

## ISLAM AND STATE'S LEGAL PLURALISM: The Intersection of *Qanun Jinayat* and Criminal Justice System in Indonesia

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### Abstract

*The article seeks to investigate the intersection of local-based religion legal system and state's legal system. It focuses on the constitutional debates on the position and the status of Aceh Qanun Jinayat within the Indonesian legal system and how the Indonesian Supreme Court the Islamic penal law based on Aceh's Qanun in their decisions. Using the legal research approach, this article begins with the background of the Qanun Jinayat implementation in Aceh, then discusses the constitutional debates on the position of the Qanun in the Indonesian legal system and ends with analyses of Supreme Court decisions on the application of the Qanun Jinayat in criminal cases in Aceh. This article argue that Aceh's Qanun is similar to the other provincial regulation within the Indonesian legal system, which has limited areas to regulate the punishment in criminal cases. However, the paper found that although the Indonesian legal system forbids Aceh's Qanun holds the penalty more severe than the National criminal law, the Supreme Court seems to accept these practices and use them in their decisions in Aceh's criminal cases.*



*[Artikel ini bertujuan untuk mengkaji persimpangan sistem perundang-undangan daerah yang berbasis agama dan sistem perundang-undangan negara. Artikel ini menyoroti perdebatan konstitusional mengenai posisi dan status Qanun Jinayat Aceh dalam sistem hukum Indonesia dan bagaimana Mahkamah Agung Indonesia menerapkan hukum pidana Islam berdasarkan Qanun Aceh dalam putusan mereka. Dengan menggunakan pendekatan penelitian hukum, artikel ini diawali dengan latar belakang penerapan Qanun Jinayat di Aceh, kemudian membahas perdebatan konstitusional mengenai posisi Qanun dalam sistem hukum Indonesia dan diakhiri dengan analisis terhadap putusan-putusan Mahkamah Agung mengenai penerapan Qanun Jinayat dalam kasus-kasus pidana di Aceh. Artikel ini menyimpulkan bahwa Qanun Aceh serupa dengan peraturan daerah lainnya dalam sistem hukum Indonesia, yang memiliki area terbatas untuk mengatur hukuman dalam kasus-kasus pidana. Namun artikel ini menemukan bahwa meskipun sistem hukum Indonesia melarang Qanun Aceh memiliki hukuman yang lebih berat daripada hukum pidana nasional, Mahkamah Agung tampaknya menerima praktik-praktik ini dan menggunakannya dalam putusan mereka dalam kasus-kasus pidana di Aceh.]*

**Keywords:** *Qanun Jinayat, Criminal Justice, Indonesian Legal System*

## Introduction

Aceh is one of four provinces in Indonesia that has a special status of autonomy. This status is a result of memorandum of understanding (MoU) between Indonesian government and “Gerakan Aceh Merdeka” (GAM) to end a national conflict Aceh and Indonesian government which lasted from 1976 to 2005. This movement was led by Hasan di Tiro which resided in Sweden during the conflict. One of the agreements reached in the MoU is Indonesian government have to approve the implementation of Islamic law or sharia in the province.<sup>1</sup> *Qanun Jinayat* part of Islamic law implementation which meet the demand of GAM in the MoU.

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<sup>1</sup> S. Butt, “Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts,” *The Journal of Legal Pluralism and Unofficial Law* 50 (2018): 402–34; Edward Aspinall, “The Helsinki Agreement : A More Promising Basis for Peace in Aceh?,” in *East-West Center Washington*, Policy Stu, vol. 20 (Washington, D.C.: East-West Center Washington, 2005), 104.

*Qanun Jinayat* is a set of criminal codes based on sharia that become one of the regulations in Aceh's legal system and state's one in the country. This law has been integrated into the broader Indonesian criminal justice system, which is traditionally based on civil law inherited from the Dutch colonial era.<sup>2</sup> The 1945 Constitution (*Undang-Undang 1945*) establishes a legal framework that includes various sources, including Islamic law.<sup>3</sup> The Indonesian legal system is divided into three levels: the district court, the high court, and the Supreme Court. The Supreme Court is the highest court in Indonesia, and its decisions are binding on all lower courts.<sup>4</sup>

Islamic law has played a crucial role in various aspects of Indonesia's legal system for centuries, particularly in personal matters like marriage and inheritance. However, its influence on the criminal justice system has been limited until recent decades, when there has been a resurgence of interest in Islamic law within Indonesia's political and social spheres. This shift is exemplified by the enactment of Law No. 18 of 2001 and Law No. 11 of 2006, which granted Aceh the authority to implement Islamic law, including the establishment of the Sharia Court. This court, originally a religious court for civil matters, has evolved to adjudicate both civil and criminal cases, including those under the *Qanun Jinayat*.

The *Qanun Jinayat* and its application have sparked considerable debate and controversy. Critics argue that the *Qanun* is unconstitutional, discriminatory, and anachronistic, as evidenced by the failed judicial review attempts at the Indonesian Supreme Court.<sup>5</sup> Additionally, there

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<sup>2</sup> Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," in *Legal Evolution and Political Authority in Indonesia* (Leiden: Brill Nijhoff, 2000), 13–31.

