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LAW, CRIMINOLOGY & CRIMINAL JUSTICE | RESEARCH ARTICLE

3 Wither *Qanun Jinayat*? The legal and social developments of Islamic criminal law in Indonesia

Zainul Fuad^{1*}, Surya Darma and Muhibbuthabry Muhibbuthabry²

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Abstract: Internally from domestic organizations, and externally from foreign
observers, Aceh's *Qanun Jinayat* (Islamic Criminal Law) has been criticized for being
unconstitutional, discriminatory, and anachronistic. However, an attempt to revoke
the *Qanun* through judicial review by domestic civil society organizations at the
Indonesian Supreme Court had failed. A socio-legal study, this paper examined the
judicial review in detail, as well as the social and legal developments which occurred
around the time of review. It was found that Islamic criminal law in Indonesia has
only obtained a temporary triumph, and most probably would face many more trials
in the rapidly changing regional, national, and global legal environment.

Subjects: Asian Law; Islamic Law; Socio-Legal Studies; Local Government Law; Criminology
and Law

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Keywords: Legal pluralism; constitutional norm; legal choice; political deference; social
accommodation

ABOUT THE AUTHOR

This paper is part of a large study on the development of Islamic law in Aceh. Specifically, it explores the legal challenge and societal response towards the implementation of Islamic criminal law in Aceh. The three authors contributed to the research from their respective viewpoints and background: human rights, Islamic law and modernity, social history of Islamic Law (Zainul Fuad); Islamic jurisprudence, Aceh's social and cultural development (Muhibbuthabry); social justice, Islamic thought (Surya Darma). Two of the authors lectures at Indonesian Islamic universities, namely Universitas Islam Negeri Sumatera Utara (Zainul Fuad) and Universitas Islam Negeri Ar-Raniry Banda Aceh (Muhibbuthabry). The other author (Surya Darma) is an independent scholar and social activist currently residing in Jakarta. The Aceh field research was facilitated by Muhibbuthabry, who provided relevant materials and contacts.

PUBLIC INTEREST STATEMENT

Aceh has received international attention since the devastating 2004 tsunami, receiving the outpouring of the world's sympathy in the form of large amounts of foreign aid. Its physical reconstruction was accompanied by legal rapprochement between the then conflicting Indonesian government and Aceh liberation forces, formalized by the Helsinki Memorandum of Understanding (MoU). The subsequent laws derived from the Helsinki MoU, in which the Aceh provincial government was given the ability to formulate Islamic laws in accordance with the dominant Islamic character of the province, clashed with the other laws of the Indonesian national government. One of the most prominent clashes occurred in the field of criminal law, which came to head in the judicial review of Aceh's *Qanun Jinayat* (Islamic Criminal Law) by Indonesian civil society organizations at the Indonesian Supreme Court. The paper examines the judicial review in detail, as well as the social and legal developments which occurred around the time of the review.

1. Introduction

Islam is the religion of about 2.0 billion people worldwide, that is about 25.2 percent of the world population (Kettani, 2019). These Muslims live in a variety of nation-state settings, in which Islam is either a state religion, a majority religion, or a minority religion. In all these settings, Islam always raises a normative structural problems due to Islam's claim of universal and eternal validity, especially viewed from the perspective of legal pluralism (Ballard, 2013; Krawietz & Reifield, 2008; Possamai et al., 2015; Turner & Arslan, 2011; Yilmaz, 2005). Countries such as Indonesia, which can be categorized under the second setting, has continually faced the challenge of creating a consistent legal regime capable of dealing with regional, national, and international legal development (Bush, 2008; Lukito, 2003; Salim, 2015; Wasti, 2009; Weiman, 2010). This challenge is very evident in the uproar over Aceh's recent implementation of Islamic criminal law, which was criticized by many domestic and foreign observers. The law, popularly called *Qanun Jinayat* was ratified by the Aceh's House of Representatives (DPRA) in late 2014.¹

Until now, Indonesian civil society organizations (CSOs) continue to express their concern against what they claim to be the "unconstitutionality" of the Qanun.² Among the criticisms directed at the Qanun was its incompatibility with human rights principles and discrimination against women.³ After a year of the Qanun's obligatory period of "socialization",⁴ as it became effectively implemented in 2015, two of these CSOs, the Institute for Criminal Justice Reform (ICJR) and United Women Solidarity (PSP), took their concern further and attempt to revoke it at the Indonesian Supreme Court (MA).⁵ Half a year of struggle for these two CSOs followed, which proved futile as the Court decided to deny the CSO's effort in late-2015, although the Decision was only published at the Court's website in mid-2016 (ICJR, 2016; Mahkamah Agung, 2016).⁶ The supporters of the Qanun, which include elites in the executive and legislative branches of the Aceh government, rejoiced upon hearing this ruling, claiming in the media that the Indonesian national government, at least represented by the most venerable institution of its judicative branches, has understood the vital importance of *sharia* in Aceh, and made the right decision in upholding the Qanun in the historically Islamic region.⁷

Chronologically, the Qanun has undergone three phases of planning, socialization, and implementation since the Helsinki peace agreement in 2005 (Al-Asyi, 2015, pp. 1–17). The first phase of planning occurred in 2008 in the form of Qanun Draft (*Rancangan Qanun Jinayat* or RQA), which was drafted and redrafted between the executive and legislative branches of the Aceh government (Grossmann, 2015). About a year after the initial planning period, on 14 September 2009 the RQA was finally approved and passed at the legislative level. However, the Qanun was stopped in its track at the executive level due to differences in opinion with regards to the extent of punishment contained in the Qanun (*hudud* and *rajam*) (Latief, 2010; Salim, 2009).⁸ After several years of dialogues, discussions, and debates between all parties involved in the Qanun, the final phase of planning was at last reached on 23 October 2014 when the Qanun was signed into law (ratified) by both the executive and legislative branches (Syarif, 2013).

2. Methodology

This paper elaborates the reasons for the Supreme Court Qanun's judicial review, detailing the arguments of the parties involved, and analyzed the Supreme Court Decision in depth. Numerous accounts in terms of newspaper reports, online comments, and scholarly papers regarding the Qanun, Decision, and related issues of the implementation of Islamic criminal law in Indonesia were also explored, summarized, and analyzed. There are many works on *sharia* or Islamic law in Indonesia and Aceh from Indonesian or foreign scholars (Buehler, 2014 [michaelbuehler.asia]; Buehler, 2016b; Feener, 2013a; Feener, 2013b), but very few base their analysis on Indonesia's constitutional and legal framework (Junadi, 2012; Parsons & Mietzner, 2009). It is hoped that this paper can be a useful addition to the constitutional and socio-legal discussion of Islamic criminal law in Indonesia.

