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Dawn of Justice: Evaluating the Alignment of Women and Children in Aceh's *Qanun Jinayat*

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Abstract

Aceh Qanun No. 6 of 2014 concerning the Jinayat Law can potentially eliminate justice for women and children. Through a literature study using a descriptive-analytical method, this article aims to interpret the substance of the *Qanun Jinayat*. The results show that the *Qanun Jinayat* has not taken sides with women and children. The first evidence, the preliminary evidence requirement for rape victims in the *Qanun Jinayat*, provides an opportunity to harm women. Victims may be unable to show evidence due to their psychological pressure. The second piece of evidence, the existence of legal dualism, between Article 81 and Article 82 of the Child Protection Law and Article 47 of the *Qanun Jinayat*, provides opportunities for violence to children. *Qanun Jinayat* provides lighter sentences to perpetrators. This article finds that the *Qanun Jinayat* was formulated and ratified with minimal involvement of many parties and absorption of community aspirations. The article recommends that the formulation of the *Qanun Jinayat* should be revised with consideration of the public benefit by involving modernist academics with a comprehensive religious education background.

Keywords: *qanun jinayat*; justice; women; children; discrimination

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Qanun Aceh No. 6 Tahun 2014 tentang Hukum Jinayat berpotensi menghilangkan keadilan bagi perempuan dan anak. Melalui studi pustaka dengan metode deskriptif analitis, artikel ini bertujuan untuk menginterpretasi substansi *Qanun Jinayat*. Hasil penelitian menunjukkan bahwa *Qanun Jinayat* belum berpihak pada perempuan dan anak-anak. Bukti pertama, persyaratan pembuktian pendahuluan bagi korban perkosaan yang ada di dalam *Qanun Jinayat*, memberikan peluang untuk menyakiti perempuan. Korban bisa tidak dapat menunjukkan bukti akibat tekanan psikologis yang dihadapi. Bukti kedua, adanya dualisme hukum, antara Pasal 81 dan Pasal 82 UU Perlindungan Anak dengan Pasal 47 *Qanun Jinayat*, memberikan peluang kekerasan kepada anak. *Qanun Jinayat* memberikan hukuman yang lebih ringan kepada pelaku. Artikel ini menemukan bahwa *Qanun Jinayat* dirumuskan dan disahkan dengan minim keterlibatan banyak pihak dan penyerapan aspirasi masyarakat. Artikel merekomendasikan bahwa rumusan *Qanun Jinayat* harus direvisi dengan pertimbangan kemaslahatan umum dengan melibatkan kaum akademisi modernis yang memiliki latar belakang pendidikan agama yang komprehensif.

Kata Kunci: *qanun jinayat*; keadilan; perempuan; anak; diskriminasi

Introduction

Qanun Number 6 of 2014 concerning Jinayat Law is a substitute for several previous qanuns which regulate *jināyāt* (criminal). Some of these qanuns, namely Qanun No. 12 of 2003 concerning *Khamar* (liquor), Qanun No. 13 of 2003 concerning *Maisir* (gambling), and Qanun No. 14 of 2003 concerning *Khalwat* (obscene; immoral), and several other types of *jarīmah* (prohibition), such as *ikhtilāṭ* (free association between men and women), adultery, sexual harassment, rape, *qadhf* (accusing other people of committing adultery without any evidence and witness), *liwāṭ* (homosexual), and *musāḥaqah* (lesbian). The ratification of the Qanun reaped pros and cons from various groups.

Studies on *Qanun Jinayat* have been carried out by many researchers as follows. Ridwan Nurdin examines the unique pattern of sanctions in the *Qanun Jinayat*.[1] Endri examines the legality of the *Qanun Jinayat*.[2] Danial examines aspects of human rights protection in the *Qanun Jinayat* by combining human rights from Islamic and Western perspectives.[3] Webby Aditya examines the effectiveness of the implementation of *Qanun Jinayat*. Aditya assessed that immoral acts in Sabang City are increasing even though the government already has a clear legal basis for ensnaring perpetrators of bullying.[4] 'Abdullāh compared the evidence of adultery between *Qanun Jinayat* and al-Shāfi'ī.

Meanwhile, regarding *Qanun Jinayat*'s relation to juvenile crimes, Munandar stated that cases involving children require complete legal instruments so that crimes do not hinder the development of children. Children must get protection.[5]

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[1] Ridwan Nurdin, 'Kedudukan Qanun Jinayat Aceh dalam Sistem Hukum Pidana Nasional Indonesia', *Miqot: Jurnal Ilmu-Ilmu Keislaman* 42, no. 2 (2018): 356–78, http://doi.org/10.30821/miqot.v42i2.542.

[2] Endri Ismail, 'Analisis Yuridis terhadap Legalitas Qanun Aceh No. 6/2014 tentang Hukum Jinayat', *Kanun Jurnal Ilmu Hukum* 20, no. 1 (2018): 123–48, https://doi.org/10.24815/KANUN.V20I1.9625.

[3] Danial Danial, 'Qanun Jinayah Aceh dan Perlindungan HAM (Kajian Yuridis-Filosofis)', *Al-Manahij: Jurnal Kajian Hukum Islam* 6, no. 1 (2012): 85–98, https://doi.org/10.24090/MNH.V6I1.590.

