

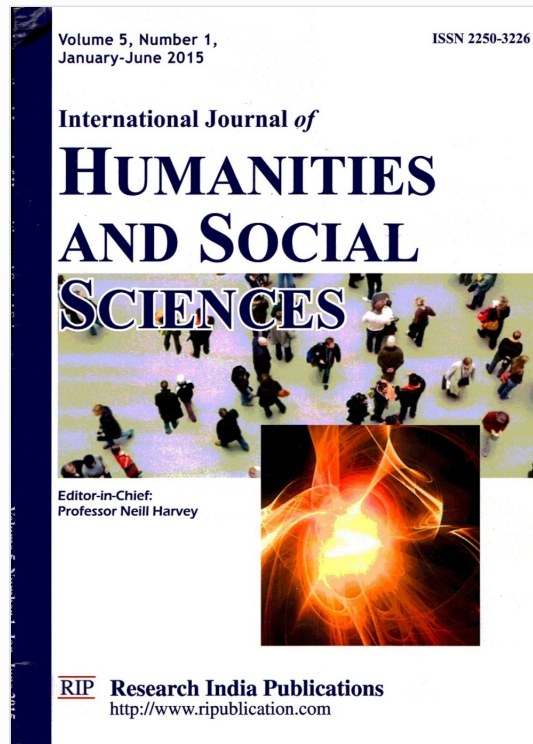


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The Urgency of Formulation of Qanun Jinayah for the Good Governance in Aceh

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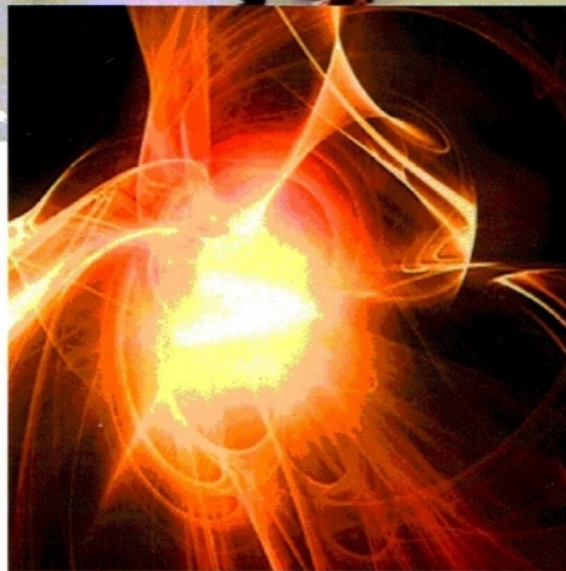
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The Urgency of Formulation of Qanun Jinayah For The Good Governance In Aceh

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Abstract

A good formulation of law substance or material is really needed to build good governance. Aceh as a unique province which has special authority to implement Islamic law (Sharia) comprehensively has intention to apply Islamic law in all aspects of life including criminal laws. The aim of this research is then to describe the urgency of *Qanun Jinayah* formulation in running the good governance in Aceh. The result shows that there are four stages to reach *Qanun Jinayah*, namely planning stage, preparation stage, and discussion, approval, promulgation and dissemination stage to be run by Aceh's government in order to reach the good governance. In conclusion, it emerges Aceh to be able to run *Qanun Jinayah* in achieving the good governance in Aceh.

Keywords: *Qanun Jinayah*, Islamic Law, Criminal Law, Governance, Aceh

Introduction

Aceh has a uniqueness of its own law, for example, the local regulations referred to *Qanun*. There is also *Mahkamah Syar'iyah* (Islamic law court). It clearly illustrates how the desire of Aceh people who do not want to leave the values of Islam from any side.

Manifestation of the willing to apply Islamic law comprehensively poured in Law No. 11 Year 2006 concerning the governance of Aceh (UUPA). Before this law was passed, the special autonomy in Aceh had accommodated several things. Firstly, Aceh has different regulations in the field that are already independently to all parts of Indonesia (autonomy). Secondly, Aceh gets additional powers in the area of law in the form of the permission for the use of Sharia (Islamic law) as material and formal law in Aceh. To implement this, Aceh is given the authority to draw up this *Qanun* as implementing regulations that is under the laws, not tied by governmental regulations and the President [1].

In the context of the implementation of Sharia, *Qanun* is similar legislation or regulations of provincial districts/cities that govern the administration and Aceh society. *Qanun* formation, as a juridical instrument for the implementation of regional autonomy or UUPA, will be as good as supported by the establishment of formulation procedure and certain and standardized methods which bind all agencies that have authority to establish laws [8].

