

AUTHORITY CONFLICT OF ACEH'S QANUN REVIEW BETWEEN THE MINISTRY OF HOME AFFAIRS AND THE SUPREME COURT

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Abstract

This study aims to understand the conflict of authority in reviewing Aceh's Qanun between the Ministry of Home Affairs and the Supreme Court. As a special autonomous province, Aceh is the only region given the authority to formally implement sharia law. These status was legitimized by the three national laws, namely the Law of Aceh as Special Region (No. 44/1999), which was strengthened by the Law of Special Autonomy of the Province of Nanggroe Aceh Darussalam (No. 18/2001), and the Law of the Governing of Aceh (LOGA, No. 14/2006). To regulate the Aceh's privileges and sharia's implementation, the Aceh Government is allowed to issue a regional regulation called as a Qanun. LOGA orders the authorities to review and annul the Aceh's Qanun. The Qanuns that are against the public interest and higher laws are examined through an executive review by the Ministry of Home Affairs. Meanwhile, the qanuns that regulate the implementation of sharia are evaluated through a judicial review by the Supreme Court. However, the Central Government regards the Qanun equal to the regional regulations in other provinces. This has led to the neglect of the privilege of Qanun as a special rule in realizing Aceh's privileges, particularly in the implementation of sharia. As such, the central government can delegate all authority to the ministry of Home Affairs in order to review and annul the Aceh's Qanuns, referring to Law no. 5/2015 on Regional Government. As a result, it is found that there are 65 Qanuns that have been recently canceled by the Ministry of Home Affairs through an executive review mechanism.

Keywords: Aceh, qanun, sharia, executive review, and judicial review.

Introduction

Qanun is a substitute for the term provincial regulation specifically for Aceh Province as a form of special autonomy.¹ The mention of qanuns for regional regulation (Perda) in Aceh was legitimized by three national laws, namely the Law of Aceh as Special Region (No. 44/1999), which was strengthened by the Law of Special Autonomy of the Province of Nanggroe Aceh Darussalam (No. 18/2001), and the Law of the Govern-ing of Aceh (LOGA, No. 14/2006).² According to Article 1 LOGA, the Aceh Qanun is a statutory regulation similar to a provincial regional regulation that regulates the administration of governance and the life of the Acehnese people.³ Article 233 LOGA also explains that qanuns are formed in the framework of administering Aceh Government, district/city government, and implementing assistance tasks. In the hierarchy of statutory regulations, Qanun is one of the statutory regulations whose order is under the Law.⁴

Because the qanun is a statutory regulation at the level of a regional regulation,⁵ the central government has the authority to review and annulment it if the qanun contradicts the provisions of higher laws and regulations.⁶ This is regulated in Article 235 paragraph (2) LOGA which states that the government has authority to examining qanuns which are contrary to public interest, interqanuns, and higher laws and regulations. It's just that this provision does not apply to qanuns concerning the implementation of sharia where the authority to revocation or test it is the authority of the Supreme Court.

The authority to examine and annulment Aceh's Qanun is not only exercised by the Supreme Court with a judicial review, but it's also given the authority to the Minister of Home Affairs through an executive review procedure to review the qanun.⁷ The cancellation mechanism can also be called a review mechanism, but it is not carried out by the judiciary or by legislators, but by central government agencies. This is regulated in Law No 23/2014 concerning Regional Government, in relation to Central Government oversight of Regional Government, Article 249 states that the

¹ Eddy Purnama, "Pembatalan Qanun Aceh Melalui Executive Review Dan Judicial Review," *Media Syari'ah* 21, no. 2 (2016): 131–46.

² Moch Nur Ichwan et al., "Islam and Dormant Citizenship: Soft Religious Ethno-Nationalism and Minorities in Aceh, Indonesia," *Islam and Christian-Muslim Relations* 0, no. 0 (2020): 1–26, <https://doi.org/10.1080/09596410.2020.1780407>.

³ Nyak Fadhullullah Helmi, "Positivisation of Islamic Sharia as Local Government Regulations for Minority Citizens as Liyan in Aceh," *Journal of Governance and Social Policy* 1, no. 1 (2020): 17–23, <https://doi.org/10.24815/gaspol.v1i1.17326>.