[4] Webby Aditya, 'The Effectiveness of Qanun Aceh No. 6/2014 of Jinayat Law in Order to Prevent Jinayah Khalwat in Law Territory of Sabang Municipality', *Nagari Law Review* 1, no. 2 (2018): 191–98, https://doi.org/10.25077/nalrev.v.1.i.2.p.191-198.2018.

[5] Munandar Munandar, 'Kedudukan Anak sebagai Jinayah dalam Qanun Aceh Nomor 6 Tahun 2014 tentang Hukum Jinayah', *Syiah Kuala Law Journal* 1, no. 1 (2017): 209–28, https://jurnal.unsyiah.ac.id/SKLJ/article/view/12288.

Fadlia and Ramadani analyze the differences between private space and public space as referred to in *Qanun Jinayat*. They stated that the *Qanun Jinayat* does not recognize private places. That is, every place can be considered a public place.[6]

In contrast to this research, this article focuses on a critical study of the *Qanun Jinayat*, which has the potential to abolish justice for two vulnerable groups, namely women and children. The enactment of the *Qanun Jinayat* has the potential to harm women and children. Potential losses for women can be seen in the article on the obligation to show evidence for rape victims. Meanwhile, the potential for violence against children lies in the legal duality between the crime of sexual abuse of children contained in the *Qanun Jinayat* and the Child Protection Law.

This research is normative legal research using a normative approach to the science of legislation (statutory approach). The statutory approach is carried out by reviewing the relevant laws and regulations. Data was sourced from the literature study. Meanwhile, data analysis was conducted qualitatively and presented descriptively.

Background and Weaknesses of *Qanun Jinayat*

A peace agreement between the Government of Indonesia and the Free Aceh Movement (Gerakan Aceh Merdeka [GAM]) was implemented in 2005. This agreement is known as the Helsinki MoU. The law followed its realization on Governing Aceh (UUPA) in 2006.[7] Peace was carried out as a solution to the economic and political problems faced in Aceh. The primary orientation of the Helsinki MoU was that former GAM members wanted autonomy in administration, communication, economy, customs and culture, as well as several other aspects. UUPA requires the application of Islamic law, which includes faith, law, and morality. It includes regulating worship, *al-aḥwāl al-shakhsiyah* (family law), *mu'āmalah* (civil law), *jināyah* (criminal law), *qaḍā'* (judiciary), *tarbiyah* (education), *da'wah*, and defence of Islam. Ratification of several regulations has been realized, one of which is *Qanun Jinayat* in 2014.

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[6] Faradilla Fadlia and Ismar Ramadani, 'The Definition of Private and Public Space in Implementation of Qanun Jinayah in Aceh', *Addin: Media Dialektika Ilmu Islam* 13, no. 1 (2019): 141–60, https://doi.org/10.21043/addin.v13i1.3324.

[7] Nellis Mardhiah, Rahma Hidayati, and Mursyidin Mursyidin, 'Internalisasi Kebijakan Pemerintah Aceh Berdasarkan Undang–Undang Nomor 11 Tahun 2006 tentang Pemerintah Aceh', *Jurnal Public Policy* 4, no. 2 (2018): 180–86, https://doi.org/10.35308/JPP.V4I2.1049.

The next consideration of *Qanun Jinayat* is Aceh's special autonomy status, which upholds justice, expediency, and legal certainty. However, after the *Qanun Jinayat* was enacted, several researchers found the potential for discrimination against vulnerable groups, particularly women and children. Justice for women is questioned, especially regarding the process of proving rape.[8] Legal certainty is also a problem when acts of sexual abuse against children contain legal dualism between the *Qanun Jinayat* and the Criminal Code (KUHP) and Law 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (Child Protection Law).

The *Qanun Jinayat* was established as part of the Islamic law implemented in Aceh. While in other areas, there are people who also apply Islamic law. Indonesia, as a democratic country, has never banned the practice of any religion.[9] However, the terms "implementation of Islamic law" with "formalization of Islamic law" create confusion in understanding the two. So, when someone criticizes the formalization of Islamic law, he will be accused of being anti-Islamic.[10] People often need help finding differences between the contents of the Qanun regarding the formalization of Islamic law and the Islamic law they understand. Moreover, the production of Qanuns is dominated by modern Islamic groups (modernists) consisting of academics and activists of modern Islamic organizations. This group is certainly different from most people who have a traditional religious understanding.[11]

The legal basis for the formation of the *Qanun Jinayat* is the 1945 Constitution, Law Number 24 of 1956, Law Number 44 of 1999, and the Law

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[8] Meri Andani, 'Providing Preliminary Evidence in the Proofing Process of Rape Cases: Study of Article 52 of Aceh Qanun No.6/2014 Regarding Jinayat Law [Kewajiban Menyertakan Bukti Pemula oleh Korban dalam Proses Pembuktian Kasus Pemerkosaan: Studi Pasal 52 Qanun Aceh No. 6/2014 tentang Hukum Jinayat', *Legitimasi: Jurnal Hukum Pidana dan Politik Hukum* 9, no. 1 (2020): 46–66, https://doi.org/10.22373/legitimasi.V9I1.7326.

[9] M Aqil Irham, 'Pengamanan Pilar Bangsa dan Masa Depan Negara Kesatuan Republik Indonesia', *Kalam* 6, no. 1 (1 July 2012): 125–50, http://ejournal.radenintan.ac.id/index.php/kalam/article/view/398.

