Aceh and Islamic Criminal Law in the Courts[1]

Introduction

In 2014, the Aceh provincial government enacted a *Qanun Jinyat* or Islamic Criminal Code.[2] The Qanun came into force on 22 October 2015 – one year later. Hundreds of citizens have since been flogged after being found guilty of engaging in various acts considered impermissible or *haram* under Islamic law as defined by the Code, including homosexual intercourse, prohibited physical 'proximity' between unmarried males and females, gambling, adultery and alcohol consumption and distribution. A smaller number of citizens have been prosecuted under the Qanun Jinayat for acts that are also illegal under Indonesia's national criminal law, such as sexual abuse and rape (Elnizar 2017).

The Qanun has been controversial for many reasons. One is that it significantly expands the scope and application of substantive Islamic criminal law in Aceh, including some of its punishments, which many groups argue violate human rights standards, including prohibitions on torture and discrimination against women. Also controversial is that the Qanun asserts that its provisions, and the Islamic precepts it imposes, prevail over national laws and even international human rights law.[3] Many advocates and lawyers argue that the Qanun Jinayat is, therefore, illegal under Indonesian law, because it violates the Constitution, which contains these human rights guarantees. Others argue that it violates Indonesia's legal order as represented in the 'hierarchy of laws', which appears to hold that a regional regulation, of which the Qanun is a type, must not contradict national statutes.

The Supreme Court is the only institution in Indonesia with power to formally determine whether a Qanun is legal. It can do this by exercising its judicial review power to invalidate lower-level laws – such as national and subnational government or executive regulations, or statutes issued by subnational parliaments, including Qanun – if they do not accord with national statutes. The Supreme Court also has the final say on the interpretation and application of the Qanun Jinayat by the Islamic courts, or Mahkamah Syariah in Aceh. It does this by hearing cassation (*kasasi*) appeals from Aceh's Syariah courts and overturning decisions when it identifies judicial errors.

The available evidence, presented in this chapter, suggests that, in cases involving Islamic criminal law, the Court has exercised neither its judicial review nor its cassation functions with the rights of citizens and the order of the legal system in mind. Instead, it has preferred to avoid making decisions about the application of the Qanun Jinayat wherever possible. This means that, despite genuine concerns about the oppressiveness of the Qanun Jinayat and its application by Aceh's courts, and the strength of legal arguments pointing towards the Qanun

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[2] 'Qanun' is an Arabic term for 'law' (Esposito 2017). In Aceh, it is synonymous with the term 'Perda' issued in other provinces (Aspinall 2006).

[3] As per Article 75 of the Qanun.

Jinayat's invalidity, the legality of the Code and its enforcement by officials in Aceh has not been judicially tested in any meaningful way.

This Chapter examines the Qanun Jinayat in light of the previous piecemeal attempts by the Aceh government to regulate the Islamic offences of gambling, proximity and alcohol-related activities. It provides an overall picture of how these laws have been applied, and the types of penalties Aceh's Syariah courts hand down. These observations are based on academic studies, press reports and the relatively few publicly available decisions of these courts. I then turn to consider the role of the Supreme Court in two the categories of cases relating to the Qanun Jinayat just mentioned. The first type is cassation cases, of which the Supreme Court has heard five on appeal from the Aceh provincial High Court in Islamic criminal cases. These cases were decided in 2007 and 2008 – before the 2014 Qanun Jinayat was enacted, but relate to crimes also prohibited under the Qanun Jinayat. No Supreme Court cassation cases concerning the Qanun Jinayat itself were publicly available. The second type of case is judicial review. The Supreme Court has heard one such challenge, brought by a human rights NGO against the Qanun Jinayat. As we shall see, in both types of cases, the Court has maintained the status quo, refusing to disturb either the decisions of the provincial court (in the cassation cases) or the Qanun Jinayat itself (in the judicial review case). By so doing, the Supreme Court has taken a path that does not draw the ire of religious conservatives.

Background

Before turning to discuss these various issues, I first provide some background about Islamic law in Indonesia and the process by which Aceh came to have authority to impose it, including criminal law, in the province.

The positions of Islam in the state and of Islamic law in the legal system have long been highly vexed issues in Indonesia.[4] Given that Muslims comprise about 90 percent of Indonesia's population, Muslim groups have long pushed for an Islamic state or for some type of formal recognition of Islam. As Indonesia's first independent constitution was being discussed in 1945, Muslim politicians successfully negotiated the inclusion, in the penultimate draft, of a constitutional obligation for Muslims to follow Islamic law (the so-called 'Jakarta Charter' or *Piagam Jakarta*) (Anshari & Saifuddin 1997). However, Indonesia's first president, Soekarno, removed this before the Constitution was promulgated, in response to Christians, particularly in Eastern Indonesia, who threatened not to join the new nation, and even to moderate Muslims, who saw religion as a private matter and did not want the state to enforce Islamic law against them (Butt 2016; Rickleffs 1993; Lindsey 2012). Instead, Soekarno included a compromise in the Preamble to the Constitution, which contains Indonesia's national ideology: the Pancasila. The first principle of five comprising this ideology is that Indonesia is a religious state – that is, one based on 'Almighty God'.[5]

Because the state is not secular, the state has assumed a role in the administration of religion. But because Islam is the religion with which most Indonesians associate, the state has dedicated more resources to supporting Islam than to other religions (Shah 2017). For

[4] See Benda (1958) for debates surrounding Islam that occurred in colonial Indonesia, and the Dutch response to it. This background discussion draws on Butt (2018) and (2010a).
[5] That Indonesia is a state based on Almighty God is restated in Article 29(1). Also included in the Constitution is freedom of religion and to worship in accordance with that religion (Article 29(2)).

example, Indonesia has a Religious Affairs Ministry that purports to help administer all recognised religions in Indonesia, but most of its operations relate to Islam (Lindsey 2012). Likewise, Indonesia has a system of 'religious courts' (*peradilan agama*), but it only has jurisdiction over Muslims and particular issues of Islamic law (Cammack & Feener 2007; Lev 1973; Hooker 2008).

Because *Pancasila* mandates such a role for religion in matters of state, the ideological door has remained ajar for some Muslim groups to continue seeking a more prominent place for Islamic principles in the operation of government. Many of them continue to see the Pancasila compromise as a betrayal of Islam, and have made sustained and spirited calls for Islamic law to be given more prominence in Indonesia's constitutional and legal systems. However, most of their efforts have been unsuccessful, with the state being able to resist calls for Islamic law to be accorded legal authority independent of the nation state.[6] For example, the religious courts apply a state-sanctioned version of Islamic law, rather than classical Islamic sources, and their jurisdiction is limited primarily to family law.[7] Their decisions can be appealed to the Supreme Court in Jakarta. This apex Court has a religious bench, but its decisions generally uphold Islamic law only to the extent that it has been adopted in the laws of the government (Hooker 2008; Nurlaelawati 2010; Butt 2008). In this context, the national government has continually rejected calls to apply Islamic criminal law across the archipelago, even if only against Muslims.