<sup>3</sup> Jan Michiel Otto (ed.), "Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present," in *Law, Governance, and Development Research* (Leiden: Leiden University Press, 2010), 529–52, <https://doi.org/10.1515/9789400600171-015>.

<sup>4</sup> Simon Butt & Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018).

<sup>5</sup> Zainul Fuad, Surya Darma & Muhibbuthabry, "Wither Qanun Jinayat? The Legal and Social Developments of Islamic Criminal Law in Indonesia," *Cogent Social Sciences* 08, no. 01 (2022), <https://doi.org/https://doi.org/10.1080/23311886.2022.2053269>.

are concerns about human rights violations and legal inconsistencies, particularly in how the sharia court's decisions are implemented within the national legal framework.<sup>6</sup> The sharia court's unique role and the characteristics of its decisions highlight the complex interplay between regional autonomy and national legal standards.<sup>7</sup>

The implementation of Islamic criminal law in Aceh, particularly the *Qanun Jinayat*, represents a significant shift in Indonesia's legal system. This development reflects the growing influence of Islamic law within the political and social spheres of the country, reshaping the criminal justice landscape and raising important questions about the future of legal pluralism in Indonesia.<sup>8</sup>

*Qanun Jinayat* is a set of Islamic criminal Laws increasingly applied in Aceh. The application of these laws is not without controversy, with some arguing that they are incompatible with Indonesia's secular legal system.<sup>9</sup> *Qanun Jinayat's* application in Indonesia's criminal justice system is regulated by the 2002 Law on Islamic Courts, which provides for establishing Islamic Courts in Indonesia.<sup>10</sup> It covers a wide range of criminal offenses, including adultery. The laws prescribe specific punishments for each offense, including fines, canning and imprisonment. *Qanun Jinayat* also provides for the imposition of hudud punishments, which are the most severe forms of punishment under Islamic law.

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<sup>6</sup> Butt, "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts."

<sup>7</sup> D. Gusman, "The Characteristic of Syar'iyah Court Decision into Unitary State of the Republic of Indonesia: Syar'iyah Court Regional Cases of Nanggroe Aceh Darussalam Province," *Riau Law Journal* 07, no. 01 (2023): 9–113, <https://doi.org/http://dx.doi.org/10.30652/rlj.v7i1.8073>.

<sup>8</sup> Amsori Amsori and Jailani Jailani, "Legislasi Qanun Jinayat Aceh Dalam Sistem Hukum Nasional," *Ar Raniry: International Journal of Islamic Studies* 4, no. 2 (2018): 221–56, <https://doi.org/10.20859/jar.v4i2.138>.

<sup>9</sup> Amsori and Jailani.

<sup>10</sup> M Ikhwan and Muhammad Heikal Daudy, "Pelembagaan Hukum Jinayat di Aceh Sebagai Bagian Sistem Hukum Pidana Indonesia," *Islam Universalia: International Journal of Islamic Studies and Social Sciences* 1, no. 2 (2019): 180–212, <https://doi.org/10.56613/islam-universalia.v1i2.119>.

The application of *Qanun Jinayat* in Indonesia's criminal justice system has been the subject of much debate in recent years. The Indonesian Supreme Court has issued several decisions that have applied *Qanun Jinayat* in criminal cases. Some of these decisions have been controversial, with critics arguing that they violate Indonesia's secular legal system and constitutional protections. Critics of *Qanun Jinayat*'s application in Indonesia's criminal justice system argue that the laws are incompatible with Indonesia's secular legal system.

This article employs doctrinal legal research methodology, an approach used to analyze legal principles and doctrines through the examination of primary and secondary legal sources. This method is commonly used to investigate the relationship between different legal systems and their applications in specific contexts. In examining the constitutional debates on the position and the status of Aceh *Qanun Jinayat* within the Indonesian legal system and how the Indonesian Supreme court applies the Islamic criminal law based on Aceh's *Qanun Jinayat* in their decisions, a doctrinal legal research methodology can provide a useful framework for understanding the position of Islamic Criminal Law within the Indonesian criminal Justice System.

The discussion of this article begins with the elaboration of the implementation of *Qanun Jinayat* in recent periods and continues by examining its position within Indonesian legal system to show its status in Indonesian legal pluralism. Afterwards, the article explains the conflict of *Qanun Jinayat* and criminal law in Indonesian legal system.

### **Manifesting Aceh's *Qanun Jinayat***

The implementation of Aceh's *Qanun Jinayat* has gained broad scholarly attention due to its international coverage about corporal punishment.<sup>11</sup> Despite the negative images of the implementation of

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<sup>11</sup> Aisyah Llewellyn, "Shame and Humiliation?: Aceh's Islamic Law Violates Human Rights" (Al Jazeera, 2019), <https://www.aljazeera.com/news/2019/6/28/shame-and-humiliation-acehs-islamic-law-violates-human-rights>.