[10] Miswari, 'Etnonasionalisme, Islamisme dan Bahaya Formalisasi Syariat Islam', in *Islam, Formalisasi Syariat Islam dan Post Islamisme di Aceh*, ed. Miswari (Banda Aceh: Bandar Publishing, 2019), 145.

[11] Ismail Fahmi Arrauf Nasution, Miswari Miswari, and Sabaruddin Sabaruddin, 'Preserving Identity through Modernity: Dayah Al-Aziziyah and Its Negotiations with Modernity in Aceh', *Hayula: Indonesian Journal of Multidisciplinary Islamic Studies* 3, no. 2 (2019): 211–32, https://doi.org/10.21009/hayula.003.2.06.

on the Government of Aceh of 2006. The UUPA regulates the formulation of the Aceh Government, which has special authority in governance, religion and civilization. GAM, which played a significant role in the existence of the UUPA, focused more on the autonomy of government administration.[12] For this reason, the issue of Wali Nanggroe and the management of regional assets is their primary concern. However, the agenda has yet to receive the wider community's attention. People are more enthusiastic about religious agendas.[13] It is because they do not distinguish between "Islamic sharia" and "formalization of Islamic sharia".

This misunderstanding also occurs in the public's understanding of the details of the Qanun. These problems impact differences in public perceptions of the substance of the *Qanun Jinayat*. This difference is commonplace because the religion understood by the dominant community in Aceh, namely indigenous peoples, originates from religious teachings by traditional clerics.[14] Meanwhile, from its formulation to ratification, the Qanun was dominated by modernist thinking. Modernist groups generally consist of members who have not studied religion since childhood, so they experience weaknesses in religion and also *mu'āmalah*.[15]

Qanun Jinayat Principle

There are six principles for establishing *Qanun Jinayat*: Islamic law, justice and balance, profit, protection of human rights, and learning for society. However, Islamic principles have a universal meaning.[16] While the law must have certainty, thus, it can be said that the application of the *Qanun Jinayat* cannot indeed comply with the Qur'an and ḥadīth. It is not by the legal

[12] Reni Kumalasari, 'Relasi Agama dan Politik di Aceh Pasca Konflik; Pemerintah Indonesia-Gerakan Aceh Merdeka', *Jurnal Adabiya* 23, no. 1 (2021): 1–18, https://doi.org/10.22373/adabiya.V23I1.7592.

[13] Adelina Nasution, 'Narsisme Ulama: Dilema dan Posibilitas Rekonstruksi Ushul Fiqh di Indonesia', *Al-Ahkam* 28, no. 2 (2019): 219–44, https://doi.org/10.21580/ahkam.2018.18.2.2308.

[14] Ismail Fahmi Arrauf Nasution and Miswari Miswari, 'Al-'Ulamā' Warathat al-Anbiyā': Modernity and Nurture of Authority in Aceh Society', *Jurnal Theologia* 30, no. 2 (2019): 197–216, https://doi.org/10.21580/teo.2019.30.2.3845.

[15] Yudi Latif, *Genealogi Inteligensia* (Jakarta: Kencana Prenada Media Group, 2013), 185.

[16] Mushthafa Mushthafa, 'Perbandingan Perkembangan Hukum Islam pada Masa Klasik dan Masa Modern', *Ijtihad* 32, no. 1 (2019), https://doi.org/10.15548/IJT.V32I1.34.

formulations written by fiqh scholars, such as the al-Shāfi'iyah school of law which is the dominant school of thought adhered to by the people of Aceh.[17]

Many parties need clarification on the implementation of the *Qanun Jinayat* in Aceh. It is because Indonesia is not a religious state but a state based on Pancasila and the 1945 Constitution. In the history of the formation of Indonesia, debates about the basis of the state have occurred. Islamists want Islam as the principle of the state. Meanwhile, the nationalist group wants the principle of the state to be a genuine understanding and accommodate every multicultural interest of the Indonesian people.[18]

During the Old Order, Islamic political groups offered Islam as the principle of the state. They tried to re-accommodate the "seven words" in the Jakarta Charter, namely "With the obligation to carry out Islamic law for its adherents". However, in the end, the attempt failed.[19] Despite these efforts, religious aspirations were continuously fought for in various regions, for example, by the DI/TII rebellion led by Kartosuwiryo in West Java. In Aceh, Daud Beureueh undermined DI/TII, which led to reconciliation. Kahar Muzakkar, the leader of DI/TII, was executed in South Sulawesi. This incident shows that religious aspirations in Indonesia are still alive. In Aceh, in 1959, the Government of Indonesia and the people of Aceh reached a common ground by making Aceh a particular area in religion, culture, and education. Several particular institutions were established to accommodate these privileges, such as the Ulama Consultative Council (MPU). The Government of Indonesia's attention to education in Aceh has also increased.

The universality and diversity of interpretations are why many parties believe Islam cannot be used as the basis of the state and its law cannot be used as the basis for positive law. Islam is seen as the principle of values forming

[17] Muhammad Zukhdi, 'Dinamika Perbedaan Madzhab dalam Islam (Studi terhadap Pengamalan Madzhab di Aceh)', *Jurnal Ilmiah Islam Futura* 17, no. 1 (2017): 121–49, https://doi.org/10.22373/JIIF.V17I1.1024.