Also important to note by way of background are the decentralisation reforms initiated after the fall of Soeharto in 1998. Under these reforms, many subnational governments received powers to make laws on a wide range of matters, with only several areas remaining within the exclusive purview of the central government (Butt 2010b). Some of these subnational governments have used this authority to pass bylaws that reflect Islamic norms, including those imposing dress codes, banning gambling, and alcohol consumption and distribution (Bush 2008; Buehler 2011). Human rights groups and others have called for the central government to revoke these bylaws, primarily on grounds that they often discriminate against minorities and women, and impose draconian punishments, but it refused, and in 2017, the Constitutional Court invalidated the central government's revocation powers in any case (Butt 2017a). As mentioned, this leaves the Supreme Court as the only institution with power to review and, if necessary, invalidate subnational laws.

Aceh is the only province of Indonesia whose legislature has formal authority to issue laws expressly based on Islamic norms, including those relating to criminal law. This privilege was granted to it as part of a peace accord – the Helsinki Agreement – signed by Aceh representatives and the Indonesian national government (Aspinall 2006). The Agreement,

[6] For example, proposals for increased constitutional recognition for Islam and Islamic law were rejected during constitutional debates in 1955-59 and 1999-2002 (Nasution 1992; Indrayana 2008; Butt & Lindsey 2012). Yet, Islamic conservatives have won some legal ground. For example, the national legislature has enacted some statutes that appear to adopt Islamic norms or prefer Islam over other religions, though not expressly. Examples at the national level include the Pornography Law (Pausacker 2009) and the National Education Law.

[7] The subject-matter jurisdiction of the religious courts is marriage (*perkawinan*); succession (*waris*); gifts (*hibah*); bequests (*wakaf*); payment of alms (*zakat*); charitable gifts (*infaq*); gifts to the needy (*shadaqah*); and the 'shari'a economy' (*ekonomi syari'ah*): Article 49(1) of Law 7 of 1989 on the Religious Courts, as amended by Law 3 of 2006 and Law 50 of 2009.

inked within a year of the 2004 Boxing Day Tsunami, aimed to end decades-long civil war in the province, led on the Aceh side by *Gerakan Aceh Merdeka*, which sought Aceh's independence from Indonesia. Under the Agreement, aspects of which were later embodied in Law 11 of 2006 on Aceh Special Autonomy ('the 2006 Law'), the Aceh government received similar powers to those of other Indonesian subnational governments, plus the power to issue Islam-based laws. Using this lawmaking power, the Aceh provincial parliament issued the 2014 Qanun Jinayat, and various other Qanun, which I now turn to discuss.

The Qanun Jinyat and its predecessors

The 2006 Law authorises the Aceh government to 'implement' Islamic law in Aceh, expressly mentioning criminal law (*jinayat*) as being encompassed (Article 125(2)). The 2006 Law also grants broad powers to the Aceh government itself to regulate, by issuing Qanun, how Islamic law is implemented. The Law also appears to have the effect of adopting an equivalent to the Jakarta Charter in Aceh: Article 126(1) states that 'Every adherent to Islam in Aceh must adhere to and observe Islamic law'. Article 126(2) adds that 'Every person living in or present in Aceh must respect the application of Islamic law'. But Article 127(2) requires the Aceh government to respect the religious values of the adherents to other religions. As we shall see, the Aceh government does not appear to have met this obligation – at least to the extent to which the Qanun Jinayat applies to non-Muslims.

The Qanun are applied and enforced by Aceh's Syariah courts. Their decisions can be appealed by the Supreme Court (Article 131(1)) and are subject to the Supreme Court's *peninjauan kembali* processes (Article 131(3)) under which the Supreme Court can reopen any case – even one of its own (Butt & Lindsey 2018). The Supreme Court recommends Syariah Court judges for appointment, and administers the organisation, administration and financial affairs of the Syariah courts (Article 135(1)).

Early Qanuns and the 2009 Draft Qanun Jinayat

In the earlier years of regional autonomy, and even before the enactment of the 2006 Law, Aceh's provincial parliament issued several laws prohibiting activities such as gambling and alcohol consumption, and enforcing strict dress codes.[8] These laws were widely enforced by the Aceh religious police (*Wilayatul Hisbah*), sometimes heavy handedly (International Crisis Group 2006), and resulted in significant numbers of prosecutions, as indicated in the case statistics, set out below.

These piecemeal efforts were later consolidated into a draft Qanun Jinayat, which also incorporated prohibitions on *zina* or adultery. On 14 September 2009, just two weeks before the end of its 2004-2009 parliamentary term, the Aceh provincial parliament passed this Code.[9] However, it never came into law and was never enforced. The Aceh provincial executive refused to approve the Bill and the Aceh governor refused to sign it (Karni 2009).

[8] See, for example, Qanun 11 of 2002 on the Implementation of Islamic Law in the Fields of Aqidah, Ibadah and Syi'ar Islam; Qanun 12 of 2003 on Alcoholic Beverages and the Like; Qanun 13 of 2003 on Gambling; Qanun 14 of 2003 on Prohibited Proximity. For discussion of these Qanun, see Feener (2014:143–5). It bears noting that, before the Helskini Agreement and the enactment of the 2006 Law, Aceh had already been granted a measure of special autonomy, through Law 18 of 2001, under which these Qanun were enacted.

[9] Only one political faction disagreed, arguing instead for a term of imprisonment and forcing fornicators to marry.

The main objection of the Governor and his administration, echoed by human rights groups,[10] related the Draft's imposition of punishments associated with Islamic law: caning and stoning, even to death. Most controversial was Article 24 of the Draft, which stated:

> Any person who deliberately engaged in adultery faces…100 strikes of the cane for those who are not yet married, and stoning/death penalty for those who are married.

The 2014 Qanun Jinayat

As mentioned, in 2014 the Aceh provincial parliament enacted a new Qanun Jinayat which, this time, the provincial executive endorsed and the Governor signed. The 2014 Qanun Jinayat retained caning as a punishment, but stoning was dropped.[11]

The Qanun Jinayat prohibits various offences (*jarimah*) that are not otherwise expressly covered by national law.[12] These include prohibited 'seclusion' (*khalwat*) – that is, being alone in an enclosed or private place with a member of the opposite sex who is not a spouse or relative;[13] and 'intermingling' (*ikhtilath*) – that is, consensual intimate relations between an unmarried male and female, such as flirting, touching, hugging and kissing.[14] Punishment for *khalwat* is up to ten strokes of the cane, a fine of 100 grams of gold or ten months in prison (Article 23(1)); and for *ikhtilath*, is 30 strikes, 300 grams or 30 months (Article 25).[15]

The Qanun prohibits drinking, producing, selling or carrying alcohol, and giving it as a gift, although use of alcohol for medical purposes as proscribed by a doctor is permitted (Article 14(1)).[16] It also criminalises gambling, with applicable penalties depending on whether the potential winnings are worth more than two grams of gold, or equivalent. If under two grams, then the punishment is up to 12 strikes, 120 grams, or 12 months (Article 18), but if more than two grams, the punishment increases to up to 30 strikes, 300 grams or 30 months (Article 19). Funding or providing facilities for gambling, or involving kids in gambling, attract higher penalties.[17]

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[10] The National Women's Human Rights Commission and other human rights groups had strongly objected to the inclusion of both stoning and caning in the 2009 draft, claiming the punishments were unconstitutional and violated human rights. They had also objected to the Aceh parliament's failure to seek community input about the draft (Hukumonline 2009).