*Qanun Jinayat* in most studies on Islamic law in Aceh, several assumptions might mislead if the researchers do not carefully see the related cases to *Qanun Jinayat* closely. For instance, many people assume that non-Muslims would have difficulties in Aceh due to the presence of *Qanun Jinayat*, but in fact, non-Muslims in Aceh prefer *Qanun Jinayat* to state's criminal when they violate the regulations.<sup>12</sup>

As a special region with special appointments, Nanggroe Aceh Darussalam can establish their own justice system including Sharia Court. Article 128, (1) law number 11/2006 on Aceh Government (Law 11/2006) states:

“Sharia Court in Aceh is part of national court system in religious jurisdiction, which is employed by Sharia Supreme Court free from any intervention.”

*Qanun Jinayat* encompasses various aspects of family law, civil law, and criminal law as mentioned in point (3) provision above stating:

“Sharia Supreme Court is authorized to investigate, judge, decide, and finalize a case related to family law, civil law, and adultery (criminal law) based Islamic law.”

These cases are also stipulated in Article 130 Law Number 11/2006 that Sharia Supreme Court consists of district sharia supreme court as the first jurisdiction and Aceh (provincial) Sharia Supreme Court as appeal court level.

The sharia jurisdiction applies to every Muslim in Aceh or in terms of adultery it can apply to non-Muslims when they commit it with Muslims. In this respect, the perpetrator who is not Muslim can choose to obey adultery law voluntarily. In addition, this law applies to non-Muslim when the adultery he or she did is not ruled by Criminal Law (KUHP) or other laws beyond KUHP. However, this law does not apply to those who live outside Aceh as regulated in Article 128-129

<sup>12</sup> Abdul Halim, “Non-Muslims in the Qanun Jinayat and the Choice of Law in Sharia Courts in Aceh,” *Human Rights Review* 23, no. 2 (2022): 265–88, <https://doi.org/10.1007/s12142-021-00645-x>.

Law number 11/2006.

In a smaller scope, law enforcement is also employed in Gampong (small village in Aceh) or Laot Lhok (the area of ocean customary law society) or Mukim level (the unity customary law society which consists of several Gampong) through their customary laws. To overcome other customary crimes or customary disputes, the leader of the villages who have authority in the areas will take over the cases. In this respect, the forces of law enforcement provide opportunity to overcome conflict/dispute in advance based on tradition in Gampong or others. While the deliberation of the trial to handle it can be hold in Meunasah or other name in Gampong level or other name and in the mosque in Mukim level or other places appointed by Keuchik or other name and Imeum Mukim or other name and the commandant of the ocean or other names and general Laot or another name. These provisions explicitly written in chapter 6-7 Qanun Aceh number 9/2008 on the guidance of customary (*Qanun Aceh 9/2008*).

Aceh Province also regulates a restorative justice for victims who suffers from a crime, some of which are regulated in Aceh *Qanun* Number 6/2014 on adultery Law (Aceh *Qanun* 6/2014); Aceh Qanun Number 7/2013 on Adultery Procedure Law (Aceh *Qanun* 7/2013); Aceh *Qanun* 9/2008; and Law 11/2006 that compensation for perpetrators whose process is not in accordance with procedures in applying the law regarding the person is regulated in Article 68 *Qanun Aceh* 6/2014. It states that everyone who is arrested and detained by the authorities who are suspected of committing misled legal conclusion without going through a legal procedure in applying the law, or a mistake regarding the person, has the right to receive compensation. Further, rehabilitation for perpetrators whose process is not in accordance with procedures in applying the law regarding the person is regulated in Article 69 of *Qanun Aceh* 6/2014 which states that everyone, as referred to in Article 68, has the right to receive rehabilitation as referred to in point (1).

Besides the above rules, there are also other types of settlement models stipulated in Article 16 point (1) of *Qanun Aceh* 9/2008. Based on these provisions there are 11 customary sanctions that may be imposed by customary courts, namely: advice; reprimand; apology; *sayam*; *diyat*; fine; compensation; ostracized by the Gampong community or by another name; expelled from the Gampong community or by another name; revocation of customary titles; and other forms of sanctions in accordance with local customs.

Not all the eleven sanctions contain punishments, because there are certain types of sanctions that are characteristic of reconciling the parties, for example, such as advice and reprimands that aim to provide an afterthought to the parties that the dispute/dispute should not be good. The other type of sanction is in the form of “*sayam*”, which is a settlement for committing a customary crime which is usually caused by a dispute/dispute in which the parties or one of the parties suffer, such as a fight. In addition, there are also other types of sanctions called “*diyat*.”<sup>13</sup> In this case, if the perpetrator of the crime has injured another person, the wound will be measured. If you bleed, the blood will be assessed for levels. Therefore, the payment of *diyat* is based on the level of the number of wounds or blood that has come out.

The main legal source used in the criminal law process in Indonesia is Law No. 8 of 1981 concerning the Criminal Procedure Code. However, as previously stated, in the province of Aceh, specificity applies where in the case of *jarimah* or criminal offense the main provisions of the law used in the proof are *Qanun Aceh* Number 7 of 2013 concerning *Jinayat* Procedure Law. This is based on article 5 of *Qanun Aceh* Number 7 of 2013 concerning *Jinayat* Procedure. However, based on Article 285 of *Qanun Aceh* Number 7 of 2013 concerning *Jinayat* Procedure Law:

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<sup>13</sup> Arfiansyah, “State Legal Pluralism The Intersection of Adat, Jinayah, and National Penal Law in Gayo, Indonesia” (Universiteit Leiden, The Netherlands, 2022), <https://scholarlypublications.universiteitleiden.nl/handle/1887/3463689>.