⁴ Andi Muhammad Asrun et al., "Asking For Aceh Qanun Legality: Compatible With Legislation System," *Kanun, Jurnal Ilmu Hukum* 21, no. 2 (2019): 273–94.

⁵ Arskal Salim, "Dynamic Legal Pluralism in Indonesia : Contested Legal Orders in Contemporary Aceh," *The Journal of Legal Pluralism and Unofficial Law* 9113 (2013), <https://doi.org/10.1080/07329113.2010.10756640>.

⁶ Alfian: Endang Larasati: Kismartini: Triyuningsih, "Implementation of Sharia Institutional Bureaucracy in The Government of Aceh Province," in *Proceedings of the International Conference on Social Science, Political Science and Humanities*, vol. 495, 2021, 381–85.

⁷ Ichwan et al., "Islam and Dormant Citizenship: Soft Religious Ethno-Nationalism and Minorities in Aceh, Indonesia."

Governor is obliged to submit Regional Regulations and Governor Regulations to the Minister within 7 days after being enacted.

In Article 251 states that "Provincial Regulations and Governor Regulations that are contrary to the provisions of higher laws and regulations, public interest, and morality are reviewed by the Minister". Since the holder of the highest power is the president and the minister is the assistant to the President, the President has control over the evaluation conducted by the Minister through his decisions. That it is possible for provincial governments to file administrative objections to the president if the provincial governments object to the cancellation of regional regulations by the Minister. In this case, the cancellation of the regional regulation is only carried out by the executive review; there is no more effort to file an objection to the Supreme Court for conducting a judicial review, if the regional government cannot accept the decision to cancel the provincial regulation by the Minister.

In statutory regulations, the qanun has its own uniqueness because even though the position of the qanun is under the law, there is no unified opinion among experts regarding who actually has the authority to examining it. According to Jimly the review of regional regulations only be carried out by the Supreme Court, as stipulated by Article 24A paragraph (1) of the 1945 Constitution.⁸ In contrast to the previous opinion, Sri Soemantri stated that there are several parties who have the right to test the regional regulation. The right to examining is exercised not only by the Supreme Court, but also by the Government, some by the President and some by the Minister of Home Affairs.

The debate regarding executive review and judicial review as an examining tool for qanun is an interesting theme to study in this era of regional autonomy considering that qanun are legal products issued jointly by the governor and the provincial house of representatives from a province that has special autonomy. Therefore, the Minister of Home Affairs must be more careful in issuing decisions related to qanuns, considering that Law no. 23/2014 concerning Regional Government, there is no longer any attempt to submit a judicial review to the Supreme Court⁹ and the government must be more careful in seeing the specificities and specialties of each region, particularly Aceh Province. A province that holds two statuses at once, special autonomy and the right to implement sharia in daily life.

From the description above, the issues that will be examined in this article are: Does the procedure for testing the Aceh Qanun in terms of judicial review and executive review meet the requirements stipulated in statutory regulations? What is the measure for the revocation of the Aceh Qanun by the Minister of Home Affairs and the Supreme Court?

⁸ Jimly Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview* (Sweet & Maxwell Asia, 2009).

⁹ Asshiddiqie.

Result and Discussion

Examining the Aceh's Qanun through a Judicial Review and Executive Review

The Aceh Qanun is considered problematic if it contradicts higher regulations and conflicts with the public interest. In this situation, the qanun can be annulment in two ways, namely through an executive review (government) and a judicial review (court). Article 235 LOGA authorizes the Government and the Supreme Court to annul the Aceh's Qanun through an executive review and judicial review mechanism in the following three conditions: (1) Contrary to public interest; (2) Contradictory to other qanuns; and (3) Contrary to higher laws and regulations.

Qanun can be examining by the Supreme Court in accordance with statutory regulations. The qanun which regulates the implementation of sharia can only be revocation through a judicial review by the Supreme Court. Referring to Article 235 LOGA, it can be concluded that there are two forms of testing of the Aceh's qanun, namely:

1. Examination conducted by the government (executive review) which in this case is carried out by the Ministry of Home Affairs against qanuns deemed contrary to public interest and higher laws and regulations;
2. Judicial review is a trial conducted by the Supreme Court on qanuns that regulate the implementation of sharia.

