and appropriate, so that its perceived benefits within the community become more widespread and comprehensive.

Its connection with the *Maqasid al-Shariah* (Objectives of Sharia) in this context lies in the fact that the *Maqasid al-Shariah* represent the underlying intentions and objectives for the legislation of laws. These objectives must be fulfilled to achieve the wisdom inherent in every legal ruling. In this context, the objective of regulating witness provisions for the creation of Notarial deeds in Aceh is underpinned by the several reasons explained previously. Therefore, the intent and objective behind legislating this specific regulation concerning witness provisions for Notarial deeds in Aceh is to ensure that the fulfilment of Sharia principles in Aceh can be properly realized and comprehensively implemented, particularly regarding these witness provisions in Notarial deeds.

Conclusion

When performing legal acts, a Notary is obligated to present witnesses, as ordained by Allah SWT in Surah Al-Baqarah, verse 282. This verse generally serves as the legal basis for requiring two witnesses in non-cash *muamalah* (transactions). Preference is given for these two witnesses to be male; if two male witnesses are unavailable, then one male witness and two female witnesses are permissible. The regulation of witness provisions for the creation of Notarial deeds in Aceh is deemed crucial. Several primary reasons underscore this importance: first, it represents obedience to the commands of Allah SWT. Second, the presence of witnesses plays a crucial role concerning the validity, legal force, and clarity of a deed. Third, it constitutes compliance with Islamic Law as implemented in Aceh (Sharia compliance). Fourth, it ensures conformity with prevailing regulations in Aceh, specifically *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia. Finally, the existing legal framework for Islamic Sharia *Qanun* in Aceh is considered weak, with suboptimal implementation that is unable to fully address community issues, partly due to the absence of specific regulations governing witness provisions according to Islamic law for the creation of Notarial deeds.

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