[11] There are some notable differences between the 2009 Draft and the 2014 Qanun Jinayat, besides the removal of stoning. For example, under the 2009, sexual intercourse between married couples was excluded from the definition of rape.

[12] The following description of offences under the Qanun Jinayat draws on Butt (2018).

[13] The offence is not committed if the two are co-employees (Article 12(1)) or live in the same house (Article 12(2)).

[14] Though punishment for *khalwat* and *ikhtilath* do not apply if helping person of opposite sex in emergency (Article 13).

[15] Accusing someone of *ikhtilath* without being able to prove the allegation attracts the same punishment applicable for *ikhtilath* itself (Article 30(1)).

[16] Drinking alcohol can attract up to 40 strikes of the cane, with repeat offenders facing 80 strikes, a fine of 400 grams of gold or 40 months in prison (Article 15); producing or selling alcohol can lead to up to 60 strikes, or 600 grams or 60 months (Article 16(1)); and carrying alcohol or giving it as a present can result in up to 20 strikes, 200 grams or 20 months (Article 16(2)). If the perpetrator involves children in drinking or producing alcohol, then he or she faces 80 strikes, 800 grams or 80 months (Article 17).

[17] For the former, up to 45 strikes, 450 grams, 45 months; for the latter, 45 strikes, 450 grams or 45 months (Articles 20-21).

The Qanun's prohibition on 'adultery' (*perzinaan*, or *zina*) is much broader that Article 284 of the national Criminal Code, which prohibits a married person having sex with someone who is not their husband or wife. Under the Qanun, adultery includes any sex between people who are not married. This covers sex between people who are married, but not to each other, between one person who is married and one person who is not, and between two unmarried people. Unlike other offences, where offenders appear to be able to choose between alternative punishments of caning, a fine or imprisonment, the only penalty for first-time perpetrators of *zina* is up to 100 strikes of the cane (Article 33).[18]

The Qanun also prohibits consensual sex between people of the same gender, distinguishing between sodomy (*liwath*) and lesbian sex (*musahaqah*), but imposing the same penalties: 100 strikes, 1000 grams of gold or 100 months' imprisonment (Articles 63-64). This is broader than the national Criminal Code, which only prohibits same-sex intercourse with a minor (Article 292).

The Qanun also prohibits sexual abuse (*pelecehan seksual*) and rape (*pemerkosaan*). For sexual abuse – an 'immoral or indecent act deliberately performed by a person in public or against another person as a victim, whether male or female, without the consent of the victim' (Article 1(27)) – a penalty of up to 45 strikes, 450 grams or 45 months applies (Article 46).[19] The Code also punishes rape (*pemerkosaan*) with 125-175 strikes, 1250-1750 grams of gold or 125-175 months' imprisonment (Article 48).[20]

Controversially, if an alleged victim reports an alleged rape to police, he or she must provide initial evidence (Article 52(1)).[21] This can be in the form of an oath, made five times, with the fifth time constituting willingness to receive the wrath of Allah if the oath is untrue (Article 53(3)). The Qanun also provides a punishment of 80 strikes of the cane for making an unproven allegation of adultery (*qadzaf*),[22] with the person making the allegation also liable to pay restitution of up to 400 grams of gold to the person accused of rape (Article 58). An alleged rape victim who promises to make an oath before a judge but then resiles from that promise also commits *qadzaf*. Problematically, a person accused of rape based on an oath can avoid responsibility, simply by uttering a counter-oath five times (Article 55(4)). If both victim and alleged perpetrator make such oaths, then the alleged victim and the alleged perpetrator cannot be found guilty of *qadzaf* or rape, respectively (Article 56). Of course, this means that where the only evidence of rape is the victim's word against the perpetrator's, the perpetrator will escape responsibility.

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[18] Repeat offences, or *zina* with a family member or a child, attract up to 100 strikes, 1000 grams of gold or 100 months imprisonment in addition to this base penalty (Articles 33-35). Unmarried women who fall pregnant can be accused of *zina* without further evidence (Article 36).

[19] The penalty doubles if the victim is a child (Article 47).

[20] An additional 150-200 strikes, 1500-2000 grams and 150-200 months applies if the victim is related to the perpetrator (Article 49) or is a child (Article 50). The Qanun allows the victim to seek 750 grams of gold as restitution from the perpetrator if the perpetrator can afford it (Articles 51(1) and (2)).

[21] Police are also able to commence investigations if they come to hear of an alleged rape (Article 52(2)).

[22] Repeated offences attract up to 80 additional strikes of the cane, though this can be substituted with 400 grams of gold or 40 months' imprisonment (Article 57(1) and (2)).

Legal predominance

Also contentious is the Qanun's claim to trump national law – particularly, the national Criminal Code. Article 72 states that if an offence is regulated in *both* the Qanun *and* the KUHP, then the Qanun prevails. Presumably, for example, Article 72 indicates that the Aceh parliament wants the Qanun's broader prohibitions on *zina* and same-sex intercourse to prevail over the narrower prohibitions in the Criminal Code, mentioned above.

While Article 72 appears to constitute an overt attempt by the Aceh provincial parliament to assert its own authority over that of the national government, Article 72 can also be interpreted as an attempt to assert the authority of Islam over the nation state, particularly considering the 'contest' between Islam and the state discussed above. There is support for this interpretation in the Qanun itself. The Preamble to the Qanun commences with a statement that the Koran and Hadith are the main bases for Islam, and that Islam has become the conviction and basis for life of the Aceh community. And, in the list of instruments that provide a legal basis for the enactment of the Qanun, the national Criminal Code is absent. On one view, the ordering of these references is symbolically important, and indicates that the Aceh provincial parliament views Islamic law as the predominant source of law in general and of the Qanun in particular. Regardless of Article 72's intent, it appears to be clearly illegal, as discussed below.

The Qanun also appears to assert predominance over widely-recognised international human rights norms. Article 2 lists various principles that are said to underlie the Qanun's implementation, including 'protection of human rights' (*perlindungan hak asasi manusia*) (Article 2(e)). The Elucidation to Article 2(e) defines 'protection of human rights' as the:

> guarantee that the formulation of Islamic offences and punishments will accord with efforts to protect and respect human characteristics, honor and dignity, in accordance with the understanding of Indonesian Muslims communities about human rights.

