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Critical Review Selecting a Proper Law to Resolve Sexual Violence Against Children in Indonesia

Nurini Aprilianda
Faculty of Law and a Researcher in Persada-LPPM Universitas Brawijaya
Mufatikhatul Farikhah
Faculty of Law and a Researcher in Persada-LPPM Universitas Brawijaya
Liza Agnesta Krisna
Faculty of Law Universitas Samudra, Aceh
Email: nurini.aprilianda@ub.ac.id

Abstract: This article was written based on the results of research aimed at finding the right choice in resolving cases of sexual violence against children in Aceh, namely between the Child Protection Law or the *Qanun Jinayat*. This research is empirical legal research with a case study approach. The data collection technique used used was interviews with key informants and document studies, namely court decisions. This study found differences in the application of different laws to the same case. Even though children as victims of sexual violence not only have an impact on physical trauma, they also experience psychological trauma which can cause mental disorders. Data for the last 3 (three) years shows that until now law enforcers have not been consistent in applying the law to the settlement of these cases. Our finding is that there are differences of opinion between law enforcers, because the two arrangements are specific criminal law in nature. Therefore, the principle of systematic lex specialis is very important as a basis for law enforcement in determining the right choice of law for the settlement of these cases.
Keywords: Choice of law, sexual violence, child protection, qanun Jinayat

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Abstrak: *Tulisan ini dibuat berdasarkan hasil penelitian yang bertujuan menemukan pilihan yang tepat dalam penyelesaian perkara kekerasan seksual terhadap anak di Aceh, yaitu antara Undang-Undang Perlindungan Anak atau Qanun Jinayat. Kajian ini adalah penelitian hukum empiris dengan pendekatan studi kasus. Teknik pengumpulan data yang digunakan adalah wawancara terhadap informan kunci dan studi dokumen yakni putusan pengadilan. Penelitian ini menemukan perbedaan penerapan hukum yang berbeda-beda terhadap kasus yang sama. Padahal anak sebagai korban kekerasan seksual tidak hanya berdampak pada trauma fisik namun, juga mengalami trauma psikis yang dapat menimbulkan gangguan jiwa. Data 3 (tiga) tahun terakhir menunjukkan bahwa sampai saat ini penegak hukum belum konsisten dalam penerapan hukum terhadap penyelesaian perkara tersebut. Temuan kami terdapat perbedaan pandangan antara penegak hukum, disebabkan kedua pengaturan tersebut bersifat hukum pidana khusus. Oleh karena itu, Asas lex specialis sistematis menjadi sangat penting sebagai landasan penegak hukum dalam menentukan pilihan hukum yang tepat terhadap penyelesaian perkara tersebut.*
Kata Kunci: *Pilihan Hukum, Kekerasan Seksual, perlindungan anak, qanun jinayat*

Introduction

Children's rights must be protected to allow them to optimally live their life, grow, and participate in their society based on their dignity and humanity free from violence and discrimination.[1] Child protection and the fulfillment of their rights are stipulated in the 1945 Indonesian Constitution and in several provisions of both national and international legislation. The protection is guaranteed under ratification of international convention on the rights of the child, where this was ratified based on Presidential Decree Number 36 of 1990 concerning Ratification of Convention on the Rights of the Child.[2]

[1] See Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. Khoiruddin Nasution and Syamruddin Nasution, "Implementation of Indonesian Islamic Family Law to Guarantee Children's Rights," *al-Jami'ah: Journal of Islamic Studies* 59, No. 2 (2021). Laurensius Arliman S and Muhammad Afif, "Protection of Children's Rights of The Islamic and Constitutional Law Perspective of The Republic of Indonesia," *Internasional Conference on Humanity, Law and Sharia (ICHLaSh)*, November 14-15. 2018.

[2] Ayu Amalia Kesuma, "Efektivitas Undang-Undang Perlindungan Anak Dalam Hubungan Dengan Perlindungan Hukum Terhadap Anak Korban Perdagangan Orang di Indonesia", *Journal Lex et Societatis* 3, no. 1 (2015), p. 64. Rohmawati and Ahmad Rofiq,

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Children as the successor to the progress of the nation, it must be maintained and protected. Child protection can be divided into 2 parts, namely: 1) juridical child protection, which includes protection in the field of public law and in the field of civil law; 2) non-juridical protection of children includes protection in the social sector, health sector, education sector.[3]

Several regulations governing the child protection indicates concern from government for its people as an asset of the state and attention addressed to the children vulnerable to being the victims of criminal offenses. The scope of the children suffering as victims is restricted to 18 years of age, where their suffering may involve physical and mental hurdles, and/or economic loss caused.[4]

Juridically, children are defined by formulating age restrictions on children for certain actions, certain interests and certain goals. The Convention on the Rights of the Child expressly means that: "for the purpose of the convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier".[5]

Fundamental Rights and Freedoms of Children is that the human rights and freedoms of the child have been recognized internationally through the Convention on the Rights of the Child (United Nations Convention on the Rights of the Child) the formulation of the text was approved unanimously by the UN General Assembly on November 20, 1989 and enforced as the law of internalism is on September 2, 1990. United Nations Convention on the Rights of the Child (*Konvensi Hak Anak*/KHA) is an instrument that contains universal principles and the law, the social elements, in the future, it will not be and cultural rights. There are 4 general principles of KHA, namely: (1) Principles of Non-discrimination; (2) The principle of best interest for the child (best interest of the child); (3) The principles of the right to life, survival and development (the rights to life, survival and development); (4) The principle of respect for the views of the child. [6]

"Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on The Protection of Biological Children's Civil Rights," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, No. 1 (2021).