Preparation of Islamic criminal law into positive law raises several problems and challenges for the scholars, academics and *Qanun* former, such as how to transfer the Islamic sharia contained in the Qur'an, Hadith and Fiqh into the language of laws. This job is not easy because the language is part of a particular culture, and style of legal language. It is different from the language of Islamic law which is derived from the Arabic text. The issue becomes urgent. Arabic terminology transformed into laws that expressed and translated into Indonesian, should be structured appropriately so that people can understand the intention, purpose, and the provisions of a rule of law, and then stick with it. The implementation agencies and the judiciary will interpret and implement such regulations. Language is one of the primary means of law enforcement and legal certainty [7]

The biggest problem faced then is on the filling material of criminal law (*Qanun Jinayah*). If the Sharia law based on the Koran and the Sunnah, there are questions whether all the rules of Islamic law contained from both of the sources, displayed immediately as it is to the material of *Qanun Jinayah* or the law will be extracted from the books of fiqh schools and how to respond to the diversity of opinions of Islamic scholars and schools in Islam which in turn can be used as *Qanun* that has a legal binding for all Muslims in Aceh. Concerns appear when siding with one of the schools or the particular stream will lead to the dismemberment of the *ummah* (Islamic society). Aside from those problems, there is also matter about adjustment of *Qanun Jinayah* with the understanding and belief of minority groups in Islam and also different religions [3].

Pros and cons of legislation of legal materials are more visible when entering the realm of criminal law. When there is a clash between the concept of Islamic criminal law and national criminal law, the question of which will be accepted by the legislative, judicial and executive raises. The difference of this concept has led to the decision of the Board of Aceh Representatives legalized *Qanun Jinayah*, but it is not ratified by the Government. The executive party is not willing to do so because it is considered to contradicts Human Rights and not synchronic to the draft submitted by the executive to the legislature [2].

This condition is crystallized as the law of life and tradition of the Acehnese people who have been accustomed to national law practice, are relatively less familiar with Islamic criminal law. In fact there are those who think that Islamic law can not be applied consistently in one area of the unitary Republic of Indonesia, as it will give birth to dualism in the application of law in society despite the implementation of Islamic law was passed by the legislation. Basic logic of this view is Indonesia is not a state based on religion [5].

Rejection of the Islamic criminal law encourages the experts to provide a wide range of legal arguments and legal basis to neutralize and find solutions for the

challenges to the application of Islamic criminal law that can be eliminated in space, place, time and circumstances. At this stage, the obstacles encountered seem to have been overcome by the adoption of some typical criminal Aceh's *Qanun* to apply in public in the political landscape of Indonesian law [6].

Thus, the legal material formulation in *Qanun Jinayah* is very urgent because this material will greatly affect the later application. Various problems must be identified systematically in order to generate Islamic criminal law or *Qanun* that can be applied effectively in order to meet the requirements of law and legal order of Indonesia. It requires a serious study of the substance of the *Qanun Jinayah* in Aceh.

Research Questions

Based on the background of the problem above, the study related to the substance of the *Qanun Jinayah* (criminal law) expected to provide answers to the following research main formula:

1. How is formulation of the substance/material of the *Qanun Jinayah* in Aceh?
2. How are ways to involve stakeholders in the formulation of the substance/material of the the *Qanun Jinayah* in Aceh?

Methodology

This study combines between library research and field research. This research was included in the disciplines of general laws especially disciplines of legislation as one of the branches of the discipline of law which deals with the formation process of law and legal aspects associated with legal research. Thus, the process of formation in the context of *Qanun* can be studied based on legislation. When connected to the realm of the Islamic sciences, this research can be studied through the disciplines of *fiqh* and *usul fiqh* as issues of *ijtihad* are the study of the science of *fiqh* and *usul fiqh*.

This type of research is descriptive-analysis. This research is descriptive because it aims to determine how the ideal concept to solve problems that occur in the legislation of Islamic criminal law in Aceh. Research analysis aims to provide an assessment of the material in the draft of *Qanun Jinayah* in order to be detected where its shortcomings lie, if selection of *Qanun* material has been through the normative process at every stage. Thus, the unit of analysis of the study is draft texts study in 2009, 2012, and 2014.

The source of primary data was obtained from the draft of *Qanun Jinayah* in Aceh and books on Islamic law legislation in Indonesia. The field data was sourced from the parties who determine the substance of *Qanun Jinayah*. Informants in this study were individuals who know practically and conceptually about the substance of the *Qanun* in Aceh and its functions. Secondary data in this study were data that researchers obtained through legal literature searches or documentation.