“Provisions in the Criminal Procedure Code, or other laws and regulations concerning criminal procedure law continue to apply as long as they are not regulated in this *qanun*.”<sup>14</sup>

The difference between Aceh *Qanun* No. 7/2013 on *Jinayat* Procedure with KUHAP is the addition of evidence and the confession of the defendant as valid evidence. While related to electronic evidence in the *qanun* has been recognized in the Criminal Procedure Code with the expansion of evidence based on article 5 paragraph 2 of the Electronic Information and Transactions Law, where electronic information and electronic documents as electronic evidence are recognized as evidence so that their existence adds to the types of evidence regulated in the Criminal Procedure Code (KUHP).

Building on these procedural differences, the implementation of Islamic penal law in Aceh through the *Qanun Jinayat* has sparked significant debates within Indonesia's legal framework, particularly concerning its alignment with national laws and its application in the criminal justice system. The application of Aceh's *Qanun Jinayat* in cases involving sexual harassment and rape of child victims, focusing on how these cases have been adjudicated in Sharia Courts and subsequently reviewed by higher courts, including the Supreme Court of Indonesia. It highlights the inconsistencies in sentencing, the legal basis of these rulings, and the broader implications of applying Islamic penal law within the context of Indonesian national legislation, specifically the restrictions imposed by Law No. 12 of 2011. From various rulings in Aceh Sharia Courts, several trends in decisions involving child sexual harassment and rape cases emerge. In five analyzed cases of child rape, defendants were generally convicted under Article 50 of the Aceh *Qanun* No. 6 of 2014 on *Qanun Jinayat*, with prison sentences averaging 150 months or more. For cases of child sexual harassment, three analyzed verdicts found the defendants

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<sup>14</sup> Dinas Syariah Islam Aceh, “Qanun Aceh Nomor 7 Tahun 2013 Tentang Hukum Acara Jinayat” (2013), [https://dsi.bireuenkab.go.id/media/2020.08/Qanun Aceh Nomor 7 Tahun 2013 Tentang Hukum Acara Jinayat.pdf](https://dsi.bireuenkab.go.id/media/2020.08/Qanun%20Aceh%20Nomor%207%20Tahun%202013%20Tentang%20Hukum%20Acara%20Jinayat.pdf).

guilty under Article 47 of the Aceh *Qanun* No. 6 of 2014.

Thus, while cases of child sexual harassment and rape are punished under similar legal provisions, there is a disparity in sentencing based on judicial considerations and mediation efforts by the defendants. Additionally, the age of the defendant plays a crucial role, with child defendants often being returned to their families for supervision.

In the case of child sexual harassment, the Sharia Court of Tapaktuan, in its first instance, delivered a verdict in Case No. 8/JN/2020/MS.Ttn., finding the defendant guilty of the crime as defined under Article 47 of the Aceh *Qanun* No. 6 of 2014 on *Qanun Jinayat*. The court sentenced the defendant to 80 months of imprisonment. The Sharia Court of Aceh overturned the original decision, reducing the sentence to 24 months of imprisonment, accounting for time already served, and imposed a court fee (IDR. 5000).

The Public Prosecutor appealed against this decision, arguing that the judge misapplied the law by not adhering to the *Qanun*. At the cassation level, the prosecutor referenced Article 47 of the Aceh *Qanun* No. 6 of 2014 in conjunction with Article 65 (1) of the Criminal Code. The Supreme Court annulled the Sharia Court of Aceh's decision, independently adjudicated the case, reaffirmed the defendant's guilt, and reinstated the original 80-month imprisonment sentence, adjusted for time served.

The Supreme Court justified its decision by pointing out the Sharia Court of Aceh's erroneous judgment, which deemed the defendant's actions non-deviant because the acts were committed against a boy to avoid more severe consequences if they were against a girl. This rationale was flawed, as sexual harassment against any child, irrespective of gender, constitutes deviant behavior. Moreover, the defendant, being an *ustaz* (Muslim preacher), held a position that should exemplify religious and legal adherence, particularly the prohibitions outlined in the Aceh *Qanun*.

In a separate case decided on August 16, 2021, the Sharia Court of Juntol rendered a verdict in Case No. 16/JN/2021/MS, involving Suriadi bin Abdullah, aged 46, accused of raping his five-year-old biological child. The Public Prosecutor charged the defendant under Article 49 of *Qanun* No. 6 of 2014 for “intentionally committing the crime of rape against a child with a mahram relationship.” The prosecution demanded a 200-month prison sentence and restitution of Rp. 14,258,000 to the victim or their heirs. Failure to pay within one month after the final judgment would result in the seizure and auction of the defendant’s assets, or a substitute imprisonment of three months if the assets were insufficient.