[3] Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak di Indonesia*, Bandung: Refika Aditama, 2010, p. 34.

[4] Nurini Aprilianda, "Perlindungan Anak Korban Kekerasan Seksual Melalui Pendekatan Keadilan Restoratif," *Jurnal Arena Hukum* 10, no. 2 (2017), p. 321.

[5] Unted Nations Children Fund, *Convention On The Rights*, Resolusi PBB Number 44/25, 20 November 1989.

[6] Unted Nations Children Fund, *Convention OnThe Rights*, Resolusi PBB Number 44/25, 20 November 1989.

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In line with the statement above, Indonesia formulates the same definition of children in Article 1 Number 1 of Law Number 23 of 2002 concerning Child Protection, that: "Child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb". However, because each field of science and the community environment has its own provisions according to their respective interests, so far in Indonesia the definition of children has different regulatory limits in some.

Incidence of sexual violence rises every year and it takes children as victims with their natural trait as weak and vulnerable individuals, easily lured to offenders' bait. The figure of the cases of sexual violence against children is only the tip of the iceberg since most cases remain unreported.

Studies on the reasoning of judges in cases involving children have been carried out by scholars in Indonesia. For example. Ramadhan and Muslimin examine the judge's consideration of child custody, judges who use textual considerations tend to decide that child custody is the mother's right. Meanwhile, the judge who used contextual considerations decided that child custody is the father's right.[7]

Kasim et. al., explained that the syar'iyah court had protected children based on the decisions of judges in Banda Aceh, Birueun and Lhoksumawe. Child protection played by the judge is in the form of granting guardianship rights to brothers who meet the requirements, granting guardianship to mothers who have been abandoned by their fathers and a father is also obliged to provide maintenance for the child.[8]

Fauzi explained that the post-divorce parenting (*ḥaḍānah*) is mostly carried out by mothers, apart from fathers and third parties such as grandparents. If a divorce caused by a spouse's quarrel usually has a negative impact on the pattern of *ḥaḍānah*, if the divorce occurs due to disagreement in life principles or certain principles it will have a positive impact.[9]

However, Rizkal and Mansari stressed that regarding the use of qanun jinayat in dealing with the issue of compensation for children as victims of sexual violence, it had not run optimally. This is caused by factors of low legal

[7]Suci Ramadhan and JM. Muslim, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivims and Progressive Legal Thought," *Juris (Jurnal Ilmu Syariah* 21, No. 1 (2022).

[8]Fajri M. Kasim, et.al., "The Sociology of Law Perspective on Child Protection at The Syar'iyah Court in Aceh," *Gender Equality*: *International Journal of Child and Gender Studies* 7, No. 1 (2021).

[9]Fauzi, "Ṣuwar al-ḥaḍānah ba'da al-ṭalāq fī Aceh al-Wusṭá," *Studia Islamika* 24, No. 1 (2017).

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awareness, law enforcers who are not thorough, there is a stigma that demeans women and the perpetrators' financial limitations.[10]

Then Analiansyah and Abubakar concluded that since the implementation of the qanun jinayat in Aceh, the handling of cases against children has been carried out based on the rule of law in accordance with the principle of lex specialis derogate legi generalis. However, some of the obstacles that occurred were the weakness of human resources and infrastructure in the Syar'iyah Court and the Government of Aceh.[11]

This study is important to explain the choice of law made by judges at the Syar'iyah court in relation to sexual violence against children. This is because there is a polarization between *qanun jinayat* and child protection laws. Because violence against children from year to year has increased in Indonesia, including in Aceh.

Similarly, related cases in Aceh also see some increases. In a closer look, sexual violence including sexual abuse, rape, and sodomy that take young victims had reached 240 cases (2016-2017). Of the 23 regencies/cities in Aceh, North Aceh accounted for the biggest number accounting for 123 cases, followed by the city of Banda Aceh for 94 cases, Aceh Besar for 81 cases, Bireuen for 69 cases, Pidie for 57 cases, Bener Meriah for 52 cases, Central Aceh for 45 cases, and East Aceh for 35 cases, while the cases in other regencies/cities were found below 30 cases.[12] Apparently, authorities implement different law from that applied in other provinces, since another law called *Qanun* Aceh Number 6 of 2014 concerning Law of Jinayat is also in place.

