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ANALYSIS OF ABSOLUTE COMPETENCE OF DISTRICT COURTS AND SYARI'AH COURTS: CASE STUDY IN ADJUDICATING *JARIMAH* OF CHILD SEXUAL ABUSE IN ACEH

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Abstract: The District Court and Syari'ah Court (*Mahkamah Syar'iyah*) jurisdictions to deal with child sexual abuse cases have still overlapped. This issue generates legal uncertainty in the enforcement of *Jinayat* Law in Aceh. This study aims to analyze the resolution patterns over child sexual abuse cases in Aceh, the resolution patterns over child sexual abuse cases at District Courts, and the efforts to solve dualism issues of the courts in trying child sexual abuse cases in Aceh. This study employed a juridical-empirical method that attempts to analyze behaviors of law enforcement officials in handling sexual abuse cases in Aceh using case and statute approaches based on the rules and principles of law studies. The legal materials utilized in this study were Law, *Qanun*, Government Regulation, and Syari'ah Court and District Court Decisions. Data were analyzed qualitatively. The findings reveal that both District Courts and Syari'ah Courts still settle sexual abuse cases. The results also point out that the resolution patterns in adjudicating sexual abuse cases at District Courts are categorized into adult offenders and young offenders. The provisions stipulated in the Criminal Procedure Code (KUHAP) are applied for adult offenders, while the Juvenile Criminal Justice System Law is regulated for young offenders. The efforts to overcome dualism are generating new policies by the Supreme Court to delegate the authority to solve sexual abuse cases and other *jinayat* cases from District Courts to Syari'ah Courts, and the issuance of Memorandum of Understanding (MoU) between Aceh Syari'ah Courts, Aceh Regional Police, Aceh High Prosecutor's Office, and Aceh High Court governing the authorization limits over the settlement of *jinayat* cases.

Keywords: Absolute Competence, District Courts, Syari'ah Courts, Child Sexual Abuse

Abstrak: Kewenangan mengadili kasus pelecehan seksual pada anak masih tumpang tindih antara Pengadilan Negeri dan Mahkamah Syar'iyah di Aceh. Hal ini menimbulkan ketidakpastian hukum dalam penegakan hukum jinayat di Aceh. Penelitian bertujuan menganalisis pola penyelesaian kasus pelecehan seksual anak di Aceh, pola penyelesaian kasus pelecehan seksual di Pengadilan Negeri dan upaya menyelesaikan dualisme pengadilan dalam mengadili perkara pelecehan seksual terhadap anak di Aceh. Penelitian menggunakan metode penelitian yuridis empiris yang berusaha menganalisis perilaku aparat penegak hukum dalam menangani kasus pelecehan seksual di Aceh dengan menggunakan pendekatan kasus dan pendekatan konseptual sesuai dengan kaidah dan asas-asas dalam ilmu hukum. Bahan hukum yang digunakan UU, Qanun, Peraturan Pemerintah dan putusan hakim Mahkamah Syar'iyah dan putusan hakim Pengadilan Negeri. Analisis data dilakukan secara kualitatif. Hasil penelitian menunjukkan bahwa penanganan kasus pelecehan seksual masih dipraktikkan di Pengadilan Negeri dan Mahkamah Syar'iyah. Pola penanganan kasus di pengadilan negeri dalam mengadili

kasus pelecehan seksual dapat dikategori menjadi dua yaitu pelaku dewasa dan pelaku anak. Bagi pelaku dewasa menggunakan ketentuan sebagaimana yang diatur dalam KUHAP sementara bila anak yang melakukannya berpedoman pada UU Sistem Peradilan Pidana Anak. Upaya mengakhiri dualisme adalah dengan melahirkan kebijakan baru oleh Mahkamah Agung untuk melimpahkan kewenangan penyelesaian kasus pelecehan seksual dan kasus jinayat lainnya dari Pengadilan Umum kepada Mahkamah Syar'iyah dan adanya MoU antara Mahkamah Syar'iyah Aceh, Kepolisian Daerah Aceh, Kejaksaan Tinggi Aceh dan Pengadilan Tinggi Aceh terkait batasan kewenangan penyelesaian perkara jinayat.