The trial court’s verdict aligned with the prosecution’s demands, convicting the defendant of the crime and imposing a 180-month prison sentence, adjusted for time served, and ordered the payment of restitution. The court also considered restorative justice in its decision.

On appeal, in Decision No. 22/JN/2021, the appellate court acquitted the defendant, citing that the fluid discharge from the victim was due to a medical condition and that the abrasions on the victim’s genital area were speculative without medical examination. The forensic evidence presented by the prosecution was dismissed by the appellate court.

The case proceeded to the Supreme Court, which overturned the appellate court’s decision in its cassation ruling. The Supreme Court reaffirmed the defendant’s guilt in raping the child with a *mahram* relationship, sentencing him to 180 months of imprisonment, adjusted for time served, and ordered the payment of restitution to the victim and their family.

Furthermore, it is important to note that the Aceh *Qanun*, as a provincial regulation, should not impose criminal sanctions exceeding six months of imprisonment or fines more than Rp. 50 million, as stipulated by Law No. 12 of 2011 on the Formation of Legislation. This raises significant legal concerns regarding the compatibility of these extended

sentences with national legislative provisions.

### State's Legal Pluralism and Constitutional Disputes

Law No. 18/2001 on Special Autonomy states “The provision of wider opportunities to organize and manage their own households, including economic resources, explore natural resources and human resources, and apply Islamic law in social life.”<sup>15</sup>

While related to the implementation of Islamic Sharia in Aceh, the scope of Islamic Sharia is clearly limited in article 5 of the Regional Regulation of the Special Region of Aceh Province Number 5 of 2000 concerning the Implementation of Islamic Sharia, namely: “In order to realize the specialty of Aceh in the field of organizing religious life, every person or legal entity domiciled in the region is obliged to uphold the implementation of Islamic Sharia in their lives.” Where Islamic Sharia includes: faith (*akidah*); worship; *muamalah*; education and preach of morals; education and preach of Islamic propaganda; *akhlak*; *amar ma'ruf nahi munkar*; *baitul mal*; community; defense of Islam; *qadha*; *jinayat*; *munakahat*; and *mawaris*.<sup>16</sup>

The authority of the Government of Aceh to manage its region in the field of sharia, one of which is the application of Islamic sharia values to the local community, was then reaffirmed by the presence of Law Number 11 of 2006 concerning the Government of Aceh.<sup>17</sup> The application of Islamic Sharia values by the Government of Aceh in the criminal sphere then gave birth to *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat* and *Qanun* Aceh Number 7 of 2013 concerning *Jinayat Procedure Law*. This then has the consequence that in adjudicating criminal cases that occur in Aceh, Judges no longer use the Criminal

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<sup>15</sup> Michelle Ann Miller, “The Nanggroe Aceh Darussalam Law: A Serious Response to Acehnese Separatism?,” *Asian Ethnicity* 5, no. 3 (October 1, 2004): 333–51, <https://doi.org/10.1080/1463136042000259789>.

<sup>16</sup> Aceh.

<sup>17</sup> Dinas Syariah Islam Aceh, “Qanun Aceh Nomor 11 Tahun 2006” (2006), <https://dsi.acehprov.go.id/halaman/qanun-perda>.

Code (KUHP) and the Criminal Procedure Code (KUHP) but must use and base themselves on *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat* as the Material Law and *Qanun* Aceh Number 7 of 2013 concerning *Jinayat* Procedure Law as the formal law.

Starting from this, the position of *Qanun Jinayat* in the Indonesian legal system based on the provisions of Law No. 12 of 2011 concerning the Formation of Legislation is considered the position of *Qanun* equivalent to local regulations in other regions. This is based on the legal hierarchy in Article 7 of Law No. 12/2011 on the Formation of Legislation, which states Constitution of the Republic of Indonesia Year 1945, Law or Government Regulation in Lieu of Law, Government Regulation, Presidential Regulation and Regional Regulation.<sup>18</sup> In the explanation of Article 7, it is clearly stated that: "Included in the types of provincial regulations are *Qanun* applicable in the Province of Nanggroe Aceh Darussalam and *Perdasus* and *Perdasi* applicable in the Province of Papua. Then the position of *Qanun* is recognized in the hierarchy of Indonesian legislation and equated with local regulations."<sup>19</sup>

The position of *Qanun Jinayat* although equal to the position of local regulations, but based on the specificity given by the central government to the Aceh government in its special autonomy, the Aceh Parliament can authorize *Qanun Qanun Jinayat* and *Qanun Jinayat* procedural law formal law and material law in the Sharia Court in trying criminal cases. However, because Aceh is part of the territory of the Unitary State of the Republic of Indonesia, the central government's supervision of the *Qanun* must absolutely exist.

This is based on the fact that the nature of a unitary state is that the highest authority is vested in the central government. Therefore, the supervision of *Qanun* must be conducted by the central government as a

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<sup>18</sup> "Pasal 7 UU 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan" (2011).

<sup>19</sup> "Penjelasan Undang-Undang 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan." (n.d.).

consequence of the unitary state.<sup>20</sup> In addition, the authority of the Aceh regional government in special autonomy is not absolute. This means that although the *Qanun* is a product born out of the special autonomy for the Aceh government, the *Qanun* itself must not conflict with the laws or regulations above it.