Qanun Number 6 of 2014 concerning Law of *Jinayat* (hereinafter *Qanun Jinayat*) was validated on 22 October 2014,[13] where this law is constructed by 10 sections and 75 articles. Ten criminal offenses punishable by the law are listed as follows:

a. *Jarimah Khamar*;
b. *Jarimah Maisir*;
c. *Jarimah Khalwat*;

[10]Rizkal and Mansari, "Pemenuhan Ganti Kerugian Anak sebagai Korban Pemerkosaan dalam Kasus Jinayat Aceh," *Gender Equality*: *International Journal of Child and Gender Studies* 5, No. 2 (2019).

[11] Analiansyah and Ali Abubakar, "Children Handling Procedure in Islamic Offense in Aceh," *Ahkam: Jurnal Ilmu Syariah* 21, No. 1 (2021).

[12] https://kumparan.com/@kumparannews/kekerasan-perempuan-dan-anak-di-aceh-2017-capai-1-791-kasus

[13]Zulkarnain Lubis and H. Bakti Ritonga, *Dasar-Dasar Hukum Acara Jinayah*, Jakarta: Prenamedia Group, 2016, p. 1.

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d. *Jarimah Ikhtilat*;
e. *Jarimah Zina*;
f. *Jarimah* of Sexual Abuse;
g. *Jarimah* of Rape
h. *Jarimah Qadzaf*;
i. *Jarimah Liwath*, and;
j. *Jarimah Musahaqah*

The word *Jinayah* is a noun (*masdar*) derived from *jana*. Etymologically, *jana* means being sinful or guilty, while *jinayah* is defined as a sin or wrongdoing. The word *jinayah* in legal term is commonly called as *delict* or criminal offense. The word *jinayah* carries meaning as revealed by Imam al-Mawardi: "*Jarimah* is a conduct outlawed by *syara'* and are punishable by *hadd* or *ta'zir*."[14]

Of these ten criminal offenses, sexual abuse and rape against children are regulated in a similar way to that in national law. In the scope of national law, sexual violence is governed in law Number 23 of 2002 concerning Child Protection, which was further amended to Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, followed by the second amendment in the Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. This Regulation in Lieu of Law was passed and amended to Law number 17 of 2016 concerning stipulation of Government Regulation Number 1 of 2016 concerning the Second Amendment to law Number 23 of 2002 concerning Child Protection (hereinafter UUPA).

The proceedings of *Qanun Jinayat* take place in *Syar'iyah* Court and are juridically supported by the Decision of Head of Supreme Court Number KMA/070/SK/X/2004 regarding transfer of particular portion of authority from General Court to *Syar'iyah* Court in the Province of Nanggroe Aceh Darussalam.

The conflict between *Qanun Jiayat* and UUPA is obvious in terms of the dualism in the resolution to sexual violence against children. Bias is still apparent among law enforcers to decide the proper law between the two to resolve this case. As mentioned, when this is UUPA chosen as the proper law to settle the case, the judgment will take place in the District Court, but when the judgment is based on *Qanun Jinayat*, *Shar'iyah* Court will be where the judgment is passed.

[14] Zulkarnain Lubis and H. Bakti Ritonga, *Dasar-Dasar Hukum…*, p. 1.

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Table 1. Dualism over resolution to sexual violence and rape as a criminal offense in Aceh

Year	District Court	Syar'iyah Court
2016	Number 268/Pid.Sus/2016/Lgs	Number 06/JN/2016/MS.Lgs
2016	Number 294/Pid.Sus/2016/PN.Ksp	Number 14/JN/2016/MS.Lgs
2017	Number 28/Pid.B/2017/PN.Lgs	Number 02/JN/2017/MS.Lgs
2018	Number 347/Pid.Sus/2018/PN Sgi	Number 16/JN/2018/MS.Jth
2019	Number 82/Pid.Sus/2019/PN.KSp	Number 001/JN/2019/MS.Ttn
2020	Number 111/Pid.Sus/2020/PN Tkn	Number 14/JN/2020/MS.Tkn
2021	Number 148/Pid.Sus/2021/PN Idi	Number 20/JN/2021/MS Idi
2022	Number 28/Pid.Sus/2022/PN.Idi	Number 14/JN/2022/MS.Idi

Article 72 of *Qanun Jinayat* states: "*Jarimah* (an offense) is governed herein and in Criminal Code or in another criminal provision, and, the provision of Qanun serves as a reference if *Jarimah* is committed." In other words, law enforcers should not be left with no other options regarding which law to use to resolve sexual violence against children, and *Qanun* should be the sole law allowed. However, more than one law is referred to over the settlement of *a quo* of the case concerned.

Qanun Jinayat can even impose flagellation, a sanction other than imprisonment, meaning that disparity of sanctions may be high for sexual violence against children, not only restricted to the severity of the sanction given, but also the forms of the sanction imposed.