Kata Kunci: Kompetensi Mutlak, Pengadilan Negeri, Pengadilan Syari'ah, Pelecehan Seksual Anak

Introduction

The special autonomy over the implementation of Islamic Law (*Syari'at Islam*) in Aceh has changed jurisdictions of General Courts to be absolute competence of Syari'ah Courts (*Mahkamah Syar'iyah*). This authority delegation is explicitly recognized in Law No. 18 of 2001 and is emphasized in Law No. 11 of 2006 on Governing Aceh (*Pemerintahan Aceh*).¹ Article 128 paragraph (3) of the Law on Governing Aceh (*UU Pemerintahan Aceh*) decides that the Syari'ah Courts are authorized to examine, adjudicate, decide, and settle *ahwal al-syakhsiyah* (family law matters), *mu'amalah* (civil law matters), dan *jinayat* (criminal law matters) based on the Islamic Law (*Syari'ah*).²

The authority of Syari'ah Courts to adjudicate *jinayat* matters is stipulated under the Supreme Court Decree No. KMA/070/SK/X/2004 on the Delegation of the Authority from General Courts to Syari'ah Courts. Article 2 of the Supreme Court Decree declares the delegation of several authorities of General Courts in Aceh Province concerning the matters established in *Qanun* (Islamic regional regulations) of Nanggroe Aceh Darussalam Province.³

Besides, Syari'ah Court jurisdiction is regulated in Presidential Decree No. 11 of 2003. The provisions of Article 3 paragraph (1) of the Presidential Decree determine that the power and authority of Syari'ah Courts and Provincial Syari'ah Courts include the power and authority of Religious Courts and Religious High Courts, in addition to other powers and authorities related to the society's life in terms of worship and *syiar* Islam (symbolism of Islam) that have been established in *Qanun*.⁴

Several forms of *jarimah* (criminal acts) are regulated in the Aceh *Qanun*, No. 6 of 2014 on *Jinayat Law* (Islamic Criminal Law), as stated in Article 3 paragraph (2) that, *jarimah*,

1 Edward Aspinall, '19. Special Autonomy, Predatory Peace and the Resolution of the Aceh Conflict', *Regional Dynamics in a Decentralized Indonesia* (ISEAS Publishing 2014); Qonita Royani Salpina, Rusjdi Ali Muhammad and Yenny Sriwahyuni, 'Kedudukan Memorandum of Understanding (MOU) Helsinki Dalam Pembentukan Undang-Undang Nomor 11 Tahun 2006 Tentang Pemerintahan Aceh' (2018) 3 *Petita* : Jurnal Kajian Ilmu Hukum dan Syariah.

2 Mark Bratton, 'Shari'a Law and Modern Muslim Ethics' [2018] *Journal of Contemporary Religion*; David Kloos, 'Book Review: Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia, Written by R. Michael Feener' [2015] *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*; R Michael Feener, 'Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia' [2013] *Oxford Islamic Legal Studies*.

3 A Hamid Sarong, 'The Child Rights in Islamic Law with a Special Focus on Aceh' (2019) 4 *Petita* : Jurnal Kajian Ilmu Hukum dan Syariah 31 <<http://petita.ar-raniry.ac.id/index.php/petita/article/view/10>>.

4 Moriyanti Mansari, *Perlindungan Perempuan Dan Anak Melalui Putusan Hakim Mahkamah Syar'iyah Antara Keadilan, Kemanfaatan Dan Kepastian Hukum* (CV Bravo Darussalam 2019).

as mentioned in paragraph (1), includes: *khamar* (liquor); *maisir* (gambling); *khalwat* (seclusion of two people of different sexes); *ikhtilath* (intimacy outside marriage); *zina* (adultery and fornication); sexual abuse; rape; *qadzaf* (false accusation of adultery); *liwath* (sodomy); and *musahaqah* (lesbianism).⁵

Based on the various types of *jarimah* mentioned above, it is evident that the Syari'ah Court is authorized to judge the matters of *jinayat* (Islamic criminal acts), as ruled under Law No. 11 on Governing Aceh and the Supreme Court Decree. The jurisdiction of an institution regulated under the Law is firm. Therefore, the government institutions under the Law are obliged to follow and carry out the Law as it aims to provide society a legal certainty.