However, Institute for Criminal Justice Reform (ICJR) considers that in *Qanun Jinayat*, the Aceh government has gone too far in exercising its authority obtained from the Aceh Government Law.<sup>21</sup> As is the case with the sanction of flogging where according to ICJR the Government of Aceh does not have the authority to create a new form of criminal sanction, let alone more severe than stipulated by the Criminal Code. This is because the Criminal Code has imitatively regulated the types of criminal sanctions that can be imposed on a criminal offense.<sup>22</sup> In addition, ICJR assesses that the content in *Qanun Jinayat* is very problematic which focuses on 3 things. First, regarding the formulation of criminal norms which are considered multi-interpretive, discriminatory, overcriminalization, and repetition with national criminal law policies. So that it has the potential to target vulnerable groups, namely: women, children, and LGBT. Second, *Qanun Jinayat* has the potential to violate fair trial for suspects and defendants because in practice it is selective, discriminatory, and not regulated by the correct procedural law. Third, the punishment is degrading to human dignity including the use of corporal punishment, in this case public flogging.<sup>23</sup> This situation has led to legal uncertainty so that later filed an application for judicial review of the *Qanun Jinayat* to the Supreme Court with the point that the *Qanun Jinayat*

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<sup>20</sup> Sekretariat Jenderal MPR RI, “Undang-Undang Dasar Negara Republik Indonesia Tahun 1945” (2020).

<sup>21</sup> Institute for Criminal Justice Reform dan Solidaritas Perempuan, “Permohonan Keberatan Terhadap Qanun Aceh No. 6 Tahun 2014 Tentang Hukum Jinayat” (2016), <https://icjr.or.id/wp-content/uploads/2016/05/Permohonan-JR-Qanun-Jinayat-Final.pdf>.

<sup>22</sup> Perempuan.

<sup>23</sup> Perempuan.

has contradicted a number of regulations above it.

The Supreme Court then decided that the petition for judicial review from the petitioners, the Institute for Criminal Justice Reform (ICJR) and *Perserikatan Solidaritas Perempuan* (PSP), could not be accepted because of several reasons.<sup>24</sup> Firstly, lack of representatives.<sup>25</sup> Article 37 of Government Regulation No. 79/2005 on Guidance and Supervision of Local Government Implementation and Article 69 of Minister of Home Affairs Regulation No. 1/2014 on the Formation of Local Legal Products, among others, emphasize that the Government, represented by the Ministry of Home Affairs, has the obligation to clarify every local legal product that is officially submitted to the Ministry of Home Affairs. Whereas the Ministry of Home Affairs has never submitted the results of clarification on *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat*, so that it brings legal consequences that the Aceh *Qanun* has legality and legitimacy in its implementation.

Secondly, Aceh *Qanun* No. 6/2014 on *Qanun Jinayat* does not conflict with Higher Laws.<sup>26</sup> Based on the Law of the Republic of Indonesia Number 11 of 2006 concerning the Government of Aceh Article 16 paragraph (2), emphasizes that:

“Other mandatory affairs which are the authority of the Aceh Government are the implementation of Aceh’s privileges which include, among others, in letter a, the organization of religious life in the form of the implementation of Islamic sharia for its adherents in Aceh while maintaining harmony among religious communities.”

Where based on the provisions of these laws and regulations, the Governor of Aceh together with the Aceh Parliament has the authority to form *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat*, because the implementation of Islamic law is the implementation of

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<sup>24</sup> Irfan Fachruddin & Hary Djatmiko, “Putusan Mahkamah Agung 60 P/Hum/2015” (n.d.), <https://putusan3.mahkamahagung.go.id/direktori/putusan/f1310477d04907315b9effbc3116577f.html>.

<sup>25</sup> Djatmiko.

<sup>26</sup> Djatmiko.

special government affairs and privileges for Aceh, therefore it is not appropriate according to the law, the Petitioner states that *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat* is contrary to the laws and regulations of *Qanun* Aceh Number 5 of 2011 concerning Procedures for the formation of *Qanun*, Article 3 paragraph (1) letter a confirms that the content material of *Qanun* contains the principle of *Dinul Islam*.

This is in line with Aceh *Qanun* Number 6 of 2014 concerning *Qanun Jinayat*, where Al-Qur'an and hadith are the main basis of Islam. Therefore, *Qanun* Aceh Number 6 Year 2014 on *Qanun Jinayat* is not contradictory to the Islamic principles: (1) Criminal Code (KUHP); (2) Law Number 39 Year 1999 on Human Rights; (3) Law Number 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights; (4) Law Number 5 of 1998 on the Ratification of the Convention Against Torture and Others Cruel, inhuman or Degrading Treatment or Punishment; (5) Law Number 12 Year 2011 on the Formation of Legislation; (6) Law Number 11 of 2012 concerning the Juvenile Criminal Justice System; (7) Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2004; (8) Law Number 8 of 1981 concerning Criminal Procedure Law; (9) Law No. 48 of 2009 on Judicial Power; (10) Law No. 7 of 1984 on the Ratification of the Convention on the Elimination of all Forms of Discrimination Against Woman.