Findings and Discussion

Formulation Process and Mechanism of Material Contents of Criminal Law (*Jinayah*) in Aceh

The process of formulating the substance of *Qanun Jinayah* through review of the legislative of Aceh is divided into following stages.

Planning Stage

Planning of legislation is made in a legislative program on provincial level called 'PROLEGA'. In the preparation stage, DPRA (House of Representatives of Aceh) asks their fittings called the legislature. DPRA has a function as the central of planning and the establishment of the *Qanun*, as stated in article 34 of Law 11 Year 2006 which states that DPRA has a duty to implement the establishment of the program. At the provincial level, the legislative strengthening program is prepared by DPRA. DPRA coordinates closely with the government of Aceh. Results of coordinating implementation of the program are set out by the decision of provincial parliament after approval from the Governor. Aceh legislation's planning program is coordinated by the Bureau or part of the duties and responsibilities including the areas of legislation.

Implementation of the program will be carried out in the medium term of 5 (five) years and the priority of each fiscal year which is prepared in a coordinated manner, focused and integrated between DPRA and government, will be determined. Formulation of PROLEGA is based on four (4) principles, namely [4]:

1. Loyalty to the ideals of the proclamation of Indonesian independence, August 17, 1945, philosophical values of *Pancasila*, and constitutional values as written in the 1945 Constitution
2. The implementation of the democratic and peaceful legal system and the rule of law in Aceh
3. The development of norms of *Qanun* and new *Qanun* institutions in order to support and underpin the legal needs of the community in a sustainable, smooth, and peaceful manner and protect all the people of Aceh
4. The implementation of Law No. 44 Year 1999 concerning the privileges of Aceh and Act No. 11 of 2006.

Each year on the draft will be evaluated, verified and updated in accordance with the dynamics of the development of society and the priority that is not implemented in previous fiscal year should be prioritized for the next year. One of the setting priority scales of list of titles of *Qanun* plan is set based on consideration of *Qanun* that supports the implementation of Sharia and other Aceh specialty. In Aceh's 2007-2009 legislative strengthening program, *Qanun* concerning on the implementation of Sharia was at the number 27. In its statement, it was said that this *Qanun* can consist of many laws. Based on this description, *Qanun Jinayah* was included in it.

In 2007, the list of priorities on the Aceh legislation program draft, *Qanun* about the implementation of Islamic law was at number 13. It indicates that the previous *Qanun* was at number 27, but in 2007, it became the priority at number 13.

Preparation Stage

Qanun can be proposed by DPRA (legislative power) and the Government of Aceh (executive power) through initiative rights. Proposal of legislative or executive initiatives on *Qanun* plan should be included as well with text/ academic studies. Academic script is a script that contains the background, the purpose of the account, the target to be achieved as well as the scope, range, object or direction on the draft of regulation that scientific conception can be accounted for while the academic study is the study of the contents on the draft prepared by the proponent who studied academically from the Islamic, philosophical, juridical and sociological point of view.

Academic paper in 2008 on the draft of *Jinayah* was compiled by Prof.Dr Elisha 'Abubakar. In the academic paper, it contains background on the proposed revisions to the previous *Qanun Jinayah*, including the procedural law while the purpose of the Academic writing was to be input in formulating scientific basis compilation of *Qanun Jinayah* draft. In turn, the draft is expected to be a driving force for the reduction of activities that is in contrary to Islamic law.

Academic Writing of *Qanun Jinayah* was done by reviewing the literature, including the review of limited discussion, workshops and various inputs and various parties on the *Jinayah*. Completion on *Qanun* was done by a team formed by Department of Shari'a in 2005, with a series of discussions (seminars and workshops) as an effort to solicit public participation and it has been discussed by Parliament together with the executive in 2006. In addition, the foundation used cannot be separated from the philosophical, juridical and sociological basis where the philosophical foundation for the values of the Islamic Shariah, juridical basis refers to the positive law and the sociological foundation based on life situation of Aceh people.

Qanun design proposal from both the executive and legislative sides must attach scripts or academic studies as a requirement on the draft of proposal. The proposal of the executive was prepared by SKPD (regional work unit). SKPD would report the preparation of *Qanun* pre-draft plan to the Governor of Aceh. together with a complete explanation of the concept on the draft of regulation which includes the background and purpose of the preparation; legal basis; targets to be realized; subject matter, scope or object to be regulated; scope and direction of the setting; and linkages with other legislation.

In 2009, there was rejection on the draft of *Jinayah* by the executive. This was a deadlock between the executive and the legislature. In 2012, the *Qanun* planning was prepared back to discuss. One of the efforts was through holding a Focus Group Discussion (FGD).