The Syari'ah Court, as a court with authority over *jinayat* matters, has tried and settled the cases of sexual abuse, such as Blang Pidie Syari'ah Court Decision No. 1/JN/2018/MS.Bpd and Lhokseumawe Syari'ah Court Decision No. 1/JN.Anak/2019/MS.Lsm. A similar case is also decided by Syari'ah Court of Suka Makmur Nagan Raya, Decision No. 02/JN/2019/MS.SKM. In the same way, Aceh Syari'ah Court has decided on the sexual abuse case, Decision No. 12/JN/2016/MS.Aceh.

The legal uncertainty emerges due to the existence of sexual abuse cases tried by the District Courts, for example, the Decisions of Banda Aceh District Court No. 5/Pid.Sus-Anak/2019/PN Bna and No. 7/Pid.Sus-Anak/2019/PN Bna. Resolving sexual abuse cases is also carried out in Calang District Court, Decision No. 79/Pid.Sus/2016/PN Cag.

The phenomena of resolving sexual abuse cases at the District Courts, as described earlier, raise an interesting issue. A comprehensive analysis is necessary due to the presence of two courts that hear sexual abuse cases. This dualism results in legal uncertainty and confusion for justice seekers in submitting the sexual abuse cases. It remains an unexpected problem in the country. The country intends a regulation to be enforced as a standard of conduct to resolve a matter. It has to be placed on the supremacy to try matters faced by the society. The issue will occur when several Syari'ah Courts have adjudicated the cases of *zina* and sexual abuse; however, some are not given the authority by the General Courts to deal with such cases. This study aims to answer three questions formulated as follows: The patterns of child sexual abuse case resolution in Aceh, the patterns of sexual abuse case resolution at the District Courts, and efforts to resolve the court dualism in trying child sexual abuse cases in Aceh.

Method

In this study, the researcher employed a juridical-empirical research method that analyses the patterns of resolving child sexual abuse cases in Aceh, which has still created an overlap of jurisdiction between District Courts and Syari'ah Courts. This study used primary data where the data obtained directly by interviewing judges who served at the District Courts and Syari'ah Courts. Meanwhile, secondary data were gathered through a document study over primary and secondary legal materials.

Primary legal materials utilized in this study consist of Law No. 44 of 1999 on Special Autonomy of Aceh, Law No. 4 of 2004 on Judicial Authority, Law No. 16 of 2004 on the Attorney of The Republic of Indonesia, Law No. 11 of 2006 on Governing Aceh, and District Court and Syari'ah Court Decisions: No. 7/Pid.Sus-Anak/2019/PN Bna, No. 2/Pid.Sus.Anak/2019/PN Cag, No. 275/Pid.Sus/2017/PN Bir, No. 2/JN/2018/MS.SKM, No. 1/

⁵ Nyak Fadhlullah, 'Metode Perumusan Qanun Jinayah Aceh : Kajian Terhadap Pasal 33 Tentang Zina' (2017) 7 in Right (Jurnal Agama dan Hak Azazi Manusia) 16 <<http://ejournal.uin-suka.ac.id/syariah/inright/article/view/1456/1262>>.

JN.Anak/2019/MS.Lsm, No. 1/JN/2018/MS.Bpd, and No. 4/JN/2020/MS.Bna, Aceh *Qanun* No. 7 of 2013 on *Jinayat* Procedure Law, Aceh *Qanun* No. 6 of 2014 on *Jinayat* Law, SEMA No. 2 of 2019 (Circular Letter of the Supreme Court), and SEMA No. 10 of 2020 (Circular Letter of the Supreme Court). Data were analyzed qualitatively by selecting primary dan secondary data along with primary and secondary legal materials relevant to this study. It was then described systematically using the case approach and the statute approach.

Patterns of Child Sexual Abuse Case Resolution in Aceh

The empirical data showed that there are two judicial institutions that settle sexual abuse matters in Aceh. In some districts, the cases are submitted to District Courts, as practiced by Banda Aceh City, Bireun District, and Aceh Jaya District. On the other hand, in some other districts, such cases are resolved in Syari'ah Courts, as enacted by Jantho Syari'ah Court, Kuta Cane Syari'ah Court, Blangkejeren Syari'ah Court, Simpang Tiga Redelong Syari'ah Court, Meulaboh Syari'ah Court, Suka Makmur Syari'ah Court, Tapaktuan Syari'ah Court, Aceh Singkil Syari'ah Court, Lhokseumawe Syari'ah Court, Lhoksukon Syari'ah Court, and Langsa Syari'ah Court. The number of sexual abuse cases tried in the Syari'ah Court in each district/city from 2016 through 2019 is presented in the following table.