3. Supreme court trial

At 23 pages long, the Qanun consists of 10 chapters and 75 articles. The 50 Articles in Chapter IV, the most numerous in this Qanun, specify in great details the criminal offenses and punishments which falls under the purview of the Qanun. Each set of offenses and punishments is described in 10 separate parts,⁹ with 3 articles for part 1 (*khamar* or alcohol (consumption, production, and distribution)), 5 articles for part 2 (*maisir* or gambling), 2 articles for part 3 (*khalwat* or being alone with a person of the opposite sex who is not a spouse or a relative), 8 articles for part 4 (*ikhtilath* or being intimate outside of marriage), 13 articles for part 5 (*zina* or adultery), 2 articles for part 6 (*pelecehan seksual* or sexual harassment), 9 articles for part 7 (*pemeriksaan* or rape), 6 articles for part 8 (*qadzaf*—falsely accusing a person of adultery), 2 articles for part 10 (*liwath* or homosexual act), and 1 article for part 11 (*musahaqah* or lesbian act).¹⁰

Even though many CSOs protested against these punishments in the Qanun, such as those who organize under the human and women's rights network JMSPS (Civil Society Network Concerned about Sharia), including Kontras Aceh, Women Network for Humanity (RPuK), Bungong Jeumpa Foundation (YBJ), Indonesian Women Coalition (KPI), Working Group for Aceh Gender Transformation (KKTGA), and Unsyiah's Human Rights Study Centre (Pusham),¹¹ only two took their case further to the Supreme Court. These two are the *Perkumpulan Masyarakat Pembaharuan Peradilan Pidana* (Institute for Criminal Justice Reform—ICJR) and the *Perserikatan Solidaritas Perempuan* (PSP). Both of these CSOs have similar headquarter addresses in Jakarta in the area of *Pasar Minggu*. However, in the lawsuit, the two plaintiffs from ICJR provided *Tangerang* and *Depok* home addresses, while the other plaintiff from PSP provided *Banda Aceh* home address. All three plaintiffs were represented by the same 12 public lawyers and assistant public lawyers from ICJR. These 12 lawyers took as their defendant the Governor of Aceh, who were represented by 7 civil servant lawyers based in the office of the Aceh's Regional Secretariat (*Sekretariat Daerah*).

At least 10 Indonesian and international laws, the latter having being ratified by Indonesia as members of the United Nations, were asserted by the two CSOs to have been contradicted by the Qanun: (a) Indonesian Criminal Code; (b) Human Rights Act (No. 39/Year 1999); (c) International Covenant on Civil and Political Rights (ratified through Act 12/2005); (d) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified through Act 5/1998); (e) Regulation Formation Act (12/2011); (f) Child Criminal Court System Act (11/2012); (g) Child Protection Act (23/2002), later modified to become Act 35/2004; (h) Criminal Law Procedures Act (8/1981); (i) Judicial Power Act (48/2009); and, (j) *Convention on the Elimination of all forms of Discrimination Against Women* (ratified through Act 7/1984) ((ICJR, [icjr.or.id])). At least 9 main legal reasons were offered regarding this contravention: (1) The flogging punishment in Qanun Jinayat is against Indonesian laws and regulations; (2) The Qanun does not abide by the Indonesian legal hierarchy; (3) The duplication of criminal stipulations in the Qanun is in opposition of the principles of legal order and certainty; (4) Some stipulations in the Qanun does not adhere to the principles of purpose and formulation clarity; (5) The stipulation containing the phrase “admission of guilt which provides further burden” is contrary to the principle of “non self incrimination”; (6) The stipulation on rape victim needing to provide proof violates other Indonesian laws¹²; (7) The use of vows as proof is in contravention of other Indonesian laws¹³; (8) The stipulation on Judge Decision go against another Indonesian law; (9) The stipulation on illicit sexual relationship discriminates against women and contravene another Indonesian law (PSP, [solidaritasperempuan.org]).

4. Application rationale or legal argumentation

The Supreme Court can only revoke a regulation if it can be proven to contradict higher level regulations or if its formulation does not fulfill the prevailing regulation formulation stipulation (Kusumasari, 2011).¹⁴ As such, the plaintiffs' legal argumentation revolves around the contradiction of the Qanun with higher level regulations and lack of fulfillment of the relevant formulation stipulation. Specifically, the plaintiffs criticized the flogging punishment (sub-part E.1),

hierarchy violation (E.2), scope ambiguousness (E.3), rule contravention (E.4), principle infringement (E.5), and stipulation contradictions (E.6, E.7, E.8, E.9).

5. Claim or request

The plaintiffs requested the Supreme Court to declare the Qanun void of legal validity or not legally binding. The specific demands to the Supreme Court were follows: (1) Accept and approve the Originating Application; (2) Declare that the Originating Plaintiffs possess the legal standing necessary to submit the Originating Application; (3) Declare that Qanun Jinayat is in opposition to 10 other Indonesian regulations above the Qanun in legal hierarchy; and finally, (4) Declare Qanun Jinayat as legally invalid and publicly inapplicable; Or if the Panel of Judges believe otherwise, please render the most just decision (*ex aequo et bono*).

6. Reply

In the Supreme Court decision document, it took only 10 pages and three almost-equally short parts for the defendants to refute the plaintiffs 60-pages long arguments and claims. In the first part, based on a number of regulations, it was argued that the plaintiffs need to include the Aceh's House of Representative and the Interior Ministry as defendants. To counter the claim that the Qanun is against higher-level regulation, in the second part the defendant used the Aceh Government Act, which explicitly states that the Aceh government has the authority to organize religious life in accordance with the Islamic religion for Muslims without disrupting inter-religious harmony (Article 16 Clause 2). The provisions for Muslim is further elaborated in Article 125, which stated that Islamic religion (*syari'at*) consists of creed (*akidah*), law (*syari'ah*), and moral (*akhlak*), covers the fields of worship (*ibadah*), family law (*ahwal al-syakhsyah*), civil law (*muamalah*), criminal law (*jinayah*), courts (*qadha'*), education (*tarbiyah*), propagation (*dakwah*), dissemination (*syiar*), and the defence of Islam.¹⁵ This law is specific in nature as the Islamic *sharia* is only regulated in this law, not in other general Indonesian laws. Hence the maxim "*lex specialis derogate lege generalis*", which means specific laws can be applied instead of general laws.

Finally, the defendant argued in the third part that the Qanun has undergone the required and necessary legal procedures, which took the forms of Academic Draft, Aceh Qanun Draft, Aceh Legislation Programme, Aceh Government Team Discussion with Aceh's House of Representatives (DPRA), Interior Ministry Consultation, and most importantly, General Hearing Meeting attended all Aceh stakeholders.¹⁶

Thus, in their demands at the *Petitum* section, the defendants asked the judges to reject the plaintiff's application in its entirety, state the plaintiff's application unacceptable as it did not include all relevant parties, state the Qanun Jinayat as not contradicting other Indonesian regulations, and state the Qanun Jinayat as legally valid to be implemented in Aceh.

7. Decision

In terms of deciding a review application of a regulation, the Supreme Court has three choices: to accept the application, that is to revoke the regulation being objected, to reject the application, or in the case where the application is deemed incomplete, to dismiss or discontinue (*niet ontvankelijke verklaard*) the application.¹⁷ In the final section of the Supreme Court Decision, the Panel of Judges provided their legal considerations as follows: (1) The Application object is the Qanun Jinayat; (2) The plaintiffs claimed that the Qanun is against 10 other Indonesian regulations; and (3) The Regulation Formation Act, one of the 10 regulations, is still under review at the Indonesian Constitutional Court with the register number 59/PUU-XIII/2015. In point (4), the Judges pointed the Constitutional Court Act (24/2003) stipulated that, "The review of regulations under the level of Laws in the Supreme Court must be halted when the laws being used as the basis of the review are themselves under review in the Constitutional Court until the Constitutional Court has decided on its review" (Article 55). Hence, the Judges deemed the Qanun's review in the Supreme Court as "premature", stating that the arguments of the Application cannot yet be accepted (*niet ontvankelijke verklaard*).