Referring to the principle of *Lex Specialis Derogat Lege Generalis* that the Law of the Republic of Indonesia Number 11 of 2006 concerning the Government of Aceh is a *lex specialis* legislation because the regulation of the implementation of Islamic sharia is only regulated in the law, while other generalist laws do not regulate the implementation of Islamic sharia, especially those related to *Qanun Jinayat*, so according to the law the implementation of Islamic sharia in Aceh is guided by Law of the Republic of Indonesia Number 11 of 2006 concerning the Government of Aceh, so that Aceh *Qanun* Number 6 of 2014 concerning



*Qanun Jinayat* does not contradict higher legislation.

Aceh *Qanun* Number 6 Year 2014 on *Qanun Jinayat* has been valid and applicable in general, especially for Islam adherents in Aceh. The establishment of the Aceh *Qanun* has been guided by laws and regulations by, among others, having an Academic Paper, Draft Aceh *Qanun*, Aceh Legislation Program, Discussion Meeting of the Aceh Government Team with the Aceh Parliament, Public Hearing Meeting (RDPU) attended by all components of Aceh society, and consultation with the Ministry of Home Affairs of the Republic of Indonesia, has also been discussed and approved together in the Plenary Session of the Aceh Parliament by giving birth to a Aceh Parliament Resolution on Approval of 7 (seven) Draft Aceh *Qanun* to become Aceh *Qanun* (including *Qanun Qanun Jinayat*).<sup>27</sup>

In the criminal offense or *jarimah* of rape itself, the regulation is contained in the Criminal Code, Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence, Law Number 35 of 2014 concerning Child Protection, as well as in Aceh *Qanun* Number 6 of 2014 concerning *Qanun Jinayat*. Where if referring to the principles of criminal law where the applicability of a regulation for a criminal act, namely:

- a. The principle of *lex superior derogate legi inferiori* is a principle that states that laws and regulations that have a lower degree in the hierarchy of laws and regulations must not conflict with higher ones.
- b. The principle of *ex specialis derogat legi generali* is a principle that states that special laws override the validity of general laws.
- c. The principle of *Lex Posterior Derogat Legi Priori* is a principle that states that new regulations override the validity of old regulations.<sup>28</sup>

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<sup>27</sup> Djatmiko.

<sup>28</sup> Bagir Manan, *Hukum Positif Indonesia* (Yogyakarta: FH UII Press, 2014).

If referring to the principle above, in theory the regulation of the crime of rape in Aceh should not refer to *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat* because in the hierarchy of laws and regulations there are regulations that are higher than *Qanun* which regulates rape. However, based on the Supreme Court Decision 60 P/Hum/2015, the Supreme Court stated that there is no conflict with the existing regulations above and the *Qanun Jinayat* is special as a regulation that implements Islamic law. Therefore, the applicable regulation in handling the crime of rape that occurred in Aceh is *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat*.

Then this is further emphasized in Article 72 *Qanun* Aceh Number 6 of 2014 concerning *Qanun Jinayat* which explains that in the event that there is an act of *Jarimah* as regulated in this *qanun* and also regulated in the Criminal Code (KUHP) or criminal provisions outside the Criminal Code, the *Jarimah* rules in this *Qanun* shall apply.<sup>29</sup>

Therefore, in the material law used to handle rape cases that occur in Aceh, other regulations governing the crime of rape are ruled out. While in the formal law, based on article 285 paragraph (3) of *Qanun* Aceh Number 7 of 2013 concerning *Jinayat* Procedure Law that provisions in the Criminal Procedure Code, or other laws and regulations concerning criminal procedure law continue to apply as long as they are not regulated in this *Qanun*.<sup>30</sup> This means that the applicability of the Criminal Procedure Code in handling criminal offenses or in this case rape is still valid as long as it is used to fill the void of existing regulations in the *Qanun Jinayat*.

### Locating *Qanun Jinayat* in Criminal Justice System

Negotiating *Qanun Jinayat*, the Islamic criminal law implemented in Aceh, Indonesia, presents unique challenges and opportunities within the broader framework of criminal justice. This negotiation often involves

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<sup>29</sup> Dinas Syariah Islam Aceh, *Qanun* Aceh Nomor 11 tahun 2006.

<sup>30</sup> Dinas Syariah Islam Aceh.

integrating customary laws and practices, such as restorative justice, into formal legal proceedings. An illustrative example of this integration is seen in the case registered as 63/Pid.B/2021/PN.Skm, where the defendant committed maltreatment against the victim.

Based on this, in his trial, the defendant defended himself by stating that with the help of Allah SWT peace had been realized between the defendant and the victim in the form of Restorative Justice. The defendant complied with the victim's request by making a statement stating that the accusation by the defendant against the victim as the cause of the defendant's sister's illness was not true. The statement letter was then attached to *Dayah Safinatun Naja* and read at the mosque on Friday before the sermon took place with a video made as evidence in court. The statement letter dated September 17, 2021, contains a statement of guilt as well as the defendant's apology to the victim and the victim's extended family for the accusation and beating of the victim. Further, the defendant and the victim are willing not to sue each other for anything more in the future after this peace agreement has been signed by both parties.