As discussed below, this definition of human rights is limited and appears to contradict both Indonesia's national Human Rights Law,[23] and Indonesia's obligations under international human rights treaties it has signed and ratified.

It bears noting, too, that the Qanun applies not only to Muslims in Aceh, but also to non-Muslims who, in collaboration with a Muslim, violate the Qanun and voluntarily submit to the Qanun (Article 5(b)). It also applies to a non-Muslim who commits an offence under the Qanun that is not otherwise prohibited by national law (Article 5(c)). In this respect, the Qanun does not significantly diverge from the 2006 Aceh Government Law, which provides that the Mahakamah Syariah is the court for 'every person whose religion is Islam and is in Aceh' (Article 128(2) of the 2016 Law). It also provides that, if an Islamic crime is committed by two or more people and that there are non-Muslims amongst them, the non-Muslims can choose to submit to Islamic criminal law (Article 129(1)). Islamic criminal law is also applicable to non-Muslims who commit an Islamic crime that is not regulated in national criminal law (Article 129(2)).

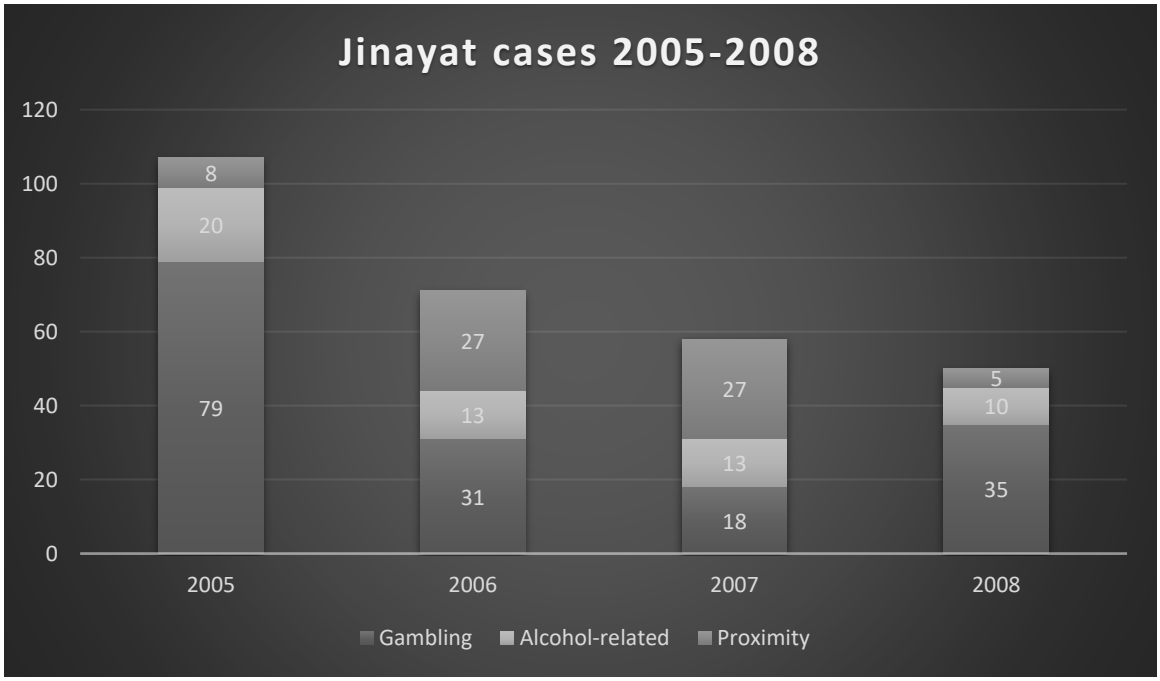
Of course, applying Islamic law against non-Muslims is very controversial. On the one hand, the Qanun is a valid exercise of legislative power of the Aceh provincial parliament – and therefore is prima facie applicable to all people in the physical jurisdiction of Aceh. But on the other hand, the Qanun's adoption of Islamic norms makes its application to people of other

[23] Law 39 of 1999 on Human Rights.

religions legally problematical, perhaps even violating the religious freedoms of defendants and convicts (Butt 2018).

Judicial application

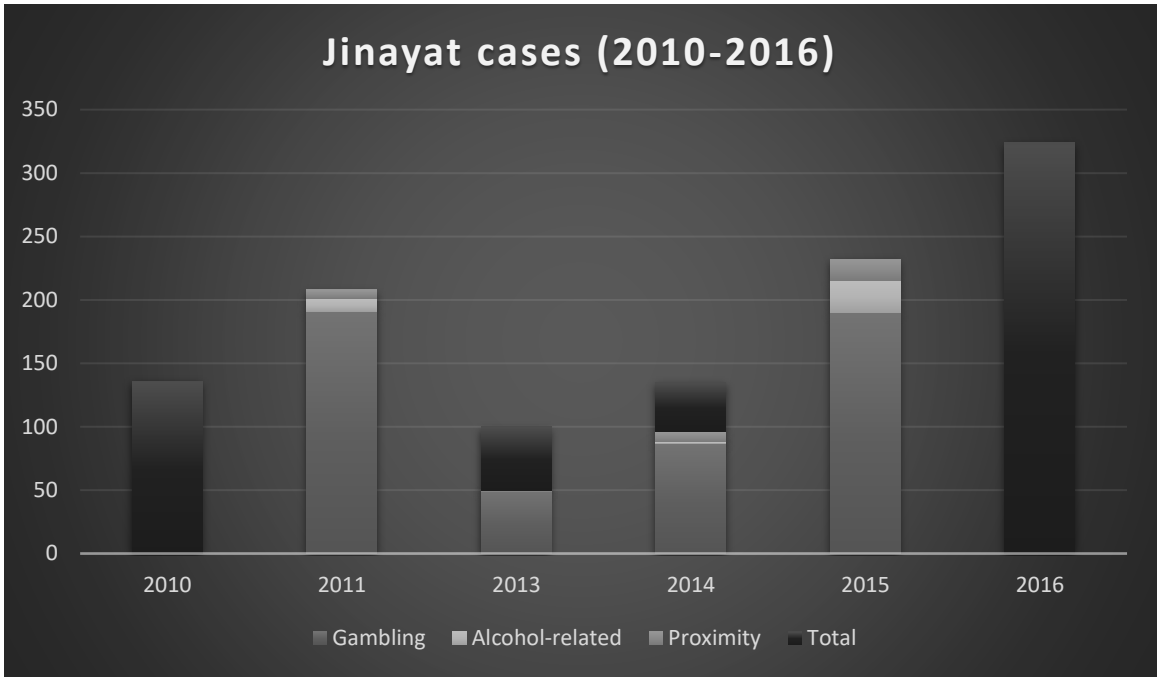
The available information about the number and type of Islamic criminal cases the city, county and provincial Mahakamah Syariah hear in Aech is patchy. Nevertheless, data obtained, primarily from Feener (2014, p.172–5) and Supreme Court annual reports, allow identification of broad trends. In addition to these criminal cases, the Syariah courts in Aceh hear the same cases as the religious courts in other parts of Indonesia. Like those other courts, their caseload is dominated by divorce applications, as well as inheritance, matrimonial property and *waqf* administration matters. By contrast, criminal matters comprise a relatively small part of their caseloads (Feener 2014, p.172).[24] Feener's statistics cover 2005-2008, as indicated in Table 1, and cover decisions brought under the various abovementioned Qanun regulating individual jinayat offences, issued before the 2014 Code was enacted. They appear to indicate that these courts have tended to hear fewer cases over time.