Such a disparity has sparked conflict: how are the sanctions different between those governed in *Qanun Jinayat* and in UUPA? And which law fits the case of sexual violence against children in Aceh?

This study is an empirical legal research with a case study approach.[15] The choice of law for judges in resolving cases of sexual violence against children as a case study, namely between qanun jinayat and the Child Protection Act. The data collection technique used was interviewing key informants and document study, namely the judge's decision.

Qanun Standing in Hierarchy of the Legislation

Regarded as the product of process of legislation, *Qanun* is closely related to religion and the state, and this position underlines the notion

[15]Munir Fuady, *Metode Riset Hukum: Pendekatan Teori dan Konsep*, Jakarta: Rajawali Press, 2018. Lexy J. Moleong, *Metode Penelitian Kualitatif*, Bandung: Rosda Karya, 2010.

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implying that legal product of the state must be based on religion. However, upon the colonialism, a force to create gap between religion and the state was obvious, but it was hampered by measures taken to bring back the idea arguing that law and the state are inseparable, like what Berman says "Law without religion degenerates into mechanical legalism, religion without law loses its social effectiveness."[16]

As the local regulation enforced in the province of Aceh, the term "*qanun*", Qanun is derived from Greek "canon" or "canonical" meaning "to give order". In Arabic, it is derived as "*qanun*". *Qanun*,[17] in such a definition is regarded as a set of principles people have to abide by and respect. This law is applicable to all the members of the society and binding.

The term *Qanun* was first stipulated in Law Number 18 of 2001 concerning Special Autonomy for the Province of Aceh as the Province of Nanggroe Aceh Darussalam, it was mentioned in the law that *Qanun* in the Province of Nanggroe Aceh Darussalam represents the local regulation under the Law in the Province of Nanggroe Aceh Darussalam for special autonomy. Several Qanun have been developed in the history of Aceh Qanuns to govers various aspects, such as Qanun Number 12 of 2012 on Khamar, Qanun Number 13 of 2003 on Maisir, and Qanun Number 14 of 2003 on Seclusion, subsequently Aceh Qanun Number 6 of 2014 on Jinayat Law was developed more than a decade later.[18]

Law Number 11 of 2006 concerning Government in Aceh as amendment to Law Number 18 of 2001 defines *Qanun* as a similar local regulation in the province/regency/city regulating government and the life of the people in Aceh. Difference emerges in terms of elaborating *qanun* in Law Number 18 of 2001, where earlier law completely gives it a full name: Qanun Nanggroe Aceh Darussalam and it regards *qanun* as local regulation, while in the new law (Law Number 11 of 2006) shortens it into *Qanun* Aceh and it defines the *qanun* as legislation similar to local regulation.

Thus, *Qanun* is not identical to local regulation, but it is rather taken as 'similar'. *Qanun* is the legislation applicable in Aceh and has to follow the *syari'at Islam* (principles of Islam) as a distinguishing feature of Aceh, unlike

[16] Harold Berman, *The Interaction of Law and Religion, Abingdon*, USA: New York, USA, 1974, p. 11.

[17] Qanun is identical to the laws in countries with Muslims as the majority. Masykuri Abdullah, et.al., *Formalisasi Syari'at di Indonesia, Sebuah Pergulatan yang Tak Pernah Tuntas*, Jakarta: Renaisan, 2005, p. 85

[18]Ridwan Nurdin, "Kedudukan Qanun Jinayat Aceh dalam Sistem Hukum Pidana Nasional Indonesia," *Miqot: Jurnal Ilmu-Ilmu Keislaman* 42, No. 2 (2018).

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regulations implemented in other regions where local regulations do not have to follow the *syari'at Islam*.[19]

It has been compulsory for the government of Aceh to maintain the harmony of religious life and assure that the principles of Islam are properly carried through for the people of Aceh following this belief.[20] The implementation of the law that involves the local authorities of Aceh regarding the principles of Islam is set based on *qanun*, directly delegated by Law Number 11 of 2006 concerning Aceh government.

According to Law Number 11 of 2006 concerning the Government of Aceh, article 241 emphasizes that qanuns cannot be viewed as the same as other regional regulations, the article reads:[21]

(1) Qanuns may contain provisions for imposing coercive costs for law enforcement, in whole or in part, on violators in accordance with statutory regulations.
(2) Qanuns can contain threats of imprisonment for a maximum of 6 (six) months and/or a fine of up to IDR 50,000,000.00 (fifty million rupiah).
(3) Qanuns may contain criminal threats or fines other than those referred to in paragraph (2) in accordance with those regulated in other laws and regulations.
(4) Qanun regarding jinayah (criminal law) is exempted from the provisions of paragraph (1), paragraph (2), and paragraph (3).

The above article states that qanuns can regulate criminal sanctions as in general regional regulations. However, a very special matter is the provision contained in Article 241 paragraph (4) that the content of Qanun Jinayat which regulates acts that are prohibited under Islamic law, the sanction system is excluded from the provisions of paragraphs (1), (2) and (3). Whereas for qanuns whose contents are not in the area of jinayah, sanctions and fines refer to the provisions contained in paragraphs (1), (2) and (3) of Article 241 of the Law on Governing Aceh.