Furthermore, on October 7, 2021, a Peusijek Traditional Procession was held and attended by parties from the defendant, parties from the victims, witnesses, local traditional leaders, and the Head of Suka Makmur Court. In Peusijek, the defendant and the victim were united again as a brother, and the shock that occurred because of the defendant's actions was restored.

Based on this, in consideration of the decision it relates to Article 13, point (1) letter m jo. Article 14 of the Aceh *Qanun* Number 9/2008 on Customary Life and Customs Development, that light maltreatment is included in the category of disputes or disputes that can be resolved in a customary way by involving local Gampong traditional leaders. As well as this is also commensurate and comparable to the customary sanctions as stipulated in Article 16, point (1) letter c of the Aceh *Qanun* Number 9 /2008, namely an apology.

Then based on the defense made by the Defendant, the Public Prosecutor stated that he was still in his charge which demanded the Defendant with 4 (four) months in prison. However, based on the various considerations that have been carried out by the Panel of Judges, in its decision the Defendant is declared to have committed a crime as the single indictment of the Public Prosecutor, but cannot be held criminally liable because he has carried out restorative justice during the examination. So therefore, in the decision of the Panel of Judges also released the Defendant from all lawsuits.

## Conclusion

The adoption of *Qanun Jinayat* in Aceh—a province with special autonomy in Indonesia—has created a complex legal environment and significant integration challenges within the broader Indonesian criminal justice system, which is traditionally based on civil law inherited from the Dutch colonial era. The 1945 Constitution establishes a legal framework incorporating various sources, including Islamic law, and the Indonesian legal system is divided into three levels: the district court, the high court, and the Supreme Court. Despite its intention to reflect local values and Islamic principles, the implementation of *Qanun Jinayat* faces substantial legal, social, and administrative challenges.

The institutionalization of Islamic criminal law in Aceh through the *Qanun Jinayat* complements national laws but is not fully accepted by all legal communities. Criticisms regarding its constitutionality, discriminatory nature, and anachronistic elements have led to legal and social challenges, with attempts to revoke the *qanun* through judicial review failing, suggesting temporary success but ongoing trials. The dual legal system in Aceh, involving both sharia and national laws, presents significant administrative and societal challenges, arising from the public's understanding of sharia law and the integration of sharia criminal codes

with national laws.<sup>31</sup>

Female victims of sexual violence in Aceh express resistance to *Qanun Jinayat*, indicating limitations in achieving justice and addressing their needs adequately.<sup>32</sup> The implementation of *Qanun Jinayat* in Aceh, highlighting that socio-political conditions significantly influence the enforcement and acceptance of Islamic criminal laws.<sup>33</sup> Moreover, the enforcement of *Qanun Jinayat* faces practical challenges, including authority conflicts between Sharia enforcers and police, and inconsistencies in legal proceedings.

Applying *Qanun Jinayat* or Islamic Penal Law within the Indonesian criminal justice system remains a contentious issue that sparks debates among legal experts and scholars. The Indonesian Supreme Court's decisions on this matter have been closely scrutinized, with some arguing that the Court's rulings have given too much weight to political considerations and disregarded fundamental principles of justice and human rights. Despite the ongoing debates, it is important to note that the Indonesian criminal justice system operates under a legal framework that recognizes the country's diversity and pluralism. As such, any application of Islamic law must follow the Constitution and other national laws.

Moreover, the debates on applying Islamic Penal Law should not overshadow the need to strengthen Indonesia's criminal justice system as a whole, particularly in ensuring fairness, transparency, and accountability. This requires continuous efforts to improve legal and judicial institutions, enhance legal education and training, and promote respect for the rule

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<sup>31</sup> Muhammad Razi and Khairil Azmin Mokhtar, "The Challenges of Shariah Penal Code and Legal Pluralism in Aceh," *Jurnal Media Hukum* 27, no. 02 (December 1, 2020), <https://doi.org/10.18196/jmh.20200151>.

<sup>32</sup> Yogi Febriandi, Muhammad Ansor, and Nursiti, "Seeking Justice through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *Qudus International Journal of Islamic Studies* 9, no. 1 (2021): 103–40, <https://doi.org/10.21043/QIJIS.V9I1.8029>.

<sup>33</sup> Samsudin Aziz, "Kanunisasi Fikih Jinayat Kontemporer: Studi Materi Muatan Qānūn Jināyat Aceh Dan Brunei Darussalam," *Al-Ahkam* 24, no. 2 (2014): 173, <https://doi.org/10.21580/ahkam.2014.24.2.145>.

of law. Ultimately, any decision on applying *Qanun Jinayat* within the Indonesian criminal justice system must consider the country's unique social, cultural, and political context, as well as the principles of justice, human rights, and the rule of law. Only by balancing these various factors can *Seeking Justice Through Qanun Jinayat* the country's criminal justice system ensure that it serves the interests of all Indonesians, regardless of their religious or ethnic background.

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