Discussion Stage

Discussion on the draft was conducted by DPRA together with the Governor. This was done through a discussion conducted in the Commission Meeting/Joint Commission/Legislation Committee/Plenary Meeting of the Special Committee and the provincial parliament.

Special Committee XII has held discussions with executives, socialization in printed media, a Public Hearing (RDPU) by inviting the parties would deal directly

with the *Qanun* such as Islamic scholars, police, prosecutor, and courts from all regencies/cities in Aceh, academics, Non-Government Organization (NGO), lawyers and student organizations, from 7 to 10 of August 2009. The Special Committee XII had also invited the Supreme Judge of Aceh twice in the series of RDPU activities until the end of the discussion carried out 2 x 24 hours before the opening of plenary session. Discussion process of the *Qanun* draft had been in accordance with the mechanism set out in the *Qanun* No. 3 of 2007 on Procedures for the Establishment of the *Qanun*.

Qanun Jinayah draft originally proposed by the executive consisted of 11 Chapters and 42 Articles. After the discussion together, there was a change of number of chapters and articles into 10 chapters and 50 articles. Matters of concern during the discussion include adjustment of terms in the general courts, the types of *Jarimah* (crime) and the types and levels of *'Uqubat* (punishment).

There are differences among the draft of *Qanun Jinayah* in 2009, 2012 and 2014. Firstly, the case of drinking *Khamar* (alcohol), on the draft year 2012 and 2014, the punishment was 40-month prison sentence. Secondly, penalty for producing *Khamar* in the draft year 2009 and 2012 were 80 times of caning, a fine of 800 grams of pure gold and prison sentence of 80 months, whereas in 2014, the draft was reduced to 60 times of caning, 600 grams of pure gold and 60 months of prison sentence. Thirdly, related to case of gambling on the draft 2009 and 2012, the punishment would be 60 times of caning, a fine of 600 grams of pure gold and 60 months of imprisonment, whereas in 2014, the draft was reduced to 30 times of caning, a fine of 300 grams of pure gold, and 30 months imprisonment. Fourthly, the draft year 2009 set about adultery for unmarried and married, while in 2012 and 2014, adultery was no longer classified.

Approval, Promulgation, and Dissemination Stage

Approval stage is the stage where the executive and the legislature have agreed the draft of *Qanun*. The draft which had been approved jointly by DPRA and the Governor in joint discussion was delivered by the leader of the DPRA to the Governor to be ratified as *Qanun*. Submission on the draft was done within maximum period of 7 (seven) days after the date of mutual agreement.

The ratification of this *Qanun Jinayah* encountered many obstacles that the draft was not signed by the executive to become *Qanun*, as stated by A.Hamid Zein as Head of Legal and Public Relations of Aceh's Regional Secretary in front of the Special Committee XII on June, 22, 2009 that the executive opposed punishment of *Rajam* (stoning) as it is not the time to apply it in Aceh today and asked to put it on hold. Zein stated it was not that executives disagree, but examine at a wider range of application of the penalty. Caning was considered enough. If on the way the sentence were really necessary, the penalty would be applied.

The biggest obstacle in the process of legislation Islamic law in Aceh is what will fill the material law in *Qanun Jinayah* after the enactment of UUPA. In addition to the absence of previous ideal format that can be used as an example, Acehnese intellectuals' readiness in formulating material in *Qanun Jinayah* also raises its own problems. This article is perhaps also the reason for the Department of Islamic Sharia

as the most responsible party in terms of the sustainability of the application of Islamic law to prefer "safe area" by making criminal *Qanun* that has not yet been set nationally (such as alcohol drinking, gambling and pornography) and *Zakat* (in its capacity as the regional income and its relation to taxes). While the field or problem that is set nationally (including corruption in it) has not been taken into consideration to be discussed because the position of Islamic law as a sub-system within the national legal system is not considered stable. In other words, criminal penalties chosen to apply are still at the level of *ta'zir* where the sentence handed over to the policy of the authority (*wali al-amr*) and have not touched the area of heavy *hudud* punishments like stoning for adulterers.

Since law material of *Qanun* can not be separated from the realm of *Fiqh*, ideas to formulate *Fiqh* of Aceh had appeared which is expected to be more in tune and in the same breath with time and the context in which Islamic law is enforced. This idea was often conveyed repeatedly by Al-Yasa 'Abubakar in various forums in his capacity as a former head of the Islamic Sharia in Aceh. It was also delivered at the International Conference of Sharia in Banda Aceh from 19 to 21 of July 2007. Furthermore, this idea is often voiced by postgraduate students of IAIN Ar-Raniry through various article published in the local media.