8. Discussion and analysis

The dismissal of the Originating Application against the Qanun by the Supreme Court was celebrated by the Qanun's supporters, especially from the DPRA. The head of the DPRA's Legislation Body, who is the DPRA's Law, Politics, Government, and Security Commission member, Iskandar Usman al-Farlaky, issued a press release in the media praising the Supreme Court's decision. Inaccurately implying that only non-Aceh residents were involved in the Application,¹⁸ al-Farlaky claimed that the plaintiffs' main intention was to undermine Aceh's special autonomy status, insisting that the Qanun was formulated with no intent to discriminate against any person, but to uplift his or her dignity and honor.¹⁹ In contrast, there has been no response in the media towards the Supreme Court's rejection from the Plaintiffs; only ICJR uploading the Supreme Court's Decision in its website at the same the page as the Application article.²⁰

In its review of the Originating Application, ICJR (2016) has summarized the problematic aspects of the Qanun, as reflected in the 9 main legal reasons contained in the Application's section E, into three parts: (1) formulation of criminal norms (multi-interpretation, discriminative, over-criminalization, duplication with national criminal law) which may target vulnerable groups such as women, children, and people with diverse sexual orientations; (2) infringement of the fair trial principle due to improper criminal law procedure; (3) corporal punishments (such as flogging) which disrespects human dignity.²¹ Three parts response could also be found in the Respondent's answer to the Application, namely: (1) lack of Co-Respondents, which were supposed to include the DPRA and the Indonesian Ministry of the Interior; (2) Aceh's special autonomy status, which allows for law formulations according to the Islamic religion, especially in fields such as creed (*akidah*), law (*sharia*), and character (*akhlak*); (3) the Qanun was formulated according to proper procedures. Hence, it can be seen that the Respondents did not really address the Plaintiffs' criticisms or legal reasons. Unfortunately, because of a "legal technicality",²² the Supreme Court judges decided that they could not discuss the substance of the Originating Application, declaring it as "premature" and cannot yet be accepted (*niet onvankelijke verklaard*). Hence, it is also inaccurate to state that the Supreme Court has rejected the Application, as claimed by al-Farlaky in the media.²³

Nevertheless, had the "legal technicality" been resolved,²⁴ it would have been difficult for similar applications, which in general questions the role of the *sharia* in Aceh, to be approved by the Supreme Court.²⁵ A common strand of arguments can be found in the opinion piece of Amrizal J. Prang,²⁶ who defended Aceh's prerogative in implementing the *sharia* on philosophical, constitutional, and juridical grounds.²⁷ The Indonesian state philosophy of *Pancasila*, the 1945 Constitution (UUD45), the Aceh's Special Autonomy Implementation Act (44/1999) (UUPKA), and the Aceh Government Act (UUPA) juridical stipulations all points towards the rights of Aceh to regulate itself based on the principle of *sharia*, especially in matters of creed, law, and character (Article 125 Clause 3 of UUPA and Article 4 Clause 1 of UUPKA).²⁸ Citing Indonesian legal scholar's literature,²⁹ Prang claimed that the UUPA Article has mandatory provisions, which must be obeyed and implemented without exception. Also, the constitutional basis for UUPKA and UUPA can be found in UUD45, which states that "The state acknowledge and respect units of regional government with special or distinctive nature as stipulated by laws" (Article 18B Clause 1).

The philosophical grounds for Aceh's special and distinctive autonomy can be found in the philosophical section of UUPKA and UUPA: "Based on the constitutional experience of the Republic of Indonesia, Aceh is a unit of local government which has been given a special or extraordinary autonomy because of the unique characteristic of Acehnese persistent and determined struggle, its source from the worldview based on the Islamic *sharia* which imbues Aceh with resilient Islamic culture, such that Aceh has always been a regional asset in the battle to seize and sustain the independence of the Unitary State of the Republic of Indonesia (NKRI)."³⁰ It can also be found in the admission of the Indonesian nation-state's diversity in the national motto *Bhinneka Tunggal Ika*.³¹

Prang also rebutted the claim that the Qanun Jinayat is against human rights and in violation of Indonesian legal hierarchy by arguing that the claim views the Indonesian legal system, human rights principles, and decentralization implementation in Indonesia partially and superficially. A more comprehensive and deep analysis of these aspects would show that Indonesia is currently using the system of both symmetrical and asymmetrical decentralizations, the latter being the system used for at least five special autonomy regions: Papua, West Papua, Jakarta, Yogyakarta, and Aceh. Without this analysis and its resulting perspective, all these regions can be considered to have violated human rights principles.³² For example, the special autonomy laws on Yogyakarta and Papua both specifically mention and drastically limit the people who can become the leaders of the respective regions.³³ Prang continues his argument in legal terms, stating that laws are derived from general legal norms, which are in turn derived from general legal principles.³⁴ As these principles are general in nature, there is room for deviation and exception which can strengthen the general principle itself (*exceptio probat regulam, de uitzondering bevestigt de regel*).³⁵ A clear example can be found in Article 28A of UUD45, which regulates the right to life, which exception can be found in Article 10 and 11 KUHP, which allows the death sentence, especially for drug-related crimes (Mertokusumo, 2012, pp. 46–47).³⁶ General legal principles also does not recognize hierarchy, levels, and positions. As such, there can be no conflict or contradiction of principles, only conflict or contradiction of regulations. One principle can co-exist with another, inseparable and in need of each other (Mertokusumo, 2012, p. 48).³⁷

There are many counter-arguments to Prang's legalistic view,³⁸ but one of the strongest ones can be found in the opinion piece of Marsen S. Naga, who proposed two sociological, and somewhat historical arguments.³⁹ First, Naga is of the view that Islamic values and laws,⁴⁰ spread and formulated by the ulamas, have always been a way of life of the Aceh people since the times of Aceh Sultanates several hundred years ago.⁴¹ Instead of strengthening these Islamic aspects, their "formalization" in the form of codified law by the state could weaken the degree in which Islam is practiced by the Acehnese, who might regard these Islamic aspects as being forced upon them without choice, ignoring their individual agency in adhering to Islam.⁴² Second, Naga claims that the assumption of *sharia* formalization as the major goal of Aceh conflict resolution with the Indonesian government is unfounded, as the Helsinki MoU, on which the resolution was based, did not explicitly demand *sharia* formalization (Suksi, 2011; Syarif, 2013). Instead, the MoU was focused more on economic and political issues, especially on the balance of regional and national power in returning justice and prosperity to Aceh (Al-Asyi, 2015). Relying on McGibbon (2006), who asserted that *sharia* formalization is a "political commodity" traded between the national and regional elites, instead of the "political will" of the general Aceh population, Naga insisted that *sharia* formalization was a tool to weaken separatist influence by way of strengthening the role of traditional ulama who has always been responsible in interpreting and formulating the *sharia*. Unfortunately, Naga continued, *sharia* formalization has created simmering tension between the Acehnese themselves, who could, and did become divided on the issue.⁴³

To the issue of *sharia* formalization, a "middle-way" in the form of Amir's "demographical" or "generational" explanation and Fikri's "compromise" solution may become of use. Amir reflected that Aceh's Qanun Jinayat, and many other Islamic-related laws, were produced by the less educated, less literate, and less connected "old generation leaders", who sincerely believed that Aceh should become a "nanny state" that regulates personal behavior instead of public needs.⁴⁴ These leaders are not undemocratic, but instead have a different worldview on what constitute the good life for the Aceh people.⁴⁵ Unused or unaccustomed to sophisticated political tools such as "demographic composition" or "opinion surveys", they could not see that the Aceh population in general are now composed of "young generation followers" who are frustrated with the sometimes-blatant hypocrisy of *sharia* implementation in Aceh, in which the poor and weak were mostly punished for committing "personal sins" inside Aceh, and the wealthy and powerful were mostly enjoying committing the same sins outside Aceh (Miller, 2010). "Public transgressions" such as corruption was given the "blind-eye" treatment, resulting in Aceh becoming the second-most corrupt province in Indonesia (Siapno, 2011).