[18] Gili Argenti, 'Ideologisasi Partai Islam Masyumi di Indonesia', *JPI: Jurnal Politikom Indonesiana* 5, no. 1 (2020): 37–57, https://doi.org/10.35706/JPI.V5I1.3731.

[19] Syamsuddin Haris, *Masalah-Masalah Demokrasi dan Kebangsaan Era Reformasi* (Jakarta: Buku Obor, 2014), 162.

beliefs and morals.[20] Its relative nature means that Islam cannot be an objective rule, like a legislator. Those who reject Islam as a legal system believe that if certain religions are used as a legal basis, there will be discrimination against identities outside of Islam. This discrimination is contrary to the Pancasila precepts, which uphold multiculturalism.

The principle of legality is also a discourse of the researchers. Endri questioned how *Qanun Jinayat* became a Regional Regulation, while Islamic criminal law (*Jināyāt*) has not been regulated in statutory regulations at the national level. The analysis results found that *Qanun Jinayat* had been promulgated by following the rules for formulating laws that did not violate procedures. Its position is also different from other regulations. It is because Aceh already has special autonomy.[21]

The next concern from the legal reviewers is the possibility of rejection of specific laws against the Aceh Qanun with general national laws. This potential arises when legal dualism occurs, in this case between the Child Protection Law and the *Qanun Jinayat*, which has the potential to discriminate against children. Another negative potential is discrimination against women. More specifically, it related to the evidence of rape cases in the *Qanun Jinayat*. This regulation is considered contrary to Law Number 39 concerning Human Rights.

The principle of justice and balance also received much criticism. Women activists say that the *Qanun Jinayat* discriminates against women. *Qanun Jinayat* stipulates that when a woman experiences cases of abuse or rape, she must be able to present four witnesses. If not, the victim will be charged with the qadhf article. In addition, if the perpetrator swears five times in the name of God that he did not do what he is accused of, he will be acquitted. This rule is considered strange. After all, how can a person be acquitted by simply taking an oath? Someone who has committed a crime is a person who does not fear God. So logically, perjury in the name of God, of course, would not be difficult for him. He would also think that perjuring himself was much easier than being whipped a hundred times.

[20] Samsudin Aziz, 'Kanunisasi Fikih Jinayat Kontemporer; Studi Materi Muatan Qānūn Jināyat Aceh dan Brunei Darussalam', *Al-Ahkam* 24, no. 2 (2014): 194, https://doi.org/10.21580/ahkam.2014.24.2.145.

[21] Ismail, 'Analisis Yuridis terhadap Legalitas Qanun Aceh No. 6/2014 tentang Hukum Jinayat'.

The principle of benefit is contained in the *Qanun Jinayat*. Especially in cases where the Criminal Code does not provide a solution. For example, the rules regarding *ikhtilāṭ*, adultery, *qadhf*, *liwāṭ*, and *musāḥaqah*. However, certain parties consider that the *Qanun Jinayat* hinders the entry of investors into Aceh. The Qanun makes potential investors regard Aceh as an Islamic country, thus making it difficult for economic development opportunities. As a result, many job opportunities and economic growth are hampered. For supporters of the Qanun, investment is no more important than the establishment of the Qanun. However, various economic problems, such as poverty, unemployment, crime, and domestic violence, cannot be solved only through Qanun. Instead, these cases can be suppressed through investment.[22] The main problem facing the people of Aceh is not the application of Islamic law but the economic problem. So, to realize the UUPA, their focus is on the sovereignty of asset management. According to the group, the people of Aceh are already Muslim, and there are no problems with the application of Islamic law.

The human rights principles contained in the *Qanun Jinayat* have also received criticism from human rights activists. They considered that the Qanun had violated human rights. It is partly because of the different perspectives on understanding human rights. Danial said that human rights from the Western perspective differ from human rights in Islam. Human rights in the western perspective are only oriented to worldly affairs, so their accountability is only to humans. Meanwhile, from an Islamic perspective, human rights are oriented to two dimensions simultaneously, namely the world and the hereafter. Therefore, his accountability is not only to humans but also to God.[23] Therefore, this difference is the reason the human rights in the *Qanun Jinayat* are considered to be contrary to universal human rights.

The principle of providing a deterrent effect, one of the focuses of the *Qanun Jinayat*, has yet to be able to reduce the crime rate. Aditya gave an example that the implementation of the *Qanun Jinayat* could not reduce the practice of immorality. On the other hand, they were flogging as *'uqūbah*

[22] Nany Salwa, Nurhasanah Nurhasanah, and Cut Atria Siska, 'Analisa Data Kemiskinan di Provinsi Aceh Menggunakan Model Efek Tetap', *Statistika: Forum Teori dan Aplikasi Statistika* 16, no. 1 (13 May 2016): 1–8, https://doi.org/10.29313/JSTAT.V16I1.2276.

[23] Danial, 'Qanun Jinayah Aceh dan Perlindungan HAM (Kajian Yuridis-Filosofis)'.

(punishment) is seen as entertainment rather than punishment.[24] Some scholars consider that caning has become a public entertainment medium.

The Weakness Dimensions of *Qanun Jinayat*

The substance of *Qanun Jinayat* has an editorial which could be clearer to interpret. For example, the meaning of khalwat, which applies to men and women who gather in quiet places, creates problems. According to this definition, the reason is that men and women who ride motorbikes on the road cannot be said to have been in seclusion. The highway cannot be called a deserted place.[25] This problem made it difficult for Wilayatul Hisabah in Langsa. They could not ensnare a young couple making out on a motorcycle at a crossroads on New Year's Eve. The road is called Love Trail because it is a favourite place for young couples to have fun while riding motorbikes.