That data from the Supreme Court's annual reports presented below in Table 2, should only be taken as being indicative, for several reasons. First, the reports generally disclose the number of cases each branch of the judiciary handles in any given year, though in some years only the number of cases *received* are given and in others only the cases *decided* are reported. Second, while it was possible to obtain statistics on the number of jinayat cases handled (that is, received *or* decided) by the Aceh courts from 2011-2016, the annual report for 2012 could

[24] Though, as Feener (2014:175) points out, these statistics certainly do not reflect actual incidents of gambling, alcohol-related crime and prohibited proximity, many of which might not get to court, with offenders instead undergoing 'moral instruction' at the offices of *Wilayatul Hisbah*, or being dealt with under local custom.

not be obtained. Third, in some years, the annual reports did not differentiate between first instance and appeal cases, instead giving a combined case disposition figure.



Source: Supreme Court of Indonesia (*Mahkamah Agung*) (2017: 94; 2016: 51, 73; 2015: 93; 2014: 65–6; 2012: 80–1).

Despite these data inadequacies, it seems relatively clear that the number of cases the Syariah courts are hearing is increasing, and that significant resources are being allocated to pursue gambling offences.

Decision-making

Only 17 judgements in jinayat cases were publicly available at time of writing, from the Aceh provincial Mahkamah Syariah webpage.[25] In all of them, the names of the defendants had been redacted. Ten of them are provincial Syariah High Court appeals, two are first instance decisions, and five are Supreme Court cassation decisions. Given the small sample size relative to the number of cases the Syariah courts hear, it is only possible to draw several general conclusions about broad trends, rather than to provide representative and specific observations about judicial decision-making in jinayat cases.

First, the Aceh Syariah High Court appears to generally uphold the decisions of first instance courts. It did so in all available cases, except two. In one of these, the High Court found that the lower court had convicted based on inadequate evidence, and in the other, the Court acquitted the defendant after finding that the evidence pointed to the defendant attempting a crime rather than completing one.[26]

Second, most of the cases related to gambling offences, for which the Court almost always imposed caning as punishment, rather than imprisonment or a fine. This probably reflects the

[25] https://ms-aceh.go.id/layanan-publik/pelayan-informasi-perkara/putusan-jinayat.html.
[26] 01/JN/2008/MSy-Prov; 02/JN/2008/MSy-Prov.

socio-economic background of most defendants, who were found guilty of gambling with very small amounts of money. For example, in one case, the defendants were convicted of gambling and sentenced to six strikes of the cane.[27] The main physical evidence against them was the cards they used for gambling and thirteen Rp 1,000 notes; sixteen Rp 5,000 notes; two Rp 10,000 notes and two Rp 20,000 notes, which were confiscated and transferred into local government coffers. In another case, the total amount confiscated was only Rp 60,000.[28] In this context, the defendants would likely have preferred to avoid a fine and imprisonment, particularly because confinement would prevent them from drawing an income to support their families.

Third, the decisions are short, at least compared with many judgements from the general courts in criminal cases that the author has read. Even though they ran only several pages, many of these judgments provided significant detail about the criminal act that the defendant had allegedly committed. In some of the gambling cases, for example, the Court gave a detailed explanation of the rules of the game the defendants were caught playing. Particularly noteworthy were the cases of prohibited 'proximity' that led to sexual intercourse between couples not married to each other. In many of these cases, the Court included an account of the lead-up to the encounter – including how the defendants met and came to be in proximity with one another in a secluded place – and an explicit description of the sexual act itself, including the timing of the alleged ejaculation.[29] The graphicness of the descriptions of these acts seems at odds with the climate of conservatism in which these acts were allegedly perpetrated and then adjudicated and punished.

Fourth, these decisions did not appear overly concerned to explain the relevance of evidence inventorised in the judgement that, the prosecution argued and the court decided, pointed towards guilt. Many of them also did not refer to any witness statements or testimony, despite the references in the various Qanun to need for the evidence of witnesses to prove particular crimes. The only notable exceptions were first instance cases,[30] but even in these, key evidence and/or a discussion of the probity of that evidence was missing. For example, in a case involving the sale of alcohol,[31] the defendant's residence was raided by the Islamic police (*Wilayatul Hisbah*), the civilian police force, the police and the military. Around 350 bottles of alcohol were discovered and seized. While the decision explained that the beverages had been tested for their alcohol content, the decision did not specify the legal authority for this search and seizure, as one sees as a matter of course in other Indonesian criminal decisions. One is left wondering whether due process was ignored in the police investigation, or whether the search warrant was simply left out of the evidence. Another example comes from the proximity cases. In almost all of them, the undergarments of the defendants were seized and held as evidence, but no mention was made about the relevance of this, and what it 'proved' beyond the fact that the defendants were wearing them.

Of course, one explanation for the apparent lack of concern to fully interrogate the evidence, at least in appeal cases, is that appeals are formally intended only to deal with legal issues,

[27] 02/JN/2010/MS-Aceh.
[28] 04/JN/2011/MS-Aceh.
[29] 01 K/AG/JN/2008: 2; 05 K/AG/JN/2007: 2; 03/JN/2010/MS-ACEH: 3-4; 05/JN/2011/MS-ACEH: 3; 04/JN/2008/MSy-BNA: 2.
[30] See, for example, 04/JN/2006/MSy. Lsm, in which the testimony of several witnesses was set out.
[31] 22/JN/2009/MS.Mbo.

not matters of fact (Subekti 1982). However, Indonesia's other courts routinely ignore this formality and rarely confine themselves to legal issues. They will usually consider the evidence used, and its weight, in appeals. Indeed, the Supreme Court itself is quite notorious for doing this (Pompe 2005).