Because qanuns have the same status as regional regulations in other provinces which are included in the category of regulations whose hierarchies are under the law, an interpretation may arise that the central government should not be given the authority by law to assess and revoke qanuns.¹⁰ As regulated by Law No. 25/2015 on local government. However, the authority to review the regional regulation is the Supreme Court as stipulated in Article 24A paragraph (1) of the 1945 Constitution. The same opinion is emphasized by experts such as Asshiddiqie and Ni'matul Huda who argue that testing of regional regulations can only be carried out by The Supreme Court as determined by Article 24 A paragraph (1) of the 1945 Constitution.¹¹

Based on the explanation above, it is the Supreme Court that has the right to revoke the Aceh's Qanun, considering that Aceh is also the only province given special privileges to implement sharia. However, to date not a single Aceh's Qanun has ever been subjected to a judicial review by the Supreme Court.¹² Instead, it was the Ministry of Home Affairs that annulment the Aceh's Qanun through an executive review mechanism.

However, in its implementation, the review of Aceh's Qanun still refers to Law No. 5/2015 concerning Regional Government. Thus, the Central Government

¹⁰ Faisal A Rani, "Islam and National Law: A Formal Legal Review on Sharia Laws in Aceh," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 20, no. 1 (2020): 47–57, <https://doi.org/10.30631/al-risalah.v20i1.521>.

¹¹ Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview*.

¹² Rani, "Islam and National Law: A Formal Legal Review on Sharia Laws in Aceh."

imposes Qanun on the same status as other provincial regulations.¹³ Without considering Aceh as a special autonomous region with the privilege of implementing sharia.

In Law No. 5/2015 on Regional Government, it is explained that the cancellation of the provincial regulation and governor regulation is stipulated by a Decree of the Minister of Home Affairs. No later than seven days after the decision to annulment by the minister, the governor must invalidate the implementation of the regional regulation. Furthermore, the Regional of House Representatives and governors are obliged to revoke the provincial regulation. In the event that the provincial government cannot accept the decision to cancel the provincial regulation on grounds that can be justified by statutory regulations. The Governor may submit objections to the President no later than fourteen days after the decision to annulment the regional or governor regulation is received.¹⁴

Furthermore, the procedure for review and revoke regional regulations is regulated in the Minister of Home Affairs Regulation No. 80/2015 on the Formation of Regional Legal Products as a further implementation of Law No 5/2015 on Regional Government. Furthermore, Article 91 of the Minister of Home Affairs Regulation No. 80/2015 explained that the Minister of Home Affairs evaluates the draft provincial regulation and the governor evaluates the draft district/municipality regulations according to the following two points:

1. Laws and regulations relating to local government
2. other laws which are higher than the provincial regulation.

The Measures for Annulment of Qanun by the Ministry of Home Affairs and the Supreme Court

In assessing a regional regulation is problematic or not. Both the Government, in this case the authority rests with the Ministry of Home Affairs, and the Supreme Court using two measures, namely (1) not to contradict higher laws and regulations, and (2) not to conflict with the public interest. The two measures are derived from two legal principles adhered to the Indonesian legal system. First, the principle of law which states *lex superiori derogate lex inferiori* (a higher level rule abrogates a lower one). Second, the legal principle which states that *salus populi suprema lex esto* (let the welfare of the people be the supreme law).¹⁵

In examining the Aceh's Qanun, apart from paying attention to the two things above, the law also instructs to pay attention to the autonomy, specificity and privileges of Aceh as a region that applies sharia.¹⁶ Thus, in conducting the

¹³ Dani Muhtada, "Politics, Local Governments, and Sharia By-Laws in Indonesia: Revisiting A Common Assumption," *Mazhab: Jurnal Pemikiran Hukum Islam* 17, no. February (2020), <https://doi.org/10.21093/mj.v17i2.1347>.

¹⁴ Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space For Law?," *Southeast Asia Program Publications at Cornell University* 97, no. 97 (2016): 55–85.