No	Syari'ah Court in District / City	2016	2017	2018	2019
1	Banda Aceh	0	0	1	3
2	Sigli	0	0	1	0
3	Takengon	0	0	0	0
4	Langsa	4	3	0	0
5	Lhokseumawe	0	3	2	0
6	Meulaboh	4	9	15	3
7	Kutacane	0	0	1	1
8	Tapaktuan	5	8	5	0
9	Bireuen	0	0	0	0
10	Jantho	3	1	4	1
11	Lhoksukon	0	0	6	6
12	Sabang	0	0	0	0
13	Meureudu	0	0	0	0
14	Idi	0	0	0	0
15	Kuala Simpang	0	0	0	0
16	Blangkejeren	4	2	3	0
17	Calang	0	0	0	0
18	Singkil	0	0	0	1
19	Sinabang	0	0	0	0
20	Simpang Tiga Redelong	1	0	0	0
21	Suka Makmue	0	0	1	2
22	Blang Pidie	0	0	1	0
23	Kota Subulussalam	0	0	0	0
Jumlah		21	26	42	16

Data was obtained from Aceh Syari'ah Court.

In Bireun and Aceh Jaya Districts, child sexual abuse cases have not been tried by Syari'ah Courts. Meanwhile, in Banda Aceh, only one case was settled by the Syari'ah Court in 2018, and the other sexual abuse cases were resolved in the District Court. Based on the researcher's review, it was found that Banda Aceh District Court, Bireuen District Court, and Calang District Court handled sexual abuse cases, as listed in the table below.

No	Pengadilan	Putusan Nomor
1	Pengadilan Negeri Banda Aceh	1. Putusan Nomor 5/Pid.Sus-Anak/2019/PN Bna 2. Putusan Nomor 7/Pid.Sus-Anak/2019/PN Bna
2	Pengadilan Negeri Bireuen	1. Putusan Nomor Nomor 70/Pid.Sus/2016/PN Bir 2. Putusan Nomor Nomor : 81/Pid.Sus /2016/PN-Bir 3. Putusan Nomor 101/Pid.Sus/2016/PN Bir 4. Putusan Nomor 117/Pid.Sus/2016/PN Bir 5. Putusan Nomor Nomor 176/Pid.Sus/2016/PN Bir 6. Putusan Nomor Nomor 275/Pid.Sus/2017/PN Bir
3	Pengadilan Negeri Calang	1. Putusan Nomor Nomor 2/Pid.Sus.Anak/2019/PN Cag 2. 33/Pid.Sus/2017/PN Cag

The data are factual information related to resolving sexual abuse cases found in actual practice. It depicts the law enforcement over sexual abuse cases that still have been tried and decided by judges of District Courts. According to Jakfar, there have no cases concerning sexual abuse submitted by a public prosecutor to Syari'ah Courts. Recently, the Syari'ah Courts have settled only the cases of *khalwat* and *ikhtilath*.⁶ Similarly, Abrari Rizki Falka, a prosecutor (JPU) at Bireun District Prosecutor's Office, stated that sexual abuse cases have currently been committed to the District Court since there is no instruction from the chief prosecutor of the Aceh High Prosecutor's Office to hand in the case to the Syari'ah Courts.⁷

This issue indicates that the enactment of Law No. 11 of 2006 on Governing Aceh that grants the authority to the Syari'ah Courts to handle *jinayat* cases is not effective. To see the effectiveness of regulation in empirical facts, according to Soerjono Soekanto, it needs to examine five factors: legal factor, law enforcement, amenities and infrastructures, society, and legal culture.⁸ The legal factor plays a vital role in considering a regulation whether it has been implemented effectively or not. In the context of this study, the existing legal factor results in the ineffectiveness of enacting Syari'ah Court jurisdiction in practice. The existing provisions of the Law are still inconsistent with other regulations, resulting in a contradiction of one norm to another norm. The inconsistent norm of Law appears as Law on Governing Aceh grants the authority to Syari'ah Courts to settle *jinayat* cases. Meanwhile, the Child Protection Law and the Juvenile Criminal Justice System Law give the jurisdiction for the settlement of criminal cases to District Courts. It is understandable that, basically, sexual abuse is categorized into *jinayat*, subsequent to the establishment of Aceh *Qanun* No.6 of 2014 on *Jinayat* Law. Prior to that, the offense was considered general

6 'Jakfar, Hakim Mahkamah Syar'iyah Bireuen, Interviewed on 24 January 2020.'