Furthermore, a very specific point is also stated in Article 235 paragraph (4), stating that specific arrangements for qanuns governing the implementation of Islamic law cannot be revoked by the government. Qanuns on Islamic law, in this case qanun jinayat, can only be annulled through a judicial review by the Supreme Court. This is where the privileges and

[19] Zainuddin and Sahban, "Problematics of Jinayat Qanun Implementation in Nanggroe Aceh Darussalam Community", *Tadulako Law Review* 3, No. 2, (2018). p. 221-234.

[20] Law Number 11 of 2006 concerning Aceh Government.

[21] Law Number 11 of 2006 concerning Aceh Government.

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juridical autonomy granted by the central government to Aceh in implementing sharia.

Comparison between Sanctions Imposed on Sexual Violence against Children in *Qanun Jinayat* and Those in amended UUPA

Sudarto opines that penal policy can be defined as an attempt to manifest criminal law that fits all-time condition and the future.[22] Moreover, Sudarto adds that political criminal law also requires election to come to a proper criminal law that is just and efficient.[23]

Likewise, with the direction of criminal policy for child protection, it can be interpreted as a rational effort to achieve child welfare and realize protection from violence and discrimination. This effort begins with establishing laws and regulations within the scope of child protection, which are rigid and complete and can be implemented optimally in order to achieve the stated goals.

In general, child welfare can be interpreted as a system of life and livelihood for children that can guarantee their growth and development in a natural manner, both spiritually, physically and socially. Ideally based on the principle of non-discrimination, welfare is the right of every child without exception. The point is that every child, whether a child in normal circumstances or a child with problems, still gets the same priority from the government and society in obtaining this welfare.

The Government of the Republic of Indonesia itself, in order to provide protection for children to achieve child welfare, has issued several laws and regulations relating to these efforts, namely:

1. Law Number 4 of 1979 concerning Child Welfare;
2. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System;
3. Law Number 23 of 2002 concerning Child Protection;
4. Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection;
5. Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

The basis for implementing child protection is: 1) Philosophical basis, Pancasila is the basis for activities in various fields of family, community, state and national life, as well as the philosophical basis for implementing

[22] Sudarto, *Hukum dan Hukum Pidana*, Bandung: Alumni, 1986, p. 93
[23] Sudarto, *Hukum dan Hukum…*, p. 16.

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child protection; 2) Ethical basis, the implementation of child protection must be in accordance with the relevant professional ethics, to prevent deviant behavior in the exercise of authority, power and strength in the implementation of child protection; 3) Juridical Basis, the implementation of child protection must be based on the 1945 Constitution and various other applicable laws and regulations. The application of this juridical basis must be in an integrative manner, namely the integrated application of laws and regulations from various related fields of law.[24]

Aceh is the province with the highest incidence of sexual violence against children. The Investigation conducted by Kita dan Buah Hati Foundation reports that Aceh represents the highest cases of sexual violence in Indonesia, followed by East Java and West Java.[25] Thus, it is not unusual that Aceh is getting more concerned in dealing with the proceedings over sex crime-related cases.

Criminal sanctions imposed based on Law concerning Child Protection and *Qanun Jinayat* are compared as follows:

1. Provision regarding criminal sanctions imposed for rapists and molesters as in Law Number 17 of 2016 concerning second amendment to law Number 23 of 2002 concerning Child Protection.

   Article 76 D of Child Protection Laws (*Undang-Undang Perlindungan Aceh*/UUPA) asserts that violence and threat posed to children to force them in sexual intercourse are outlawed. This criminal sanction is governed in Article 81, and fine and imprisonment are formulated cumulatively. This Article bears the shortest imprisonment of five years and 15 years for the longest and the highest fine is charged at IDR 5,000,000,000 (five billion rupiahs).

Aggravation proposed by child's parents, guardians, kin, caretakers, teachers, school staff, specified law enforcers or groups of people is also governed in this article, where the 1/3 (one thirds) of the sentence proportion is added. This aggravation is imposed simply because the offender concerned is involved in an offense as intended in Article 76 D.

This article also regulates sanctions imposed on an offense that takes more than one victim, causes serious injury, mental illness, contaminates a disease,

[24]Arif Gosita, "Aspek Hukum Perlindungan Anak dan Konvensi Hak-hak Anak," *Jurnal Ilmiah Ilmu Hukum*, No. 4 (1999). p. 266-267.

[25]Ali Abu Bakar and Zulkarnain Lubis, *Hukum Jinayat Aceh (Sebuah Pengantar)* Jakarta: Prenadamedia Group, 2019, p. 101.

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causes reproduction impairment or total dysfunction of reproduction, or causes death. The offender concerned is punishable by death penalty, life sentence, or at least ten years' imprisonment or not more than 20 years. Additional punishment is also imposed as follows:

a) Disclosure of identity
b) Chemical castration, and
c) Attachment of electronic detector to the offender.