Fikri (2016) offered the state philosophy Pancasila as a basis for evaluating Indonesian laws. The philosophy, with its "middle-way" nation-building approach, neither too religious nor too secular, can

avoid intolerance and religious freedom violation especially in the context of regional lawmaking. Fikri cited the Law on Islamic Banking which has enabled Muslims to use Islamic banks' services based on choice, not coercion. Indonesian Muslims are not forced to use Islamic banks by the Law, and they can continue to use their regular banks even after the Law has been introduced and implemented in Indonesia. A good example of "religious freedom" in Indonesian lawmaking, this Law can also serve as an inspiration to not only regions with Muslim-majority, but also regions with Christian-majority such as Papua, which has made Sunday mandatory as a religious day for Christians.

A more comprehensive view on the issue of *sharia* and national law, including their criminal components, is given by Jan Michiel Otto (2008) in his book on foreign policy recommendation for the Dutch and European Union government towards "Muslim countries". Otto stated that these countries often include two norms, one that is based on Islam or *sharia* and another that is based on human rights. To Otto, reconciling these two norms will require "continuous review and negotiation", resulting in "an inherent ambiguity and ongoing contestation about a range of specific issues". This is precisely what is happening in Indonesia. The recently popularized "Four Pillars" (*Empat Pilar*) of nationhood (*kebangsaan*) contain the two norms highlighted by Otto. The two pillars of UUD45 (1945 Constitution) and NKRI (Unitary State of the Republic of Indonesia) form the constitutional backbone of the Qanun Jinayat's detractor's arguments, while the other two pillars of *Pancasila* (Five Principles) and *Bhinneka Tunggal Ika* (Unity in Diversity) are used by the Qanun's supporters. The former two pillars contain the norm of human rights, emphasizing legal centralism, while the latter two pillars contain the norm of religion, Islam in this case as a majority religion, and legal pluralism.

Kunkler and Sezgin (2016) have shown that the turn towards legal pluralism in India and Indonesia since the 1970s was mostly driven by concern for political stability and electoral politics, not due to state incapacity or elite ideology.⁴⁶ Specifically for Indonesia, it should be noted that civil war in the name of Islam had erupted all over Indonesia in the first ten years of its independence, led by Kartosuwiryo in West Java in 1949, Kahar Muzakar in South Sulawesi in 1952, Ibnu Hajar in South Kalimantan in 1953 and Daud Beureuh in Aceh in 1953.⁴⁷ As elaborated earlier in this paper, the civil war in Aceh continued until the Helsinki MoU and the resulting compromise of special autonomy in Aceh. More than a decade has passed since this compromise, and there have been many negotiations and contestations about a range of political and legal issues, including this Qanun Jinayat. At the national level, the Supreme Court and the Constitutional Court seem to be a peaceful venue for the negotiations and contestations of different norms by their supporters, as exemplified by this case.

In the conclusion of a paper on legal pluralism and the European Union,⁴⁸ N.W Barber asked: is a pluralist model of legal systems desirable? Barber has demonstrated that the European Union and its individual countries' legal order can be described as pluralist, wishing that the hierarchy of legal sources in this order can be more clearly defined. However, instead of seeing the inconsistency in the European plural legal systems as a disadvantage, Barber viewed it as a desirable compromise, a legal-political framework within which competing claims can exist peacefully. Barber stated that the advantage of such a compromise is that it avoids unnecessary and potentially destructive conflict, and allows the claimants to work together on beneficial projects where agreement exists. The same view is probably relevant for the case of Indonesia and the regions with special autonomy such as Papua and Aceh.⁴⁹ Given that currently Indonesia adopts a legal pluralist compromise *de facto*, if not *de jure*, Yuksel Sezgin's description of the Israeli *millet* system may also be seen in Indonesia: "when we take a closer look at the field of human rights... individuals constantly challenge the legitimacy of State-imposed religious laws, and seek to advance rights and liberties which are denied to them under the current system by engaging in various strategies of resistance."⁵⁰ The present case is one such manifestation of resistance.

In their study of the Egyptian Supreme Constitutional Court procedure and decision with regards to adherence to *sharia* and human rights, Lombardi and Brown showed that in the Egyptian legal context, it is not so much the norms that matter, but the people deciding which norm to follow, that is the Court's judges. This is also the case in Indonesia. However, unlike in

Egypt, where the Court judges were found to have developed “a coherent and, apparently, politically viable liberal approach to constitutional Islamization (Lombardi & Brown, 2005),” Indonesian Constitutional Court judges were more conservative in their outlook. Irianto (2017) noted that the Court has rejected judicial reviews from civil society organizations in various important cases involving the accommodation of religious values in the Indonesian constitution, such as “Blasphemy Law (no. 1/1965), the Bill on Pornography (no. 44/2008), polygamous marriage as stated in certain Articles of Marriage (no. 1/1974), and the Religious Court (no. 3/2006)” (Irianto, 2017). This accommodation has been called by Crouch (2016, 2015) as “religious deference”, a method practiced by the secular Indonesian state courts, from the District Courts to the Constitutional Court, to negotiate and reconcile the demands of legal pluralism.⁵¹

As Indonesian law is heavily influenced by the civil law system, analysis of court decisions is not as important as in the common law system (Pompe, 2005). However, the Originating Application to revoke Aceh's Qanun Jinayat by ICJR and PSP is a landmark case in the application of Islamic criminal law in Indonesia due to its precedent-setting status. As the Supreme Court issued what was an essentially a procedural decision, rejecting the Application due to a “technical”, not substantive legal reasons, there should be many more such cases given the “technical” reasons have now been resolved.⁵² Future cases involving the Qanun,⁵³ the Application, and the Rebuttal should not repeat the avoidable errors contained in them, a major one being the lack of public participation proof by the defendant.⁵⁴ There are complaints that the Qanun should include more substantive public crimes, such as corruption, collusion, and nepotism prevalent in contemporary Aceh, instead of only perceived private and sexual-related crimes ([komnasperempuan.go.id], 2014; RN, 2009). Indeed, some members of the DPRA have indicated that public crimes will be included in future revisions of the Qanun ([atjehpost.co], 2014). Even though the civil law system usually favors state over non-state actors when it comes to court decisions (Lev, 2000), when controversial cases arise, such as those involving newly-defined crimes (*jarimah*) in the Qanun such as *liwath* (homosexual acts between two men), and *musahaqah* (homosexual acts between two women), Islamic criminal law in Aceh and Indonesia should be facing many more trials after this temporary triumph.⁵⁵

9. Conclusion

The existence of the Qanun Jinayat in Aceh notwithstanding its acceptance in Aceh is still an issue that continues to be discussed. From the exploration of the development of the implementation of the Qanun Jinayat and the dynamics of thought explained above, there is a need to rethink sharia norms behind the Qanun that can be contextualized in the life of society. Without neglecting the important role of sharia in the life of the Muslim-majority in the Aceh province, sharia should be implemented with a humanist and non-discriminatory character and in accordance with the demands of modern society. Aceh, which remains an important part of Indonesia, should be able to create an inclusive life and culture within the legal entity of the Unitary State of the Republic of Indonesia.