Finally, in none of the decisions analysed did the court indicate how it arrived at the punishment it handed down. There was, for example, no explanation about how the court determined how many strikes of the cane should be administered to the defendant, and no attempt to standardise or compare punishments across similar cases. For example, while gambling seemed to attract a penalty of 6 or 7 strikes of the cane in many cases,[32] in other cases it was less and in other cases many more, but the court did not explain why.[33]

Supreme Court cases

As mentioned, only five Supreme Court cassation appeals are publicly available. In all of them, the Supreme Court refused to overturn the decisions of the Aceh courts. In all but one case, the Court refused to intervene because it characterised the main issues in dispute as being related to the facts of the case rather than the relevant law. It declared that it could only hear cassation appeals on issues of law.[34]

So, for example, in Decision 01K/AG/JN/2008, the Supreme Court considered an appeal against a proximity conviction by the Aceh provincial Mahkamah Syariah. A couple had claimed that they were married, even though there were not, in an effort to secure access to a room, presumably at a hotel. According to the case file, they had sexual intercourse on two occasions, thereby violating Qanun 14 of 2003.[35] At first instance, they were sentenced to eight and seven strikes of the cane respectively, but on appeal, the first defendant's punishment was reduced to five strikes and the second defendant escaped with a fine. The Supreme Court case file explains neither why the defendants had received different punishments, nor the reasons for the appeal court reducing their sentences.

In the Supreme Court appeal, the defendants' arguments centred on the evidence used to convict them. They argued, first, that one of the witnesses was lying and had engineered the case against the first defendant because of a dispute about a debt; second, that another witness was the husband of one of the defendants, and therefore, was not sufficiently impartial to provide reliable testimony; third, that the arrest and detention was not performed by a member of the police force, but someone who merely claimed to have authority to perform the arrest; and finally, that some of the evidence used against them had been obtained through violence.

The Supreme Court refused to entertain these arguments, stating:

> These reasons cannot be justified, because the *judex facti* did not wrongly apply the law, and, indeed, the evaluation of evidence, which takes the form of evaluating fact, cannot be considered during cassation examinations, because cassation examinations

[32] 04/JN/2011/MS-Aceh; 02/JN/2010/MS-Aceh.
[33] 03/JN/2011/MS-Aceh.
[34] In this case, Decision 02K/AG/JN/2008, the Supreme Court refused to hear the cassation appeal because the defendant did not lodge it within 14 days of the appeal court decision.
[35] Specifically, Articles 5 and 22(1).

only touch upon the implementation or wrong application or violation of applicable law, as referred to in Article 30 of Law 14 of 1985 as amended by Law 5 of 2004.[36]

This decision has little to commend it. As mentioned, in other types of cases, the Supreme Court rarely limits itself to considering only legal issues – such as an erroneous application or misinterpretation of the law by a lower court judge. Also, it is arguable that some of the issues here that related to admissibility of evidence were actually issues of law, not fact. For example, whether husbands or wives of defendants can legally give evidence against their spouses, and the consequences of an illegal arrest or detention on subsequent legal proceedings, appear to be matters about which a lower court could have misapplied the relevant law.

Similar observations can be made about Supreme Court Decision 04K/AG/JN/2008, which was an appeal against a gambling conviction. At first instance, the defendant was sentenced to two strikes of the cane but on appeal, the provincial Mahkamah Syariah acquitted him after finding that the defendant had not committed the alleged crime, but rather had merely made preparations to run an illegal lottery. The prosecution appealed to the Supreme Court, arguing that even though the relevant Qanun did not capture attempted crimes, Article 50 of the Criminal Code, which covers attempted crimes, should be applied in this case.

Again, the Supreme Court refused to intervene, employing a passage virtually identical to that extracted above from 01K/AG/JN/2008 and then adding two further possible grounds for cassation that, for the Court, did not apply in this case: 'whether the way of adjudication was not performed according to statute, and whether the Court has exceeded its jurisdiction, as referred to in Article 253 of the KUHAP'.[37] Again, the Supreme Court may have ignored a significant legal issue raised by this case: whether Article 50 of the national Criminal Code can apply to a case alleging breach of the relevant Qanun. This appears to be a legal issue because it involves the application of the hierarchy of laws, contained in Article 7(1) of Law 12 of 2011 on Lawmaking, and to determine whether there was a 'conflict' between the Qanun and Article 50.

The Court's contestable categorisation of these issues as factual rather than legal could indicate that the Supreme Court is wary of disturbing the decisions of Aceh courts in Mahkamah Syariah cases and, therefore, will avoid doing so if possible. While the small sample size renders this a necessarily speculative conclusion, it seems to be supported by the Supreme Court's use of 'cut and paste' responses in these cases. The passage extracted above from Decision 01K/AG/JN/2008 was reproduced verbatim by the Supreme Court to dismiss an appeal in Decision 05K/AG/JN/2008;[38] and that the equivalent passage in Supreme Court Decision 04K/AG/JN/2008 appears verbatim in Decision 03 K/AG/JN/2008.[39] This gives

[36] 01K/AG/JN/2008: 6.
[37] 04K/AG/JN/2008: 5.
[38] 05K/AG/JN/2008 was an appeal against a conviction for proximity, based on facts that clearly alleged adultery. The defendant was sentenced to nine strikes of the cane, which was upheld on appeal. At the cassation level, the defendant argued that because he was a member of parliament, he should have been called for questioning and interrogated in accordance with parliamentary standing orders, but was not. Therefore, he argued, the investigation and prosecution was flawed and should be declared invalid by the Court.
[39] See page 5 of the Decision. This was an appeal against a first instance decision, confirmed by the Aech provincial Mahakamah Syariah, imposing a fine on a defendant for providing facilities to others for gambling. On cassation, the D argued that he did not know about the gambling, even though it did occur at his residence; and promised, perhaps

the impression that the Court did not give much consideration to the circumstances of each case.

Caning as a punishment

The 2013 Qanun Jinayat Procedual Code[40] establishes caning procedures. Canings are to take place in public and are to be visible to the people in attendance (Article 262(1)). People under the age of 18 years are not permitted to attend canings (Article 262(2)). The caning is to be performed on a three-by-three-meter platform, with a gap of at least 12 metres between the person to be caned and the public (Articles 262(3) and (4)), with a doctor, prosecutor and supervising judge positioned near the platform (Article 262(5)). The caner's face must be covered, and must stand between 700 millimetres and 1 metre from the left or right of the person to be punished (Articles 264(1) and (2)). The caner is not permitted to swing the cane higher than his or her shoulder (Article 264(4)). The person being caned is to wear a shirt provided by the prosecution, and can choose to kneel or stand (Articles 265(1) and (2)). The caning can be stopped on the instructions of the doctor, for medical reasons (Article 266(a)).

According to one estimate, 527 people were flogged during 2015-2017 (Amanda & Rayda 2017). ICJR estimates that at least 339 people were caned in Aceh in 2016, and 118 in January-September 2017, but the number is likely much higher given that ICJR does not monitor canings in all parts of Aceh, and the Mahkamah Syariah, which oversees the punishments, does not publish statistics (ICJR 2017).