Article 81A imposes additional punishment under the condition that (1) the punishment must be imposed no longer than 2 years and after the offender serves the main sentence, (2) it must be under the supervision of social, law, and health ministry. (3) The castration must come with rehabilitation. (4) Further provisions regarding guidelines of action and rehabilitation are governed in Government Regulation.

Furthermore, Article 76E of UUPA confirms that violence or threat of violence, force, craftiness, series of lies, or persuasion aimed to entice a child to molestation are outlawed. All these provisions are governed in Article 82, while fine and jail sentence are cumulatively formulated. The shortest imprisonment is imposed for five years and maximally 15 (fifteen) years and IDR 5,000,000,000 (five billion rupiahs) fine.

Aggravation is formulated in Article 81 under the condition that the offense takes more than one victim, causes serious injury and mental illness, contaminates a disease, causes impaired reproduction or total dysfunction of reproduction, or causes death. The aggravation involves 1/3 (one thirds) sanction addition. Additional punishment and related provisions are governed in Article 82A and formulated as in Article 81A.

2. Provision of criminal sanctions imposed for sexual harassers and rapists against children as in *Qanun Jinayat*. Article 47 governing criminal sanctions imposed for sexual harassers and molesters against children states: Whoever intentionally commits sexual harassment as intended in Article46 against children is punishable by flagellation of '*Uqubat Ta'zir*' 90 times, maximally 90-month jail sentence or is subject to 900 grams of pure gold fine.[26]

Sanction imposed for the rapist is regulated in Article 50 elaborating that: Whoever intentionally rapes a child as intended in Article[27] 48 is punishable

[26] Article 46 implies that whoever intentionally commits sexual harassment is punishable by flagellation of '*uqubat ta'zir'* for 45 times or subject to the maximum fine of 450 grams of pure gold or maximum imprisonment of 45 months. See Qanun Jinayat

[27] Article 48 implies that whoever is intentionally involved in rape is punishable by flagellation of '*uqubat ta'zir*' for at least 125 times to 175 times, or subject to fine of at least

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by flagellation of '*Uqubat Ta'zir'* for at least 150 times 200 for the most, minimum jail sentence of 150 months or 200 months for the most, or the offender is subject to at least 1,500 grams of pure gold fine or 2,000 grams for the most.

At a closer look, those two laws bear some differences in the sanctions imposed:

a. In Article 47, molestation is punishable by maximally 90 months' imprisonment or equal to 7.5 years but without any minimum imprisonment governed. This criminal sanction is regarded lower compared to that in Article 82 of UUPA with the maximum jail sentence of fifteen years added with aggravation of twenty years' imprisonment or even death penalty or life sentence. Additional punishment is governed in UUPA but not in *Qanun Jinayat*.
b. Article 50 concerning rape governs the minimum 150-month jail sentence or equal to 12.5 years and 200 months for the maximum equal to 16.6 years. This sanction is lower than that regulated in Article 81 of UUPA with the maximum jail sentence of 15 years added with aggravation of 20 years maximum. Additional sanction is governed in UUPA but not in *Qanun Jinayat*.
c. Aggravation is governed in UUPA for sexual harassers and rapists but not in *Qanun Jinayat*.
d. The criminal sanction governed in UUPA is cumulative in the scope of the word "and", in which judges can impose both jail sentence and fine, and jail sentence replacing the fine. *Qanun Jinayat*, however, is an alternative where it gives options of punishment ranging from flagellation, jail sentence, to fine, aimed to deter offenders.

In her response to those sanctions, Amrina argues that the severity of the punishment or '*uqubat jarimah*' in sexual violence against children governed in *Qanun Jinayat* should be proportionally equal to those governed in UUPA or should even be severe due to increasing figures of related cases in Aceh. It is supported by the tough principles of Islam severely condemning such a sin in sexual violence.[28]

Sharing similar ideas, Ali Abubakar also argues that severe punishment needs to be taken into account, or this incidence will never stop

1,250 grams of pure gold to 1,750 grams or imprisonment of at least 125 months to 175 months. See *Qanun Jinayat.*

[28] Interview with Amrina Habibi, Head of Department of Children's Rights Fulfilment (*Dinas Perlindungan, Permberdayaan, Perempuan dan Anak*/DPPPA) Aceh.

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rising. Flagellation is considered lenient for a punishment but it keeps being imposed since this form of punishment is seen fitting the principles of Islam.[29]

Proper Law to Resolve Sexual Violence Against Children in Aceh

Criminal judicial system helps to prevent, settle, or minimize crime. Mardjono Reksodiputro asserts that this system is intended to prevent and control offenses committed in societies.[30] Unlike Mardjono, Tolib Effendi confirms criminal judicial system embraces two objectives: protecting people and enforcing law.[31]

The regulations concerning sexual violence against children have led to a quandary of whether to implement *Qanun Jinayat* or to refer to amended UUPA to resolve this case. Despite its two-time revision, sanctions regulated in *qanun* do not quite represent the vigor implied in UUPA, or criminal sanctions imposed for *a quo* offenders in the Province of Aceh are lenient compared to those imposed in the other 33 provinces in Indonesia. However, all the provinces show the same impacts caused by this case.