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Notes

1. Historically, there are three related terms commonly used to call Islamic law, varying in degrees of specificity: *sharia*, *fiqh*, and *qanun*. Note that the popular, instead of accurate, transliteration is used here (e.g. *sharia* instead of *shari'ah*). The most general term, *sharia*, is usually defined as “God’s eternal and immutable will” or “an idea or an abstraction of a Divine Law”. Using this definition, *fiqh* is then the human scholarly attempt to interpret *sharia*. The most specific term, *qanun*, is subsequently typically defined as the institutionalization of *fiqh* by the state. Because of its human origin, *fiqh* and *qanun* can and do vary across time and space. See the entries of “*shariah*”, “*fiqh*”, and “*qanun*” in Oxford Islamic Studies

- Online [oxfordislamicstudies.com] and Wikipedia [en.wikipedia.org]. See also, Roald (2003, pp. 103–104); These definitions also hold in the context of Aceh, with *sharia* being understood as “divine law” and *qanun* as “the interpretation of divine law by Acehnese ulama, political leaders and governments” (Afrianty, 2015, p. 78). It must also be noted that in the time of Islamic empires, *qanun* need not originate from *fiqh*, but from *siyasa*, a term which can mean “secular legislation” (Balz, 1995, p. 37; Asifa Quraishi-Landes, 2015). However, the term “secular legislation” may be a misnomer in a time of Muslim domination as manifested in these empires, as *fiqh* can be better understood as *sharia* interpreted by ulama (Islamic scholars) and *siyasa* as *sharia* interpreted by *umara* (Islamic ruler). In other words, in these times, *sharia* did permeate most, if not all, aspects of Muslim life (R. W. Hefner, 2012). Linguistically, the Indonesian word *qanun*, which means law, is etymologically derived from the Arabic word with the same Romanized spelling (Arabic: *قانون*). The Arabic word is in turn derived from the Greek *kanōn* (kanōn, which also the the root for the modern English word “canon”). Legally, in the Indonesian context, *qanun* refers to laws or regulations which applies regionally in the Aceh province, cities, and regencies; while *jinayat* is a branch of Islamic law which deals with crimes and criminality ([en.wikipedia.org] & [id.wikipedia.org], 2016; Ergene, 2014, p. 109). Thus, in this paper, the term *Qanun Jinayat*, and its short form, *Qanun* refers to the formulation of Islamic criminal law at a regional level in Aceh. This *Qanun* is officially called “*Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat*” which can be translated as “Aceh Regional Regulation Number 6 Year 2014 on Islamic Criminal Law”.
2. As last accessed on 9 September 2016 a sample of news heading regarding the *Qanun* as it was ratified, and then implemented, is as follows: (1) CSO: *Qanun Jinayat Remains Discriminative towards Women* [acehterkini.com]; (2) CSO: *Jakowi Must Revoke Discriminative Regional Regulation* [m.tempo.co]; (3) CSO: *Qanun Jinayat Ends Women's Rights in Aceh* [regional.kompas.com]; (4) ICJR *Deems Qanun Jinayat Aceh Against Human Rights* [beritasatu.com]; (5) *Setara Institute Considers Qanun Jinayat Implementation as Inhuman* [tribunnews.com]; (6) *Kontras Aceh: Flogging Punishment is Inhuman* [tempo.co]; (7) *LBH Apik Condemns Qanun Khalwat Aceh* [cnnindonesia.com]; (8) *Amnesty International Urges Indonesia to Revoke Qanun Jinayat* [acehkita.com]. Note that the headings have been translated by the author.
 3. It has also been noted that Islamic regulations such as the *Qanun* often focus on ‘orthopraxy, a term which in the context of Aceh means correct conduct in daily life and worship (Hooker, 2008: xi).
 4. Feener (2013) has examined the meaning of “socialization” in a number of literature and concluded that it the context the *sharia* promotion, it can be best defined as “efforts to promote ideals so that they are understood and implemented.”
 5. As detailed later in this paper, an Aceh’s *qanun* can only be revoked through the judicial review mechanism at the MA ([hukumonline.com], 09/02/2015).
 6. The Decision is officially called “*Putusan Nomor 60 P/HUM/2015*”, which translation is “Decision Number 60 P/HUM/2015”.
 7. The same article title, which has been translated by the author, “MA Rejects Review of Jinayat Law” can be found in at least two news websites, Aceh-based *Serambi Indonesia* and Medan-based *Analisa* ([aceh.tribunnews.com]; [harian.analisadaily.com]). The main figure covered in the articles is Iskandar Usman al-Farlaky, a young yet high-ranking Acehnese politician, whose profile is elaborated later in this paper. Other supporters of the *Qanun* include Muharuddin, the current DPRA head [habadaily.com], Imran Abubakar, the head of *Rabithah Taliban Aceh*, the largest Islamic boarding school students’ (*santri*) organization in Aceh [hidayatullah.com], and Samsul B. Ibrahim, the head of Aceh’s branch of *Gerakan Pemuda Ansor*, a youth offshoot of the largest Islamic mass-organization in Indonesia (*Nahdlatul Ulama*—NU) [nu.or.id]. They also supposedly include 33 other Aceh-based or Aceh-branch of Islamic organizations under the umbrella of *Sharia Communication Forum (Fokus)*, such as *Front Pembela Islam (FPI)*, *Dewan Dakwah (DD)*, *Hizbut Tahrir Indonesia (HTI)*, *Pelajar Islam Indonesia (PII)*, *Kesatuan Aksi Mahasiswa Muslim Indonesia (KAMMI)*, *Pergerakan Mahasiswa Islam Indonesia (PMII)*, *Ikatan Siswa Kader Dakwah (ISKADA)*, and *Badan Komunikasi Pemuda Remaja Masjid Indonesia (BKPRMI)* [daerah.sindonews.com]. *Fokus* also includes Muhammadiyah, the second largest Islamic mass-organization in its list of organizations. It is to be noted that Al Yasa’ Abubakar, a main figure in the *Qanun*’s planning phase in his capacity as Head of the Islamic *Sharia* Agency, is also the Regional Head of Muhammadiyah Aceh [aceh.muhammadiyah.or.id].
 8. *Rajam* is the stoning of a married adulterer to death. The Governor of Aceh at the time, Irwandi Yusuf, claimed that this punishment is disruptive Aceh’s peace, against national and international law, and upsetting to the international investment community [kabarnet.in]. He also requested legislative members to examine the *Qanun Meukuta Alam Al-Asyi*, laws compiled by authoritative Aceh ulama during the “golden age” of Sultan Iskandar Muda, indicating that *rajam* punishment was not an issue to be taken lightly [acehkita.com]. His Vice-Governor, Muhammad Nazar, added that even the *hudud* punishment (flogging) should be reduced and even replaced with *ta’zir* (imprisonment and fine), reasoning that the latter is more suited to current Aceh society, whose lack of Islamic legal knowledge may unwittingly put them under the oppressed category by a government which insist on “maximum punishment” [acehkita.com]. Two Islamic Sharia Agency Heads, Al Yasa’ Abubakar and Syahrizal Abbas, mentioned that the *rajam* punishment was included unilaterally by the DPRA based on general opinion or public input, but without government consultation and sufficient scholarly study ([antaranews.com], 2009; [santri-dayah.com], 2013).
 9. Part 9 (*Bagian Kesembilan*) seems to be missing from Chapter IV, as Article 57–62 under Part 8 (*Bagian Kedelapan*) is immediately followed by Article 63 in Part 10 (*Bagian Kesepuluh*). See page 19 of the *Qanun* [www1-media.acehprov.go.id].
 10. The variation in the number of lashes contained in the related *jinayat qanuns*, planned or ratified, can probably be explained by three “political will” models proposed by Khamami (2014) in his comparative study of *jinayat* laws in Aceh and

Kelantan: (1) Strong political will to implement the *jinayat qanun* in stages; (2) Weak or no political will to implement the *jinayat qanun* comprehensively; (3) Neither strong nor weak political will to implement the *jinayat qanun*. The first model was exemplified by the former Governor Abdullah Puteh, who managed to ratify Qanuns on *Khamar, Maisir, and Khalwat* in 2003. Irwandi Yusuf, the former and current Aceh Governor, represented the second model, as the 2009 planned Qanun remained in limbo and was never ratified by him. The former Governor Zaini Abdullah, who showed neither inclination to support or reject the Qanun during his tenure, falls under the third model.