According to Al-Yasa', the formulation of *Fiqh* of Aceh necessitates *ijtihad* of the scholars and intellectuals that are needed to bridge the legislative impasse in the field of *Jinayah* due to the absence of an ideal example, which is established on three main principles: (1) methodologically makes Al-Quran, Sunnah, *tafsir* and various *Fiqh* rules that exist as a primary source; (2) meet the local needs of the people of Aceh; (3) oriented forward and meet the needs of modernity, including the consideration of human rights issues and gender equality.

Historical position and sociological condition of the Acehnese to Islamic law rooted in the practice of the legal life of society, so it can automatically become a strong power tie. This becomes a very dominant factor in the application of a law in a society since the existence of an ideal law should consider the needs of the community as a legal subject. This means that the Islamic Law in Aceh has the support of the majority of the population because the majority of people who live there are Muslims.

The success of the formalization of Islamic law is very much determined by the law awareness of the public and the political law of a state. Public awareness will put Islamic law as the law of life in the community (living law). When the Islamic law has become a living law, the state will provide protection to the Islamic law. Formalization of Islamic law aim, in addition to positive law, is the unification of Islamic law, in view of the fact that Islamic law is also very plural, both in terms of material, and definition. Entity is expected to address the legal pluralism. With entity, it will create legal certainty in the community. Judges rule on the dispute will be referred to the law which has been formalized. Moreover, the formalization of Islamic law is also intended that the formal Islamic law can be enforced in a society. The formalization of this law, the path of an institution or a procedure is commonly known as the legislature. In fact, in a state legislature, not all members understand the Muslim or Islamic law, would find an obstacle.

One example of *Taqnin* is Melaka law has a variety of contents of which contains the provisions of Islamic law in addition to a number of provisions which are not known in Islam. In fact, there are provisions that are not allowed in Islam, such as tooth extraction punishment for slaves who mock others. Although there are still engaging with local values, but the inclusion of Islamic norms in this law proves *Taqnin* efforts have been done. The same conclusion can also be drawn from *Tazkirât al-Tabaqat al-Qanun al-Syar'i* of Kingdom of Aceh which contains various rules applied in the era of Kingdom of Aceh Darussalam.

The above facts indicate the importance of *Taqnin* and there are at least three reasons why *Taqnin* becomes important. Firstly, there is the absence of specific provisions on the form for the state in Islam. Secondly, it is not possible to make Fiqh directly as legislation. At last, things that must be regulated by the state in recent times are more complex than in the past because the presence of human life technology leads to dependence on technology products.

Based on historical analysis, according to 'Abid al-Jabri, the existence of the state as the power to implement Sharia law is on one hand, and the state as a social institution is on the other side. The existence of a command (*taklif*) in the Qur'an that demand role as executive authorities became the basis of Islam bound by a government agency. But the silence of Sharia on the determination of a particular form of government means allowances for any form of social institutions as implementation Islamic law. Thus, based on the historical analysis of al-Jabri, it can be concluded, that the desired state by Islam is a social institution that can run Islamic law regardless of its form.

As a result, the shape of the nation state that is now practiced in the majority of Muslim countries should be accepted as a dynamic, not coercion of particular civilization as a form of hegemony. Political hegemony or the hegemony of civilization should be rejected because we believe in the existence of plurality and diversity in many ways such as differences in race, language, religion, politics and culture. Then the nation to be ideal when it is able to carry out the command (*taklif*) of the word of God (*khiithâb*) whose implementation needs institutions.

Conclusion

The design of the substance of *Qanun Jinayah* is an urgent need to run the government. Therefore, ideally, in the process of formulating the *Qanun* material or public policy determination, the politicians must rely on ethical participatory communicative logic that emphasizes communication and public participation process with reference to ethical values. Since the draft of *Qanun Jinayah* associated with the lives of the people, then in the process of formulation shall be communicated, socialized, and then formulated by community of participation and the feasibility and priority tested to keep the values of ethics and expectations of the people of Aceh.

The ethical participatory communicative logic is applied so that the legislation process of *Qanun Jinayah* draft has no impact on efforts of "Fooling Politics" in public. The process of impoverishment that the *modus operandi* goes through three stages: 1) disclaimer of dialectic of ideology, values discussion, and debate about

priorities, 2) reduction of public space into the market, and 3) the impoverishment of political ethics. In the process of *Taqnin Jinayah*, the matters relating to prevention should also be considered and predictable.

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