The inconsistency of the electorate of law regulation has an impact on the competence of the authority to try in Aceh which is also different, namely: If law enforcement chooses to use the Child Protection Act as the norm choice, then the judicial institution that has the authority to try is the District Court. Meanwhile, if you choose to use *Qanun Jinayat*, then the judicial institution that has the authority to adjudicate is the Syar'iyah Court.

Considering or Considering in a statutory regulation contains a brief description of the main ideas that form the background and reasons for making the said statutory regulation. Furthermore, according to Maria, the main ideas in the preamble to laws or regional regulations contain philosophical, juridical and sociological elements which are the background for their creation. The philosophical, sociological, and juridical elements which are the considerations and reasons for the formation of a statutory regulation are placed sequentially from philosophical, sociological, and juridical, along with the explanation:[32]

a. The philosophical element illustrates that the regulations formed take into account the view of life, awareness and legal ideals which

[29] Interview with Ali Abubakar, a lecturer in Fakulty of Syariah and Law UIN Ar-Raniry, Banda Aceh, 2020.

[30] Rocky Marbun, *Sistem Peradilan Pidana Indonesia (Suatu Pengantar)*, Malang: Setara Press, 2015, p. 31.

[31] Rocky Marbun, *Sistem Peradilan Pidana Indonesia…,* p. 33

[32]Maria Farida Indrawati Soeprapto, *Ilmu Perundang-undangan Proses dan Tehnik Pembentukan*, Yogyakarta: Kanisius, 2013, p. 108-110.

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include the mystical atmosphere and the philosophy of the Indonesian nation which originates from Pancasila and the Preamble to the 1945 Constitution of the Unitary State of the Republic of Indonesia.

b. The sociological element illustrates that regulations are formed to meet the needs of society in various aspects.
c. The juridical element illustrates that regulations are formed to resolve legal issues or fill legal voids by taking into account existing regulations, which will be amended, or which will be revoked in order to guarantee legal certainty and a sense of justice for the community.

In order to get the main idea of forming Qanun Jinayat, it can be seen from its preamble, it is stated that:

a. that the Al-Qur'an and Al-Hadith are the main foundations of the Islamic religion which bring blessings to all nature and have become the beliefs and guidelines for the life of the people of Aceh;
b. that within the context of implementing the Memorandum of Understanding between The Government of the Republic of Indonesia and the Free Aceh Movement, Helsinki 15 August 2005, the Government of the Republic of Indonesia and the Free Aceh Movement affirmed their commitment to resolving the conflict Aceh in a peaceful, comprehensive, sustainable and dignified manner for all, and the parties are determined to create conditions so that the Government of the Acehnese people can be realized through a democratic and fair process within the Unitary State of the Republic of Indonesia;
c. that Aceh as part of the Unitary State of the Republic of Indonesia has special privileges and autonomy, one of which is the authority to implement Islamic Sharia, by upholding justice, benefit and legal certainty;
d. that based on the mandate of Article 125 of Law Number 11 of 2006 concerning the Governance of Aceh, the Jinayat law (Criminal law) is part of the Sharia implemented in Aceh;
e. That based on the considerations referred to in letters a, b, c and d it is necessary to establish an Aceh Qanun concerning Jinayat Law;

Based on the description, it is explained that the purpose of establishing the Qanun Jinayat is part of the implementation of Islamic law in Aceh, which is the autonomy and privilege of the province of Aceh. So that the type of offense or finger that is regulated must be based on Islamic law. All types of offenses are acts that are considered disgraceful in Islamic law, in

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this case the types of offenses may differ from the meaning of forbidden in national criminal law. The type of delict that is regulated is general in nature, not merely the provisions of Islamic law governing child protection. This is different from the considerations contained in the UUPA, namely:

a. that the Unitary State of the Republic of Indonesia guarantees the welfare of each of its citizens, including the protection of children's rights which are human rights;
b. that children are a mandate and a gift from God Almighty, in which dignity and worth as a whole human being are attached;
c. that children are buds, potentials, and the younger generation to continue the aspirations of the nation's struggle, have a strategic role and have special characteristics and characteristics that guarantee the continued existence of the nation and state in the future;
d. that in order for every child to be able to bear this responsibility one day, he or she needs to get the widest possible opportunity to grow and develop optimally, both physically, mentally and socially, and to have a noble character, it is necessary to make efforts to protect and realize the child's welfare by providing guarantees towards the fulfillment of their rights and the existence of treatment without discrimination;
e. that in order to realize the protection and welfare of children, institutional support and laws and regulations are needed that can guarantee its implementation;
f. that various laws only regulate certain matters concerning children and have not specifically regulated all aspects related to child protection;
g. that based on the aforementioned considerations in points a, b, c, d, e, and f it is necessary to stipulate a Law on Child Protection;