As for the legal and political aspects, the ratification of the *Qanun Jinayat* was considered hasty and did not take into account many aspects. The four main reasons are that it is against human rights, discriminates against women, has the potential to create ambiguity in the implementation of the law, and hinders investors. However, the opposition was ignored. In the end, it was proven that investment took much work to come to Aceh. In addition, other criticisms related to the clarity of the legal basis for Wilayatul Hisbah only focused on the punishment of caning. Some have suggested that violations of the *Qanun Jinayat* be dealt with at the village level. The reason is that this method is considered more educational than systematic through current precedents.

The investment crisis, the dismissal of officials who violated the Qanun, and several other issues, have placed the Aceh Government in a dilemma after the enactment of the *Qanun Jinayat*.[26] The reason is that the Qanun comes from the aspirations of the modernist group, which is approved by the community

[24] Aditya, 'The Effectiveness of Qanun Aceh No. 6/2014 of Jinayat Law in Order to Prevent Jinayah Khalwat in Law Territory of Sabang Municipality'.

[25] Sufrizal and M. Anzaikhan, 'Pernikahan Sedarah dalam Perspektif Hukum Pidana Islam', *Legalite : Jurnal Perundang Undangan dan Hukum Pidana Islam* 5, no. 2 (2020): 130–49, https://doi.org/10.32505/legalite.v5i2.2782.

[26] Reza Idria, 'Tales of the Unexpected: Contesting Syari'ah Law in Aceh, Indonesia' (Harvard University, 2020), 286, https://dash.harvard.edu/handle/1/37366008.

only because of the similarity of expression, namely Islamic law. Meanwhile, the government has many more pressing responsibilities, namely ensuring the welfare of the people, especially economic stability, public facilities services, and security guarantees.

The crisis shows that *Qanun Jinayat* has been perceived differently by various groups. The local government expects the ratification of *Qanun Jinayat* to win the community's sympathy so that it can provide support for the local government to improve welfare. For example, the local government creates and facilitates spaces that can be used as a place to travel because there can be economic transactions for the community's welfare. However, with these recreational facilities, the community even pressured the government to be able to guard public places so that they would not become immoral areas. The pressure again puts the government in a difficult position. If the community's guard is too tight, it will hinder entertainment and tourism activities so that economic activity stops.

Ambiguity in the enforcement of violations is also still occurring. A misconduct case sometimes needs clarification because of whether the Satpol-PP of Wilayatul Hisbah or the police should handle it. Coordination between both institutions could have been more optimal. So, it becomes a target of the public's assumption because of the lack of law enforcement.[27] Members of Wilayatul Hisbah themselves still need to be a model for implementing Islamic law. It is not uncommon for members of Wilayatul Hisbah themselves to be perpetrators of sharia violations. The operationalization of Wilayatul Hisbah is also very limited due to budget constraints. Additionally, there are Wilayatul Hisbah people who have a personal relationship with the manager of the place, who has the opportunity to become *ikhtilāṭ* place. The person was the first information that would inform about the patrol.

Another problem is the need for more control of society over *Qanun Jinayat*. In this regard, the community's involvement since the formulation of the Qanun could be more substantial. In addition to the abandonment of many criticisms when the *Qanun Jinayat* draft has yet to be passed, the involvement of traditional groups that are representatives of the wider community is

[27] Muh Fauzi, 'Problematika Yuridis Legislasi Syariat Islam di Provinsi Nangroe Aceh Darussalam', *Al-Ahkam* 22, no. 1 (2012): 1–26, https://doi.org/10.21580/ahkam.2012.22.1.1.

minimal. Thus, *Qanun Jinayat* is the result of the decisions of the political elite, modernist Islamic governments, and academics. The authorities' disregard for various criticisms also showed a lack of attention to the community's efforts to participate.[28]

The absence of criminal law provisions originating from Islamic law, the absence of a successful government when making Islam a legal principle, and the lack of resources related to Islamic criminal law are also severe challenges in the implementation of the *Qanun Jinayat*. *Qanun Jinayat* was initiated and supported by people who needed help understanding religion comprehensively. This Qanun, along with many others, is dominated by modernists who do not have a deep history of religious studies. Generally, they only study religion in college with a semester system, in contrast to religious learning in Islamic boarding schools, which is carried out early, systematically, starting from the lowest book to the highest, and guided by scholars whose scientific traditions are evident.[29] Unfortunately, these groups are not involved in the formulation of the Qanun. In addition to qualified religious capacity, traditionalists dominate Acehnese society.

The domination of the modernists in formulating the Qanun caused traditional society to be confused in understanding its contents. Acceptance of the Qanun is based more on the similarity of the label, namely "Islamic Sharia". Women activists also complained about the contents of *Qanun Jinayat*. According to them, the *Qanun Jinayat* is discriminatory against women. Legal experts also found that the *Qanun Jinayat* resulted in legal dualism in the criminal act of sexual abuse of children.