¹⁵ Bernhard May, "The Law on the Governing of Aceh: The Way Forward or a Source of Conflicts?," *Conciliation Resources*, no. 20 (2008).

¹⁶ R. Michael Feener, *Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia*, ed. Anver M. Emon, I (Oxford, United Kingdom: Oxford University Press, 2013).

examination and annulment of the Aceh Qanun, three legal principles must be considered: first, *lex superiori derogate lex inferiori*; second, *salus populi suprema lex esto*; and third, *Lex specialis derogat legi generali* (special law repeals general laws). When these three principals were applied simultaneously in testing the Aceh's Qanun, there were often unequal interpretations by policy makers. Particularly between the *lex superiori derogate lex inferiori* principle that enforces Law No. 5/2015 on Regional Government as a rule that is higher than the Aceh's Qanun, with *lex specialis derogat legi generali* which mandates the Aceh's Qanun as a special law can override higher general laws such as Law no. 5/2015 on Regional Government.

The complexity of the problems in examining and annulment the Aceh's Qanun certainly requires an assessment from a legal institution such as the Supreme Court.¹⁷ The authority of the Supreme Court is also explained in Article 235 paragraph (3) and paragraph (4) LOGA which states that “Qanuns can be tested by the Supreme Court in accordance with statutory regulations. Qanun as referred to in paragraph (3) which regulates the implementation of sharia can only be canceled through a judicial review by the Supreme Court”.

Although legally and in theory the Supreme Court has the authority to examining and annulment the Aceh's Qanun. In practice, however, all regional regulations, including the Aceh's Qanun, were examining and revoke by the Ministry of Home Affairs. Since LOGA was issued in 2006 until recent day there are 65 Aceh Qanuns that have been canceled by the Ministry of Home Affairs through an executive review mechanism.¹⁸

The 65 qanuns that were canceled consisted of six provincial qanuns and 59 qanuns belonging to district/municipality. For Aceh, the most qanuns that were canceled were the Retribution Qanuns, the Regional Tax Qanuns, and the Regional Asset Management Qanuns. Meanwhile, at the district/municipality level, most of the cancellation of qanuns came from the Aceh Besar District. From data obtained from the Ministry of Home Affairs, the 65 canceled qanuns can be seen in the table below:

No	Region Levels	Qanun Concerning
1	Aceh Province	1. Qanun No. 6/2008 on Population Administration 2. Qanun No. 1/2011 on Irrigation 3. Qanun No. 6/2012 on Plantation 4. Qanun No. 14/2013 on Regional Property Management 5. Qanun No. 15/2013 on Mineral and Coal Mining Management 6. Qanun No. 1/2014 on Public Service Retribution
2	Banda Aceh Municipality	1. Qanun No. 10/2011 on Entertainment Tax 2. Qanun No. 2/2014 on Retribution for

¹⁷ Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview*.

¹⁸ Sonia Ivana Barus, “Dilemma Executive Control: Development of Regional Regulatory Canceling Models,” *Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 7, no. 2 (2020): 113–26.