The inconsistency in the selection of legal regulations also has an impact on not realizing legal certainty. legal certainty is defined as a condition in which the law can function as a rule that must be obeyed. Legal certainty is a feature that cannot be separated from the law, especially for written legal norms. Legal certainty is defined as clarity of norms to be used as a guideline for people subject to this regulation. It means that the application of the law in society has been clear and firm to avoid misinterpretations. [33]

Qanun and UUPA are *lex specialis* or *bijzonder delict*-based (dealing with special criminal offenses). This conflict of the two laws, according to Eddy O.S. Hiariej, has an impact on criminal law enforcement due to different

[33] Aries Harianto, "Does Religious Holiday Allowance Policy during Covid-19 Provide Legal Certainty?", *Journal Sriwijaya Law Review* 5 No. 1 (2021), p. 91.

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procedural laws governed in both laws. *Lex specialis sistematis* is required to resolve this juridical issue.

Derived from *lex specialis derogate legi generalis*, *lex specialis sistematis* deals with the object of general definition thoroughly governed in special outlines of provisions. *Spesialis logis*, however, clearly elaborates offenses that are governed within the scope of general definition. *Qanun Jinayat* is the derivative of the government law in Aceh governing 10 (ten) *jarimah* (offenses) related to the enforcement of the principles of Islamic law referring to Quran and hadiths. These offenses contravene the Islamic principles but are not regulated in a national criminal law, while UUPA serves as a special law governing all aspects regarding children's rights.

Still concerning the conflict of the two laws, the amended UUPA is regarded as the proper law enforced to resolve the case according to the principle of *les specialis sistematis* since this law is clearly regulated in the special outlines of criminal provision. Law is not an objective, but it is rather an instrument to reach the objective of the law people generally accept.

In reference to the concept of justice and the legality according to Hans, justice carries the definition of legality. General rules are considered "just" when they are truly enforced, or they are considered "unjust" when they are left unimplemented for other similar cases.[34] Suominen states *"*in a national setting, legal certainty is understood as entailing a state having legislation and a legal system that protect the individual against arbitrary measures from the state itself."[35]

Referring to the concept of justice and legality that the meaning of "justice" means legality. A general rule is "fair" if actually applied, meanwhile a general rule is "unfair" if it is applied to a case and not applied to other similar cases. [36] In line with Arief's opinion that the principle of legality is in principle a principle that places limits on the authorities in exercising their authority, with the aim of providing legal certainty for the community as well as providing legal protection for the community. [37]

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[34] Marwan Effendy, "Teori Hukum (dari Perspektif Kebijakan, Perbandingan dan Harmonisasi Hukum Pidana)", Jakarta: Gaung Persada Press Group, 2014, p. 81.

[35] Annika Suominen, "What Role for Legal Certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?" *Bergen Journal of Criminal Law and Criminal Justice* 2, no.1 (2014), p. 1-31

[36]Marwan Effendy, *Teori Hukum (Dari Perspektif Kebijakan, Perbandingan dan Harmonisasi Hukum Pidana)*, Jakarta: Gaung Persada Press Group, 2014, p. 81.

[37] Barda Nawawi Arief, *Beberapa Aspek Penegakan Hukum dan Pengembangan Hukum Pidana*, Bandung: Citra Aditya Bakti, 1998, p. 72.

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Conclusion

The enactment of the Qanun in the province of Aceh is based on the privileges and special autonomy possessed by the province of Aceh. Based on this right, the province of Aceh has the authority to implement the implementation of Islamic Shari'ah. Qanun Jinayat was drafted with the intention of upholding Islamic law, but in the formulation of the types of finger, there are provisions that are the same as the national criminal law, namely in the Child Protection Act related to criminal acts of sexual abuse and closure of children. The conflict between Qanun Jinayat and the UUPA cannot be allowed to continue because it has an impact on the application of different laws which has the potential to marginalize legal certainty both for children as victims, for perpetrators and for society. This is because the material of the regulated criminal sanctions is not only different in terms of severity, but also different in the form/type of punishment. In criminal law terms, this situation is often referred to as a form of disparity in sanctions. Steps that can be taken to determine the right choice of law is to use the principle of *les specialis sistematis*.

The application of this principle can be reviewed through consideration of two or more laws and regulations that are specific in nature and regulate the same type of offense. Considerations in a statutory regulation contain a brief description of the main ideas that form the background and reasons for making said statutory regulation. It contains 3 (three) main elements, namely: a philosophical element, a sociological element, and a juridical element. Therefore, the right choice of law in resolving the problem of sexual violence against children in Aceh is to use the UUPA, so that child victims of sexual violence in Aceh get the same justice as other provinces, this can actually be in line with the principle of the best interests of the child.

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