11. JMSPS seems to be comprised between 16 to 20 Aceh-based CSO member. See the article *Kaji Ulang Qanun Jinayat: Aparat* [acehkita.com]; the Annual Report *Kebebasan Beragama dan Kehidupan Keagamaan di Indonesia Tahun 2009*, p. 30 [wahidinstitute.org]; the paper *Formalisasi Syariat Islam di Indonesia: Telaah atas Kanunisasi Hukum Islam di Nanggroe Aceh Darussalam* by Andaryuni (2011, pp. 41-42).
12. The requirement for rape victims to provide proofs in the Qanun (Article 52 (1)) contradicts KUHAP and the Human Rights Act (Article 17).
13. The use of vows as additional proof in the Qanun (Article 52 Clause 3-5, Article 53-56) is at odds with KUHAP (Article 184) and Human Rights Act (Article 17).
14. According to the Indonesian Constitution, the Supreme Court could only review regulations which contradict laws (legal review), while the Constitutional Court could only review regulations which contradict the Constitution (constitutional review). See Article 24A clause (1) and Article 24C clause (1) of the 1945 Constitution of the Republic of Indonesia. As such, the Qanun's judicial review was requested at the Supreme Court as the legal arguments were all based on the supposed contradictions between the Qanun's stipulations and Indonesian laws, not Constitution.
15. There is a mild controversy concerning the official name of *sharia* in Aceh. As can be seen in Article 125, there are two variations of the word *sharia*: *syariat* and *syariat*. The former word in Indonesian is always followed by the word *Islam*. The controversy arose when the government attempted to change the phrase *syariat Islam* into *dinul Islam*, probably to distance the word *syariat* from *syariat*, as the latter has acquired a legal connotation in Indonesian. In this respect, the government probably intends the meaning of *syariat* to be closer to the more "holistic" *agama* in Indonesian, which can be translated into *din* in Arabic, rather than the "legalistic" *syariat*. However, many Acehnese are unhappy with the government's focus on "semantics", criticizing the lack of "substantial" implementation of *sharia* in Aceh. There are some who urge that the *syariat Islam* should be implemented by, in, and across all Aceh government agencies, such as the Agencies of Public Works (PU), Planning (Bappeda), Mining (Pertambangan), Maritime and Fisheries (Kelautan dan Perikanan), and Tourism (Pariwisata), instead of only the Agency of *Syariat Islam*. This may be possible given the actually broad meaning of the words such as *dakwah*, *syiar*, and *pembelaan Islam* in Article 125 Clause 2 (Fahmi, 2014).
16. The plaintiffs may have a stronger case if they base their arguments on the principles and statements

found in Article 236, 237, and 238 of the 2006 Law Number 11 on Aceh Government. These articles specifically highlighted the principles of regulation formulation (236), content formulation (237), public participation (238) which may not have been fulfilled satisfactorily by the defendants.

Specifically, Article 237 clause 1 stipulates that the content of any Aceh's *qanun* must fulfill the following principles: a. protection; b. humanity; c. nationhood; d. kinship; e. diversity; f. justice; g. nondiscrimination; h. equality before law and government; i. legal order and certainty; and/or j. balance, harmony, equality, and synchronicity. However, despite these promising principles, clause 2 of this Article immediately stated that other principles can be used in accordance with the *qanuns'* content. This clause opened up the possibility of using Islamic principles in the formulation of relevant Aceh's *qanun*.

17. The first two choices, acceptance or rejection, is stipulated in Article 6 of the *Peraturan Mahkamah Agung No. 1 Tahun 2011 tentang Hak Uji Materiil* (Supreme Court Regulation on Judicial Review (No. 1/2011)). However, the third choice, dismissal, cannot be found in this regulation, but in Article 31A clause 5 of the Supreme Court Act (No. 3/2009). This Act is the second revision of the original Supreme Court Act (No. 14/1983).
18. The translation of Al-Farlaky's statement is as follows: "We have spoken long before, that regional regulation (*qanun*) related to the special status of Aceh and Islamic sharia should not be interfered by people not residing in Aceh." This statement is inaccurate because one of the plaintiffs, Puspawati Dewi, the Head of National Executive Body (*Badan Eksekutif Nasional*) of PSP, used her Aceh's home address in the Application (*Jalan Nuri Nomor 9, Desa/Kelurahan Sukadamai, Kecamatan Lueng Bata, Banda Aceh*).
19. In Indonesian, dignity is *martabat* and honor is *harkat*. To many of its proponents, Islamic law has been very successful in realizing a "non-criminal" society, albeit in a "totalitarian environment". See, Santoso (2003, p. 4) and Mulia (2010, p. 143).
20. See *Pengujian Qanun Aceh No 6 Tahun 2014 tentang Hukum Jinayat*, [icjr.or.id] (27 September 2016). There is no upload date of the Decision, which was rendered on 1 December 2015 by the Supreme Court. However ICJR dated the article *Pengujian* in its website on 22 October 2015 which is also the date of the Supreme Court's Application filing.
21. Broader regional *sharia* regulations in Indonesia has also been summarized to be problematic in terms of constitutional issues (religion is supposed to be under the control of central, not regional, government); discrimination issues (*sharia* regulations discriminate non-Muslims and women), and governance issues (*sharia* regulations are necessary in the face of ineffective legal, judicial, and law enforcement apparatus; Bush, 2008, p. 175). However, in terms of constitutional issues, it has been noted that Aceh has been allowed to exercise some authority in "areas of public affairs that are designated as areas of the central government, with religion, justice and fiscal matters being such examples" (Suksi, 2011, p. 356).
22. The 2011 Law No. 12 on Law Formation, one of the 10 regulations used as a basis for judicial review by the plaintiffs, is itself still under review at the