		Telecommunication Tower Control
3	Sabang Municipality	<ol style="list-style-type: none"> 1. Qanun No. 12/2010 on Retribution for Reimbursement of Printing Family Cards, Identity Cards and Civil Registry Deeds 2. Qanun No. 13/2010 on Disturbance Permit Retribution 3. Qanun No. 13/2011 on Disturbance Permit Retribution 4. Qanun No. 4/2012 on Local Tax 5. Qanun No. 2/2013 on Retribution for Telecommunication Tower Control
4	Aceh Besar District	<ol style="list-style-type: none"> 1. Qanun No. 11/2010 on Retribution for Telecommunication Tower Control 2. Qanun No. 5/2011 on Hotel, Restaurant, Entertainment and Advertising Taxes 3. Qanun No. 9/2011 on Disturbance Permit Retribution 4. Qanun No. 10/2011 on Retribution for Building Permits 5. Qanun No. 11/2011 on Retribution for Reimbursement of Printing Family Cards, Identity Cards and Civil Registry Deeds 6. Qanun No. 12/2011 on Slaughterhouse Retribution 7. Qanun No. 22/2012 on Retribution for Fishery Business Permits
5	Aceh Pidie District	<ol style="list-style-type: none"> 1. Qanun No. 6/2011 on Regional Property Management 2. Qanun No. 11/2011 on Entertainment Tax 3. Qanun No. 20/2011 on Retribution for Reimbursement of Printing Family Cards, Identity Cards and Civil Registry Deeds 4. Qanun No. 25/2011 on Retribution for Telecommunication Tower Control 5. Qanun No. 30/2011 on Slaughterhouse Retribution 6. Qanun No. 32/2011 on Disturbance Permit Retribution
6	Pidie Jaya District	<ol style="list-style-type: none"> 1. Qanun No. 2/2013 on Certain Permits Retribution 2. Qanun No. 3/2014 on Public Service Retribution
7	Bireuen District	<ol style="list-style-type: none"> 1. Qanun No. 11/2011 on Retribution for Telecommunication Tower Control 2. Qanun No. 14/2011 on Disturbance Permit Retribution
8	Aceh Jaya District	<ol style="list-style-type: none"> 1. Qanun No. 4/2013 on Retribution for Telecommunication Tower Control
9	West Aceh District	<ol style="list-style-type: none"> 1. Qanun No. 7/2011 on Public Service Retribution 2. Qanun No. 10/2013 on Retribution for

		Telecommunication Tower Control 3. Qanun No. 4/2014 on Certain Permits Retribution
10	Southwest Aceh District	1. Qanun No. 7/2009 on Entertainment Tax 2. Qanun No. 14/2013 on Certain Permits Retribution
11	North Aceh District	1. Qanun No. 15/2012 on Disturbance Permit Retribution 2. Qanun No. 16/2012 on Retribution for Fishery Business Permits
12	East Aceh District	1. Qanun No. 9/2011 on Public Service Retribution 2. Qanun No. 10/2011 on Local Taxes 3. Qanun No. 15/2012 on Disturbance Permit Retribution
13	Langsa Municipality	1. Qanun No. 10/2010 on Retribution for Telecommunication Tower Control
14	Central Aceh District	1. Qanun No. 4/2009 on Retribution of Services Construction Service Licenses 2. Qanun No. 3/2010 on Local Tax
15	Gayo Lues District	1. Qanun No. 4/2011 on Local Tax 2. Qanun No. 5/2011 on Retribution of Certain Licenses
16	Nagan Raya District	1. Qanun No. 5/2009 on Management of Regional Owned goods
18	Aceh Tamiang District	1. Qanun No. 9/2008 on Retribution of Replacement Costs for Printing Signs, Family Card and Civil Registration Assets 2. Qanun No. 14/2010 on Management of Regional Owned goods 3. Qanun No. 7/2011 on Entertainment Tax 4. Qanun No. 10/2011 on Nuisance Permit
19	Subulussalam Municipality	1. Qanun No. 13/2010 on Nuisance Permit
20	Simeuleu District	1. Qanun No. 7/2009 on Management of Regional Owned Goods 2. Qanun No. 12/2012 on Nuisance Permit 3. Qanun No. 22/2012 on Fishery Business License
21	Nagan Raya District	1. Qanun No. 5/2009 on Management of Regional Owned Goods

Conclusion

According to the prevailing regulations, the Aceh Qanun can be canceled by two mechanisms, the executive and judicial review. The executive review is performed by the Ministry of Home Affairs taking into account the Qanuns contradicting higher regulation as well as those conflicting with the public interest. Meanwhile, the judicial review is conducted by the Supreme Court to examine the Aceh Qanuns relating to the implementation of Sharia.

Nevertheless, the Central Government does not consider the Aceh Qanun as a special rule subjected to the legal principle of *Lex specialis derogat legi generalis*. In addition, the central government also proposes the legal principle of *lex superiori derogate lex inferiori* in dealing with the Aceh Qanun. This reality has led the Aceh Qanun is considered as the same regional regulations as those from other provinces. It is also explained that the government used an executive review mechanism in testing and cancelling the Qanuns. Thus, the Government always refers to Law no. 5/2015 on Regional Government as a basis for examining and revoking the Aceh Qanun.

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