Criticisms

Unsurprisingly, the 2014 Qanun Jinayat drew heavy criticism from gender and human rights activists in Indonesia and abroad.[41] Human Rights Watch, for example, pointed out that the UN Committee Against Torture had recognised flogging as torture, which violates the Convention against Torture and the International Convention on Civil and Political Rights, both of which Indonesia has ratified, as well as domestic Indonesian law.[42] (Indeed, in 2008, the Committee had already singled out other laws in Aceh imposing corporal punishment and called for their immediate abolition for violating the Convention.[43]) Amnesty International, Indonesia's National Human Rights Commission, and various Indonesian non-government organisations, voiced similar concerns, particularly about the physical and psychological aspects of canings (Acehkita.com 2009; Amnesty International 2017; Florene 2017; Afif 2014).

Although some have claimed that the primary purpose of caning is to shame perpetrators rather than cause physical injury, some of those caned have suffered such injury. As they point out, some canings have needed to be stopped on medical advice, and then continued once the convict is able (Aziz 2017). In 2017 a 30-year-old woman was hospitalised after receiving 100 lashes for adultery before a crowd in the capital, Banda Aceh (Amanda & Rayda

contradicting this claimed lack of knowledge, not to repeat the offence and or to be involved in criminal activity.

[40] Qanun 7 of 2013 on the Jinayat Procedural Code.

[41] See, for example Kine (2017).

[42] https://www.hrw.org/news/2014/10/02/indonesia-acehs-new-islamic-laws-violate-rights; https://www.hrw.org/news/2016/03/29/human-rights-watch-complaint-rights-lgbt-people-indonesias-aceh-province

[43] UN Committee against Torture (2 July 2008) Concluding observations: Indonesia, CAT/C/IDN/CO/2, para 15, available at: https://www.hri.global/files/2011/11/08/IHRA_CorporalPunishmentReport_Web.pdf.

2017). At least partially because of the negative psychological consequences of public canings, they are now, by virtue of a 2018 Gubernatorial Regulation,[44] more commonly performed in detention rather than in public, though of course, this makes independent monitoring more difficult, if not impossible (ICJR 2017).

Several cases resulting in canings have drawn significant public attention, in Indonesia and internationally, such as where the punishment has been imposed upon non-Muslims. This occurred in a case involving the playing of electric games at a Funland entertainment centre at a mall in Peunayong, Banda Aceh. About a dozen people were arrested after a month-long police investigation, including players, workers, and providers of the premises, primarily for playing, or being involved in the provision of, the 'Seafood Paradise' electronic game, which officials deemed to involve gambling (Setyadi 2017). The media reports about this case contained no convincing explanation about the elements of the game that involved gambling. It was not possible to obtain a copy of the decision in this case at time of writing. According to one description of the game, players purchased coins to play a game in which they attempted to shoot fish. If they were able to reach 600 points playing the game, they received tickets, which they could then exchange for cash (Setyadi 2017). Two of those arrested and tried were Christians, who were found guilty of breaching Article 18(1) of the Qanun Jinayah on gambling. Each was found guilty and was initially sentenced to eight strikes, but this was reduced to six and seven times respectively on appeal because they had already been imprisoned for over one month before the Syariah court decision finding them guilty was handed down (Setyadi 2018). Their punishment was carried out before a crowd of 300 people (Jakarta Post 2018).

Other cases have involved non-Muslims. In one, a 60-year-old Christian woman was whipped for selling alcohol. And, in another, two Chinese Buddhist were caned for running a cockfighting betting scheme (Jakarta Post 2018). Though Aceh officials are often quick to explain that non-Muslims have freely chosen to be caned instead of fined or imprisoned (Setyadi 2017), human rights activists claim that non-Muslim offenders are usually deprived of legal assistance (Jakarta Post 2018). Also controversial has been the caning of homosexuals for having consensual sex. In 2017 two gay men were the first to be punished, with each receiving 85 lashes (Amanda & Rayda 2017).

Supreme Court review

One of the most vocal domestic critics of the Qanun Jinayat has been the Institute for Criminal Justice (ICJR), which advocates for criminal justice reform and human rights protections. It has long been concerned about many aspects of the Qanun, including caning as a punishment. ICJR engages in what it describes as 'strategic litigation' – providing amicus curiae submissions in some matters and even bringing its own cases.[45] In one such case, ICJR sought judicial review of various provisions of the Qanun before the Supreme Court. This had been preceded by the unsuccessful efforts of several NGOs to convince the government to review and revoke the law using its executive review powers.[46] The Ministry of Home Affairs quite rightly responded that it lacked power to do this (Jakarta Post 2018).[47]

[44] Government Regulation 5 of 2018 on the Implementation of Jinayat Procedure.
[45] http://icjr.or.id/category/special-project/strategic-litigation/.
[46] For an explanation of these review powers see Butt and Parsons (2014).
[47] Pointing to Article 235(4) of the 2006 Aceh Autonomy Law, which states that Qanun which implement Islamic law can only be invalidated by the Supreme Court through judicial review.

Applicants' arguments

The ICJR lodged its application with the Court on 22 October 2015 – the very day the Qanun came into force. ICJR compellingly argued that the Qanun clearly contradicted various higher-level laws, or at least was not supported by them. ICJR argued, for example, that the use of caning as a punishment was not supported by the national Criminal Code, which sets out an exhaustive list of punishments, and does not include caning.[48] Similarly, an oath is not recognised as a determinative form of evidence under national criminal law, yet the Qanun permitted alleged rapists to use oaths to avoid prosecution. ICJR also alleged that caning breached constitutional provisions and various domestic human rights laws that seek to protect against torture, inhumane or undignified treatment;[49] national child protection laws;[50] international treaties that Indonesia has signed; and United Nations Human Rights Committee recommendations.[51]

ICJR argued that the Qanun also violated various provisions of the 2011 Law on Lawmaking that required maintenance of the legal order (*ketertiban hukum*). For ICJR, the Qanun compromised the legal order because many of its provisions were not supported by or contradicted higher level laws; because it duplicated offences already prohibited by national law; and because, for some offences, perpetrators could choose whether to be prosecuted under the national criminal law or the Qanun (which imposed different penalties). The Qanun also contained inconsistencies: on the one hand, Article 52(1) states that people who report allegations that they have been raped to police must provide initial evidence of the rape; on the other, Article 52(2) requires police to investigate to find initial evidence of 'every rape it knows about'. It is unclear why Article 52(1) is necessary if, once the allegation is reported to police, they will 'know about' it and must then investigate to find evidence under Article 52(2) in any event. The applicant also claimed that the Qanun contained unclear drafting, thereby violating the Lawmaking Law, which requires clear drafting. As an example, ICJR pointed to the Qanun's definition of *khalwat* as the voluntary act of an unrelated and unmarried man and woman being in a closed space, which 'tended towards the act of zina'. ICJR argued that the meaning of 'tended towards' was unclear and thus susceptible to subjective interpretation.