Evidence Instrument and Discrimination Potential for Women

The *Qanun Jinayat* Civil Society Network for Advocacy, a combination of several non-governmental organizations, is a community coalition focusing on the study of *Qanun Jinayat*. They argue that the Qanun has the potential to

[28] Edi Yuhermansyah and Meri Andani, 'Tanggapan Masyarakat Kecamatan Pulau Banyak terhadap Pemberlakuan Qanun Nomor 6 Tahun 2014 tentang Hukum Jinayat', *Legitimasi: Jurnal Hukum Pidana dan Politik Hukum* 7, no. 1 (2018): 43, https://doi.org/10.22373/legitimasi.v7i1.3964.

[29] Tgk. Zarkasy, 'Paradigma Baru Pendidikan Dayah', in *Wacana Pemikiran Santri Dayah Aceh*, ed. Khairizzaman and Abidin Nurdin (Banda Aceh: Wacana Press, 2006), 162–63.

increase violence against women. The rape article states that a person who claims to have been raped must swear an oath as evidence that he was raped.[30]

Qanun Jinayat Article 52 states:

(1) Anyone who admits they were raped can submit a complaint to the investigator, including preliminary evidence, about the person who raped them.

(2) Whenever it is known that there has been a rape, the investigator is obliged to conduct an investigation to find initial evidence.

This process will be complicated for the victim. Victims usually experience post-rape trauma, difficulties presenting evidence, and the psychological pressure they face, making them victim unable to swear. If the victim cannot submit evidence as intended, the victim himself can be charged with *qadhf* and get *'uqūbah ḥudūd* in the form of being whipped eighty times.

A *Qanun Jinayat* Article 54 states:

(1) If the accused does not want to swear an oath, even though he has signed the minutes referred to in Article 52, he is deemed to have committed *jarīmah qadhf*.

(2) As referred to in Paragraph (1), the defendant is threatened with *'uqūbah ḥudūd*, namely being whipped 80 (eighty) times.

If the victim is deemed unable to provide evidence or the perpetrator is willing to swear five times that he has not done what is alleged, the perpetrator, apart from being released from legal bondage, can also report the victim on defamation charges. Instruments of slander are more accessible to show than evidence of rape accusations. Women victims of rape will find it challenging to show initial evidence because of their psychological pressure. Thus the *Qanun Jinayat* does not seem to provide a mechanism for victim protection. It even opens opportunities to place the victim as a party constantly being harmed.[31]

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[30] Yusi Amdani, 'Ruler of Interests, Political Interests, or Law Enforcement: Case Study of Amnesty Plan for Din Minimi Group in East Aceh', *Al-Ahkam* 28, no. 2 (31 October 2018): 245–62, https://doi.org/10.21580/ahkam.2018.18.2.2420.

[31] Faradilla Fadlia and Ismar Ramadani, 'The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia', *Journal of Southeast Asian Human Rights* 2, no. 2 (2018): 448–70, https://doi.org/10.19184/JSEAHR.v2i2.8358.

Women as victims of rape in the legal system, as in the *Qanun Jinayat*, are significantly disadvantaged. Especially when the victim is a woman with special needs, they will have difficulty presenting evidence. In addition, if the perpetrator also swears that the allegations of rape against him are untrue, he will be acquitted of the charges. It shows how easy it is for rape to be committed in areas with a legal system that is very likely to harm certain parties, such as women, who are the main targets of rape.

The *Qanun Jinayat*, which in its implementation has the opportunity to marginalize women, is the main focus of women activists. Suraiya Kamaruzzaman gave an example, violence against women and children continues to increase. It is because the mechanism of proof makes it easier for perpetrators to harm victims, primarily actions that have the opportunity to make women victims.

A rape victim who does not want to swear an oath even though she has signed the document given will be subject to the Qadhf article, which threatens to be whipped eighty times. The threat was indeed only given when the victim had signed the document. However, the oath requirement is also a legal system whose dimensions of alignment with victims must be evaluated, especially women victims. Many parties consider that the drafting of the *Qanun Jinayat* did not involve many parties, including women activists. It can be seen from its content, such as the demand for evidence and the oath mechanism, which is a system that does not favour women. The formulation of the law must pay attention to the dimensions of the victim.

The perspective of victims, including vulnerable groups such as women and children, is critical. Their confessions can determine the articles that ensnare them, whether forced or not. The phrase "forced or not", which is a description of the victim, must be seen from the victim's perspective. Even solving the problem of rape and sexual abuse of children often ends in a family settlement. They cannot make the law a lesson even though the *Qanun Jinayat* confirms this.

Article 2 of *Qanun Jinayat* states:

> Implementation of Jinayat Law is based on: a. Islam; b. legality; c. fairness and balance; d. profit, e., protection of human rights; and f. learning for the community (*tadabbur*).

The meaning of lessons for the community is that the contents of the Qanun, both the formulation of the Jarimah and the type, form and number of uqūbat, are easy to understand. Thus, it contains elements of education so that people obey the law, know what is prohibited and believe it to be an evil act that must be avoided. By knowing *'uqūbah*, they will suffer if they commit violations and understand that there is balanced protection for victims, perpetrators and society.

Including the dimension of partiality for vulnerable groups, apart from women and children, also towards minority groups. Minority groups are also another part of the *Qanun Jinayat* which turned out to be the attention of activists.[32] In Takengon, *'uqūbah* flogging is administered to a sixty-year-old non-Muslim woman.