- Indonesian Constitutional Court with the register number 59/PUU-XIII/2015. It should be noted that the review has nothing to do with the Originating Application, instead having to do with the status of Pancasila as a "national political doctrine" ([hukumonline.com], 25/06/2015).
23. Al-Farlaky's comment in the media, as translated by the author: "The Supreme Court rejected their decision. We appreciate it, it's the right legal action".
 24. On 7 September 2016 the Constitutional Court has issued a Decision on the case 59/PUU-XIII/2015. Hence, the "legal technicality" which formed the basis of the Supreme Court Decision can be said to have been resolved. However, there is no mention yet of a follow-up Application by the plaintiffs, or any other CSOs.
 25. There are many other instances where Aceh's "special" status have been questioned by non-Aceh, but especially Aceh, residents. These questions, which are often based on claims of individual constitutional right and higher regulation contravention, take the form of "judicial review" of stipulations contained in 2006 Law No. 11 on Aceh Government through the "channels" of Supreme Court or Constitutional Court. Thus far, the reviews has revolved around "political" stipulations, those relating to regional head elections, regional official appointments (such as Regional Police Head), and regional flag and symbol. See the articles *UUPA Jangan Jadikan Mainan Pilkada* [waspada.co.id], *Diajukan Judicial Review Penetapan Kapolda Aceh* [analisdaily.com], *Ini Dia Penggugat Qanun Bendera dan Lambang Aceh* [aceh.tribunnews.com]. All articles' title is translated by the author and was last accessed on 28 September 2016. There also ongoing reviews on other Qanuns, such as the application by an Aceh-based environmental organizations to review Aceh's spatial planning. See the articles *Walhi Gugat Qanun Tata Ruang Aceh* [walhi.or.id], *Demi Keadilan Ekologis Walhi Tetap Gugat Qanun RTRW Aceh* [mongabay.co.id], *Sidang Gugatan RTRW Aceh Berlanjut Pokok Perkara* [baraneasaceh.co]. These reviews seem to function as a mechanism of "checks and balances" towards the ruling Aceh Party, which are mostly composed of the Free Aceh Movement (GAM) ex-members, whose elites are perceived as unsuccessful or unenlightened in their attempts of developing Aceh.
 26. Prang is doctoral candidate at the Law Faculty of Universitas Sumatera Utara in Medan [acehinsti-tute.org]. A Constitutional Law lecturer in Universitas Malikussaleh, Lhokseumawe, Aceh, he is among the most prolific writers on law and qanun in local Aceh newspaper, *Serambi Indonesia* [aceh.tribunnews.com]. His dissertation is titled *Konsultasi dan Pertimbangan Gubernur terhadap Kebijakan Administratif Pemerintahan Pusat di Aceh*, which covers the now contentious issue of Aceh executive power vis-à-vis appointment of regional heads of national institutions such as the Police and State's Attorney. In general, Prang questions what he perceived as a purposeful intention of the national government to hamper the regional development of Aceh, especially in the area of law. He implies "legal uncertainty" caused by national and regional elite infighting as the main source blocking Aceh's progress. See also the articles by Amrizal: *Hati-hati Jika Menguji Materi UUPA* [mahkamahkonstitusi.go.id] and *Politik Hukum Setengah Hati* [aceh.tribunnews.com]. All websites last accessed on 29 September 2016.
 27. See the article *Filosofi-Konstitusional Syariat Islam Aceh* [aceh.tribunnews.com]. Such philosophical, sociological, and juridical analysis on sharia implementation in Aceh has also been conducted by Abubakar (2014, p. 515). He cited J.E. Sahetapy, a nationally acknowledged legal scholar who is also a Christian, to defend religious-influenced criminal stipulations based on the fact that the Indonesian state philosophy, Pancasila, is religiously inspired. He further stated that Indonesian criminal law must be directed towards the awakening of faith such that a criminal may repent and become a faithful and practicing religious person.
 28. In Indonesian, *Undang-Undang Dasar 1945*, abbreviated UUD45; *Undang-Undang No. 44 Tahun 1999 tentang Penyelenggaraan Keistimewaan Aceh*, abbreviated UUPKA; *Undang-undang No. 11 Tahun 2006 tentang Pemerintahan Aceh*, abbreviated UUPA.
 29. Among the scholars Prang cited is the aforementioned Jimly Asshiddiqie (2010, p. 28).
 30. As mentioned previously, these philosophical sections are often located in the *Menimbang* (Consideration) section of Indonesian laws.
 31. This motto, which literally means "We are of many kinds, but we are one", is often translated as "Unity in Diversity" [en.wikipedia.org]. Written by the Majapahit poet, Mpu Tantular, to reconcile Hinduism and Buddhism in the 14th century, in modern Indonesian context, the motto signifies the unity of Indonesians despite their ethnic, regional, social or religious differences [eastjava.com]. Similar mottos can be found in the diverse United States (*E pluribus unum*—Out of many, one) and European Union (*In Varietate Concordia/In Varietate Unitas*—United in diversity) [en.wikipedia.org].
 32. The Aceh Government Act (No. 11/2006) also has a special clause on human rights in Article 227, stipulating even academic and cultural activities must not be in contradiction with Islam (Clause 1c).
 33. To become the Governor of Yogyakarta, the person must hold the throne of Sultan Hamengku Buwono, and as the Governor of Papua, the person must be a Papuan native. See Yogyakarta's Specialness Act (No. 3/2012) (Article 18 Clause 1 Sub-clause c) and the Papua's Special Autonomy Act (No. 21/2001) (Article 12).
 34. In Indonesian, general legal norms is *norma/kaidah hukum* and general legal principles is *asas umum hukum*.
 35. The former Latin phrase means "the exception confirms the rule". Wikipedia page on this phrase gives an example that the description of a nurse as "a male nurse" (the exception) proves that most nurses are female (the rule) [en.wikipedia.org]. The latter Dutch phrase also means "the exception confirms the rule" in English [proz.com].
 36. The famed Supreme Court justice Aridjo Alkostar has also stated that the death penalty given towards drug dealers does not violates the constitution and human rights (Detik.com, 25/2/2016).
 37. An example is the application of the general principle *lex specialis derogat legi generali*, which means that specialized regulations (*lex specialis*) can abrogate generalized regulations (*lex generalis*). An example is the stipulations on central and regional government relations in the 1945