In response, the respondent, the Aceh governor, complained that the Ministry of Home Affairs should have been joined as a respondent and emphasised that all formal enactment procedures had been followed in respect of the Qanun. He also argued that the 2011 Aceh Autonomy Law gave power to the Aceh provincial parliament to enact the Qanun and claimed that the Law overrode the various national and international laws cited by the applicant, on grounds of *lex specialis derogate lege generalis* – a maximum of statutory interpretation that is well known in Indonesia (Hamzah 1986). In this context, he argued that the Aceh Autonomy

[48] See Article 10 of the KUHP, which specifies only death, incarceration, fines, revocation of particular rights, confiscation of particular property and announcement of the judicial decision.

[49] Namely, Articles 28G(1), 28G(2) and 28I(1) of the Constitution; Articles 5(1) and 33(1) of Law 39 of 1999 on Human Rights; Articles 7 and 10 of Law 12 of 2005, which ratified the ICCPR; Articles 1 and 5 of Law 5 of 1998, which ratified the Anti-Torture Convention.

[50] See Article 71(1) and 71(2) of Law 11 of 2012 on the Children's Criminal Justice System, which limit the punishments that can be applied to children under the age of 18, whereas Article 65 the Qanun allowed for a person aged 12-18 years to receive one-third of the penalty of an adult.

[51] Including Articles 7 and 10 of the ICCPR and the Convention against Torture.

Law was specific and therefore the powers it granted overrode any limitation otherwise placed on it by these other laws.

The decision

The Supreme Court did not consider any of the arguments from the applicant or respondent, deserving of attention though they may have been. The Court simply threw out the case, giving its reason in only two paragraphs. This was that Article 55 of the Constitutional Court Law[52] requires it to stop hearing a review of a lower level law against a statute if the constitutionality of that statute is being reviewed by the Constitutional Court. The Supreme Court observed that the Constitutional Court was examining the constitutionality of the 2011 Lawmaking Law,[53] and, citing Article 55, refused to proceed with the case. It mattered not that the Supreme Court and Constitutional Court cases were otherwise unrelated, brought by different parties for different purposes.

Analysis and implications

On a narrow reading of Article 55, the Supreme Court's decision appears to be correct. After all, the Constitutional Court was reviewing Article 7(1) – one of the very provisions the ICJR asked the Supreme Court to review the Qanun against. If the Constitutional Court invalidated Article 7(1) and the Supreme Court invalidated Qanun provisions for violation of Article 7(1), then much uncertainty and disputation would have undoubtedly resulted. The Constitutional Court has identified avoiding this uncertainty as the main rationale for Article 55, the constitutionality of which was unsuccessfully challenged in a 2012 case.[54]

However, this narrow view was only one of many open to be adopted by the Supreme Court. In particular, it is arguable that, meeting this purpose of avoiding uncertainty requires only that Article 55 be read to prevent the Supreme Court from proceeding with applicants that rest entirely on statutory provisions under review in the Constitutional Court. It makes no sense for the Supreme Court to refuse to proceed when only one statute or statutory provision is subject to constitutional review. In other words, there seems nothing to stop the Supreme Court from refusing to proceed only with the applicant's arguments based on the Lawmaking Law (the only statute in the application subject to simultaneous constitutional review) and continuing to consider the applicant and respondent arguments based on the human rights law, KUAP and Aceh Regional Government Law. After all, these alleged violations stood independently from the Lawmaking Law arguments. This way there could have been no overlap between the Supreme Court and Constitutional Court cases and the Supreme Court could have addressed the serious legal problems with the Perda, including the apparent violation of fundamental rights, and its attempt to override the Criminal Code. There is nothing in the words of Article 55 to preclude this reading. Only if the Constitutional Court is testing the constitutionality of all statutes used as a basis for a simultaneous Supreme Court review should the Supreme Court refuse to proceed.[55]

[52] Law 24 of 2003 on the Constitutional Court.
[53] Constitutional Court Decision 59/PUU-XIII/2015.
[54] Constitutional Court Decision 74/PUU-X/2012.
[55] Incidentally, the Constitutional Court ultimately threw out the challenge for lack of standing, because the applicants established no clear constitutional ground to object to Article 7(1): 59/PUU-XIII/2015: 47-48.

Conclusions

Aceh's Qanun Jinyat, and its predecessors, has proved to be more than just symbolically important. It has been enforced with some enthusiasm, with regular canings being performed in public, at least until recently when they began being performed in detention centres. This application of Islamic criminal law, though specific to Aceh, has occurred as other many parts of Indonesia have experienced a 'conservative turn' (van Bruinessen 2013). It corresponds, too, with the growing influence of conservatism on politics at both national and regional levels, combined with a growing intolerance for liberalism and for religious and other minorities (Butt 2016; Crouch 2014; Menchik 2016). Conservative sentiment appears to have found its way into other Indonesian courts, including the Constitutional Court, which in 2017 only barely rejected a constitutional review application urging it to expand the definition of adultery and prohibited homosexual intercourse in the national Criminal Code to fit generally-recognised Islamic norms (Butt 2018). Another prominent example of the courts upholding Islamist interests was the North Jakarta District Court blasphemy trial of former governor of Jakarta, Basuki Tjahaja Purnama. The prosecution was able to produce almost no evidence to support the charges against him, yet the Court found him guilty and sentenced him to two years' imprisonment, after the Council of Islamic Scholars (*Majelis Ulama Indonesia*) issued a ruling declaring a statement he made to be blasphemous and urging authorities to take legal action against him (Butt 2017b).

Ahok's conviction without convincing evidence suggests that his trial was far more political than legal. The same might be said for many of the Jinayat cases heard in Aceh discussed above, in which convictions were secured without clear evidence. The same might be said, too, for the Supreme Court's decision in the Qanun Jinayat review case. There, the Supreme Court was able to deflect convincing arguments that might have led to the invalidation of the Qanun Jinayat in Aceh, citing technicalities that need not have been applied. It seems clear that the Supreme Court deliberately sought to avoid hearing this case on its merits.

Why have the Aceh courts and the Supreme Court adopted this position? Answering this question necessarily involves speculation, but it is possible that at least some judges share conservative sentiment, or are afraid of a backlash from Islamists if they decide cases in ways that are inconsistent with that sentiment. The Supreme Court's cassation appeals from the Aceh Mahkamah Syariah in Mahkamah Syariah matters appear to betray a court reluctant to 'engage' in genuine legal debate about the application of Islamic criminal law. Instead, it appears to prefer to defer to the decisions of the provincial Aceh court, using legal justifications that sit uncomfortably alongside long standing Supreme Court practices. If this speculation is correct, then Indonesian judges are failing to perform their main constitutional function: impartially interpreting and applying the law. And, by so doing, they are also failing to protect citizens, particularly minority groups.

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