Punishment for older women is proof that discrimination is not only experienced by women and children. Non-Muslim women aged 60 years in Takengon are not only included in the vulnerable gender group, namely women but also included in the elderly vulnerable group. The older woman was publicly whipped thirty times for selling alcoholic beverages. This action is legally flawed because according to *Qanun Jinayat* rules, non-Muslims can be punished by *Qanun Jinayat* if they are involved in criminal acts involving people in Aceh. In fact, the woman was buying and selling alcoholic beverages without involving Muslims.

The execution of whips against non-Muslim women is considered to disturb the religious harmony that should be upheld within the territory of the multicultural unitary state of the Republic of Indonesia.[33] Moreover, the execution case in Takengon was carried out contrary to *Qanun Jinayat*. *Qanun Jinayat* should not ensnare non-Muslims who commit offences without involving Muslims. Due to the emergence of many issues after the ratification of *Qanun Jinayat*, the Civil Society for Advocacy demanded the Central Government, in particular the President, the Ministry of Home Affairs, and the

[32] Miswari, 'Mu'dilat al-Aqlīyah al-Masīhīyah Fīhudud Balad al-Sharī'ah al-Islāmīyah', *Studia Islamika* 25, no. 2 (2018): 351–403, https://doi.org/10.15408/sdi.v25i2.6978.

[33] I. F. A. Nasution et al., 'Covid-19 In Islamic Theology and Its Impact on Socio-Religious Affairs In Indonesia', *European Journal of Science and Theology* 18, no. 1 (2022): 51–65, https://pesquisa.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-1615294.

Supreme Court to review the Qanun. The organization also called on the public to keep an eye on discriminatory policies, such as *Qanun Jinayat*.

The case experienced by the non-Muslim woman shows the concerns of the National Alliance of Bhinneka Tunggal Ika, who are worried about the rights of convicted canings regarding access to legal aid.[34] If only there had been sufficient legal assistance, the case of legal defects experienced by non-Muslim sellers of alcoholic beverages in Takengon would not have occurred. The alliance also said that *Qanun Jinayat* was passed in a hurry, the discussions needed to be completed, and with adequate trials. That is why in its implementation, the Qanun drew much criticism and produced many problems in its application.

Legal Dualism of Child Protection

There was a legal dualism after the ratification of *Qanun Jinayat*. In the Qanun, rules are made on criminal acts against perpetrators of sexual crimes against children in Article 47. Meanwhile, the regulation was previously contained in Article 81 and Article 82 of Law Number 35 in 2014 concerning Amendments to Law Number 23 in 2002 concerning Child Protection. In this case, some prosecutors propose the case with the State Court through the Child Protection Law. Some prosecutors propose to the Sharia Court through *Qanun Jinayat*.

Article 81 of the Child Protection Law confirms that sexual violence against children will get criminal law for at least fifteen years and three years and pay a maximum fine of three hundred million rupiahs and a minimum acceptable sixty million rupiahs. Any person who intentionally commits violence or threats of violence, forcing a child to have intercourse with him or with other people, shall be punished with a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp. 300,000. 000 (three hundred million rupiahs) and at least Rp. 60,000,000.00 (sixty million rupiahs).

[34] Happy Saputra, Mahdalena Nasrun, and Muhammad Anzaikhan, 'Revitalizing Local Wisdom in Committing Radicalism in Aceh', *Innovatio: Journal for Religious Innovations Studies* 21, no. 2 (2021): 112–21, https://doi.org/10.30631/innovatio.v21i2.140.

While in *Qanun Jinayat*, in Article 47, sexual violence against children is whipped at most ninety times, or dented at most nine hundred grams of gold, or imprisonment for a maximum of ninety months. This part shows how the dualism of criminal sanctions against cases of child sexual abuse occurred in Aceh after the enactment of *Qanun Jinayat*. Any person who knowingly commits a sexual abuse act as referred to in Article 46 against a child shall be threatened with *'uqūbah ta'zīr* whipping at most 90 (ninety) times or paying a fine more than 900 (nine hundred) grams of pure gold or imprisonment for a maximum of 90 (ninety) months.

Criminal sanctions are a result of someone's actions given so that guarantees against society can continue.[35] Then, the criminal procedure must be clear and sure to provide justice to the perpetrator and victim. However, a dualism of criminal sanctions can create a sense of injustice for both the perpetrator and the victim. Therefore, legal dualism is a critical issue that needs to be resolved to achieve the aims and objectives of law enforcement.

The dualism of criminal sanctions is also a very urgent case to be overcome, namely child sexual abuse. Abuse is an insult that gives the victim the effects of shame, anger, and hatred. Moreover, in this case, the victim is a child. The child himself is a party that the state and society must protect. Child sexual abuse is particularly noteworthy as the safety crisis for children is intensifying. Even though children are the most critical asset in the nation, abusing them is very likely to damage their future.[36] This case is detrimental to the victim and his family, even the future of a nation and state. For this reason, a fair crime for perpetrators of child abuse is a severe punishment and can have a deterrent effect on the perpetrator. The legal dualism in criminal acts and such cases provides many problems.

From the results of the study of legal dualism, if there is a criminal case of sexual abuse of children, the prosecutor determines the level of violence experienced by the victim. Suppose it is classified as a severe category, for example, up to copulation or having a blood relationship. In that case, the perpetrator is entangled in Articles 81 and 82 of the Child Protection Law.

[35] Tri Andrisman, *Asas-Asas dan Aturan Umum Hukum Pidana Indonesia* (Bandar Lampung: Universitas Lampung, 2009), 9.