- Constitution. It is stated both that “regional government heads are elected democratically” (*lex generalis*) (Article 18) and “regions with special autonomy such as Aceh, Yogyakarta and Papua can choose their governors ‘undemocratically’” (*lex specialis*) (Article 18B Clause 1). Thus specialized regulations do abrogate generalized regulations in regions with special autonomy such as Aceh.
38. Moch Nur Ichwan’s (2013) description in a Leiden University Institute for Area Studies Report of the apparent divide between law and spirituality, *sharia* and *tariqa*, jurists and sufis is an apt example. In addition of criticism from some Aceh sufis, “sharia’tism” has also been criticized by progressive Muslim intellectual, feminist, and queer residents of Aceh. Ichwan deemed these groups “to have developed ‘alternative politics’ and created non-Sharia spaces” in Aceh, essential for the future of Islamic democracy, under the term of “plural democracies”, in Aceh. Most papers in the Report are quite critical of *sharia* in Aceh.
 39. Marsen S. Naga, *Hukum Jinayah di Aceh* [ms-aceh.go.id]. A shortened English version of the article is titled *Logical flaws in Aceh’s “Qanun Jinayah”* [the-jakartapost.com]. Both articles were last accessed on 1 October 2016.
 40. In Indonesian, “Islamic values” can be translated as “*nilai-nilai Islam*”. Naga uses the term *syariat* for Islamic law.
 41. There are questions of whether Islamic law could be considered “native” or “foreign” in Indonesia. Even in the times of Aceh Sultanates, there are reports of gambling and alcohol drinking in Acehese court (Lindsey, 2008, p. 212).
 42. By “formalization” Naga means the “formulation of Islamic law in books or standardized form”. The codification-based civil law system which influences most Muslim-majority countries today, including Indonesia, may have exercised a corrupting and perhaps authoritarian influence on Islamic law in the contemporary age. In general Islamic law is thus unpopular among the Muslim masses, and in areas where it is popular, such as Aceh, it engenders inequality and intolerance among residents who are of different religion and has a different degree or kinds of Islamic piety. See also Abubakar (2014: 520-21), El Fadl (2001, p. 5), Salim (2008), R. Hefner, 2009, p. 750).
 43. The five years period spent between the ratification of the *Qanun Jinayah* in 2009 by the DPRA to the issuance of the *Qanun* in 2014 by both the DPRA and the Governor is a quick evidence of the tension present between Acehese who are divided on the issue of *sharia* formalization. During the period, and even until now, it is common to hear the rhetoric that foreign agents are doing their utmost to revoke the *Qanun* and those who wish to revoke the *Qanun* are enemies of Islam.
 44. Amir (2014) stated, “It does not necessarily mean that these leaders are less democratic. It simply means they have a different mental construct on what constitutes a good lifestyle for Aceh. Populism is not enough to describe this phenomenon as many of these leaders actually believed in the *qanun* that they created. Ask any random person in Aceh and they would answer that they want *sharia* implemented in Aceh, but if you ask them how, they will give different answers.” An example of different Acehese views on *sharia* interpretation and implementation can be found in Afrianty (2015). In his review of the book, Buehler (2016a) noted that Afrianty has found that many Acehese, men and women, criticize the politicization of Islam in Aceh for the sake of politics, not religion, and local Aceh women have their own interpretation of Islamic law and local *sharia* regulations and deliberately collaborated with relevant parties to make their interpretation heard.
 45. This line of “demographical” or “generational” argument is echoed sophisticatedly by Balz (2008, p. 126), who stated, “Legal assistance, in the sense of aid work aiming at building and enforcing the legal system and the rule of law, in my opinion should exactly focus on the transfer of such legal technology as opposed to attempting to export substantive legal rules. As opposed to exporting ready made codes and standards, one should focus on fundamental concepts and procedures, which are more likely to be suited as the intellectual seed of indigeneous change.”
 46. See also, Sparr (2014). Taking his cue from an-Naim’s distinction of legal and normative pluralism, Sparr contended that “the implementation of *Sharia* in nation-states alongside the pre-existing national state law is not helped by legal pluralism and plural jurisdictions” and that “legal pluralism is not about legal flexibility; rather, it is an attempt to save the nation-state while subsequently and unintentionally undermining the legal foundation of it.” Further, see, An-Na’im (2012).
 47. The impetus for the rebellion had been brewing since the omission of the seven words of the Jakarta Charter (Piagam Jakarta) in the official Indonesian state philosophy, *Pancasila*. If included, these words would have cemented the inclusion of Islamic norms in the Indonesian constitution (Syarif, 2013).
 48. It should be noted that Indonesia covers as much, if not more area, than the European Union. See *Inilah Ukuran Luas Indonesia Sebenarnya Dibanding Negara Lain*, [tipsiana.com].
 49. This view is also probably relevant for other South East Asian countries grappling with the issues of special autonomy, such as Thailand and the Philippines. See, Analysis: A debate over autonomy in Thailand’s restive south [reuters.com], Thailand: A Plan for Muslim Autonomy? [worldview.stratfor.com], The Long Struggle for Moro Autonomy in the Philippines [fpif.org], Federalism Versus Autonomy: Debate and Practice in the Philippines [iag.org.ph], *Autonomy and Ethnic Conflict in South and South-East Asia* (Ganguly, 2012).
 50. The Israeli millet system is noteworthy because it seems to accommodate what Sherman Jackson (2006, p. 158; 2003, p. 88) has eloquently argued in his papers. However, argument is no match for reality. Like in the times of Islamic empires, present Israel may have resolved legal issues of diversity through its practice of legal pluralism. However, as Sezgin showed in the case of Israel, and many other authors in the case of Islamic empires, political issues remain unresolved. This is where Sparr’s (2014) argument found its relevance: “*Sharia* is a set of moral values; it is a normative way of thinking about right and wrong, and what the good in life is. This can definitely serve as a political principle for finding good laws, but those laws may not be taken for granted as divine and absolute. Such laws are the product of human understanding and reasoning, and they represent the political will of people—not the religious will of God. Because of

this, I have argued that this debate is actually about representation, citizenship, political compromise, participation, deliberation, and organization. The call for *sharia* is actually an expression of political disappointment by Muslims, that the general will does not include them". In this case, Wael Hallaq's (2009) opinion on the need for a consistent Islamic law methodology should also be noted.

51. If the Indonesian Constitutional Court practices "religious deference", the Supreme Court seemed to have practiced "political deference". With regards to Aceh's *qanun*, Indonesian law has mandated that the latter Court be the forum for judicial review, as stated earlier in this paper. Several *qanuns* have been reviewed in the Court, including this *Qanun Jinayat*. Like the Decision on this *Qanun*, in the other completed case, the Court also provided a "technical" rejection, this time declaring a lack of "legal standing" of the plaintiffs. However, the Court did mention in its Decision that "the proofs provided by the defendants showed that the case is full of political issues, and hence is best resolved through the active participation of the National Government, or through an executive review by the Ministry of Interior". See *Putusan Mahkamah Agung Nomor 47 P/HUM/2016*. It must be noted that the latter option, executive review, is no longer viable as the Constitutional Court has voided the authority of the Minister of Interior to revoke any regional regulation, including *qanuns*. See *Putusan Mahkamah Konstitusi Nomor 137/PUU-XII/2015*. In light of this Constitutional Court Decision, it would be interesting to see whether the Supreme Court would be more assertive in its decisions and substantive in its arguments in the future, instead only practising political or religious deference masked by technical or procedural arguments, in cases similar to this one.
52. Even though the success of these future cases remains doubtful. So far, bureaucratic and judicial review have mostly succeeded when the issues at stake are illegal taxation or user charges (Butt, 2010). Also, the legal position of *sharia* regional regulation (*perda syariah*) in many Indonesian regions is very strong (Parsons & Mietzner, 2009). Thus, in the special autonomous region of Aceh, with its emphasis on Islam, the *Qanun*'s position is even stronger.
53. A possible major error in the *Qanun* is the lack of Part Nine (*Bagian Kesembilan*) in Chapter IV (*Jarimah and Uqubat*). After Part Eight on *Qadzaf*, the *Qanun* jumps to Part Ten on *Liwath*. See *Qanun Aceh Nomor 6 Tahun 2014 tentang Hukum Jinayat* [jdih.acehprov.go.id] (5 October 2016), p. 19.
54. It is stated on the Rebuttal part of the Supreme Court Decision that the defendant has organized a Public Hearing (*Rapat Dengar Pendapat Umum—RDPU*) which involved all components of Aceh society. However, in the list of proofs supplied by the defendant, which include letters to the DPRA and Aceh Governor, State Attorney, Police, *Sharia* Court, MPU Head, and Interior Minister, this Public Hearing is not mentioned at all. In the previous DPRA ratification of the *Qanun* in 2009, the Head of the DPRA committee responsible for the *Qanun* formulation stated that the public, such as the *ulama* and representatives from CSOs, universities, youth organizations, had been invited for a RDPU. However, no one attended. One wonders

whether the case is the same in 2014, or if the defendant merely forgets to include the proof that RDPU has taken place. See *Putusan Nomor 60 P/HUM/2015* p. 68 [putusan.mahkamahagung.go.id], p. 70-71. Also, see Zulkarnaini Masry, *Qanun Laba-Laba*, [kompasiana.com]. Other minor mistakes found in the Application and Rebuttal include spelling mistakes in page 4 (*ketentuan-ketentuan* should be *ketentuan-ketentuan*), 10 (*keberadaan—keberadaan*), 71 (*ranangan—ranangan*; *Oktobr—Oktober*), 62 (*lahimnya—lahirnya*; *gubemur—gubernur*), 63 (*gubemur—gubernur*), and 64 (*hams—harus*). In page 23, the Plaintiff also missed including the article numbers 1, 3, and 5 in the first row and fourth column. See *Putusan Nomor 60 P/HUM/2015* [putusan.mahkamahagung.go.id]. All websites last accessed on 5 October 2016.

55. Indeed, the Indonesian and foreign media, as well as CSO websites, are still full of complaints of *Qanun Jinayat*. See *Dianggap Merugikan, Sejmlah LSM Minta Qanun Jinayat Ditinjau Ulang* [aceh.tribunnews.com] (2017), *Dianggap merugikan, Perda Syariah Islam di Aceh diusulkan ditinjau* [bbc.com] (2017).

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