[36] Ismantoro Dwi Yuwono, *Penerapan Hukum dalam Kasus Kekerasan Seksual terhadap Anak* (Yogyakarta: MedPress, 2018).

When considered a mild category, for example, making out and groping, it is ensnared by Article 47 of *Qanun Jinayat*.[37] However, this kind of enforcement by the victim's family is considered unfair. If their child has received an act of sexual abuse, regardless of the form of the act, if it is entangled with Article 47 of *Qanun Jinayat*, the victim will feel aggrieved. The offender will only receive the *'uqūbah ta'zīr* whip a maximum of ninety times. Then the perpetrators scattered and wandered through society. While the victim will experience lifelong trauma,[38] the child's future was damaged. Moreover, if the perpetrator is a rich man, he can easily replace the threat of caning with a gold fine.

Likewise, the perpetrator may be entangled with Articles 81 and 82 of the Child Protection Law since he feels that his actions can be entangled with Article 47 *Qanun Jinayat*. So that the legal dualism that occurs makes the perpetrators and victims feel injustice in the implementation of the law. Some parties suspect law enforcement and want to incriminate the perpetrators. Then they will use Article 81 and Article 82 of the Child Protection Law. If law enforcement wants to ease sanctions for victims, they will refer to article 47 of *Qanun Jinayat*. The absence of a final provision regarding the limits on the extent of violence raises public suspicion towards law enforcement and gives the impression that there has been legal uncertainty. This dualism is also an opportunity for law enforcement officials who lack the integrity to commit fraud.

The selection of criminal acts of child sexual abuse cases in the legal dualism in Aceh depends mainly on the transfer of cases carried out by investigators. Of course, if the investigator uses Article 81 and Article 82 of the Child Protection Law against the perpetrator, the prosecutor will choose the settlement path through the District Court. On the other hand, if the investigator chooses to use Article 47 of the *Qanun Jinayat* Law against the perpetrator, the prosecutor will choose the path of settlement through the Sharia Court. As previously stated, the basis for the transfer of the case by the

[37] Liza Agnesta Krisna and Rini Fitriani, 'Dualisme Kewenangan Mengadili Perkara Anak sebagai Pelaku Kejahatan Pelecehan Seksual di Kota Langsa-Aceh', *Jurnal Yuridis* 5, no. 2 (2019): 262, https://doi.org/10.35586/.v5i2.771; Andi Rachmad, Yusi Amdani, and Zaki Ulya, 'Kontradiksi Pengaturan Hukuman Pelaku Pelecehan Seksual terhadap Anak di Aceh', *Jurnal Hukum dan Peradilan* 10, no. 2 (31 July 2021): 315–36, https://doi.org/10.25216/JHP.10.2.2021.315-336.

[38] Belli Jenawi, 'Kajian Hukum terhadap Kendala dalam Perlindungan Hukum oleh Aparat Penegak Hukum terhadap Anak Korban Pelecehan Seksual', *Lex Crimen* 6, no. 8 (2017): 102–8, https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/17935.

investigator must be precise when it depends on the level of the weight and light category groups. The classification must also have a clear guideline basis. The transfer of cases is also determined based on the conscience of the legal practitioner who handles the case. The goal is to provide justice to the victim. However, the legal ineptitude that occurs due to this dualism has the opportunity to reduce public confidence in law enforcement in Aceh.

According to the explanation of legal practitioners involved in this kind of case, the lower category is the act of the perpetrator who kisses and touches. Meanwhile, in the high category is having sex. Thus, the act which falls into the lower category will be ensnared by Article 47 of *Qanun Jinayat*. Nevertheless, unfortunately, many victims refused to be entangled with the article because the act of sexual abuse included in the light category can be entangled with Article 82 of the Child Protection Law.

A person who intentionally commits violence or threats of violence, coerces, commits deception, a series of lies, or induces a child to commit or allow an obscene act to be committed, shall be punished with a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and pay a maximum fine of Rp. 300,000. 000, 00 (three hundred million rupiahs) and at least Rp. 60.000, 000, 00 (sixty million rupiahs).

In the article above, the perpetrator can be sentenced to a maximum of fifteen years in prison, a minimum of three years in prison, and pay a maximum fine of three hundred million rupiahs, or at least thirty million rupiahs. Compare that to Article 47 of *Qanun Jinayat*, whose *ta'zīr* is lowered. This dualism, of course, opens up a massive opportunity for the public to doubt the law's implementation in Aceh, especially regarding criminal acts against cases of sexual abuse of children. Moreover, in Aceh, the principle of *lex specialis derogate legi lex generali* is often violated, so that, in the case of this legal dualism, perpetrators of child sexual abuse who are categorized as lower will be entangled with Article 47 of *Qanun Jinayat*. The existence of *Qanun Jinayat* even harms this community.

Conclusion

The loss of justice for children in Qanun Jinayat is due to legal dualism in enforcing cases of sexual abuse of children. The emergence of Qanun Jinayat after the existence of the Child Protection Law made the enforcement of the

case seem subjective. Especially if the perpetrators are charged with the Qanun Jinayat, the punishment is very light compared to the Child Protection Law. Injustice also befalls women. The case in Takengon shows that the lack of assistance and law enforcement seems subjective. This paper recommends that Qanun Jinayat be revised to ensure justice for vulnerable groups.[a]

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