7 'Abrari Rizki Falka, JPU Bireuen, Interviewed on 17 January 2020.'

8 Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum* (PT Raja Grafindo Persada 2007), 5.

criminals that belong to the District Court jurisdiction. Therefore, the Child Protection Law and the Juvenile Criminal Justice System Law should be synchronized through law harmonization.

Based on empirical facts, the effectiveness of Law is not only influenced by the five factors mentioned above. Instead, the researcher believes that the same perspective among law enforcement officials in understanding the Law will also support it. The legal consequence that likely occurs is that several law enforcement officials submit sexual abuse cases to District Courts and some of them send the cases to Syari'ah Courts. Some prosecutors suggested that, pursuant to several existing laws and regulations, the authority to adjudicate sexual abuse cases belongs to the Syari'ah Courts.⁹ In contrast, Siara Nedi argued that *jinayat* matters should be resolved by the District Courts.¹⁰ The submission of sexual abuse cases to the court is a sign of the ineffectiveness in implementing Article 128 paragraph (3) of Law on Governing Aceh that empowers the Syari'ah Courts to try sexual abuse cases. By considering various ways to resolve sexual abuse cases, it is prominent to provide law enforcement officials an understanding that resolving sexual abuse cases becomes the authority of Syari'ah Courts.

In addition, another law that is not effectively enacted is Article 72 of the *Qanun on Jinayat Law*, which obliges law enforcement officials to apply the provisions that have been regulated in the *Qanun on Jinayat Law*. Article 72 of the *Qanun on Jinayat Law* states that "In case there is a deed of *jarimah* (criminal acts) as stipulated in this *Qanun* and arranged in the Criminal Code (KUHP) or criminal provisions outside the Criminal Code, the rules in this *Qanun* apply. This rule explicitly requires law enforcement officials to employ law materials in the *Qanun*; however, the Child Protection Law is still being used in actual practice.

Moreover, another provision inconsistently implemented in Aceh is Article 90 paragraph (1) of the *Qanun on Criminal Procedure Law (Hukum Acara Jinayat)*, stating that Syari'ah Courts at districts/cities are authorized to arbitrate all matters related to *jarimah* conducted within its legal region. It means that this *Qanun* strictly arranges that all *jarimah* matters committed in a district or city are under the jurisdiction of Syari'ah Courts. In other words, the *jarimah* referring to what stipulated in the *Qanun Jinayat* as mentioned in the Aceh *Qanun* No. 6 of 2014, including *jarimah* of sexual abuse, is handled by the Syari'ah Courts.

The legal consequence resulting from the dualism of judicial institutions that settle sexual abuse issues is the difference in legal materials used by law enforcement officials in a court. For those who send the case to the District Courts, the Child Protection Law will be used as a legal basis to impose criminal convictions on the perpetrators. This practice is understandable that the District Courts are not authorized to use the *Qanun Jinayat* as the basis for sentencing decisions. Hence, the judges at District Courts utilize the Law to decide punishments for the perpetrators.

In this case, the legal basis for the imposition of sentences employed by the Syari'ah Courts is different from what the District Courts use. For the Syari'ah Courts, *Qanun* serves as the legal basis perpetually referred to by the judges in deciding the punishments for the criminal offenders. Even if the criminal offense has been stipulated in the *Qanun Jinayat* and other laws or regulations, it should refer to the provisions of *the Qanun*. This statement is aligned with the provision of Article 72 of the *Qanun Jinayat*, as previously stated, "In case there is a deed of *jarimah* (criminal acts) as stipulated in this *Qanun* and arranged

9 'Muhibuddin, Aspidum, Interviewed on 19 March 2020.'

10 'Siara Nedy, JPU, Bireuen District Attorney, Interviewed on 17 January 2020.'

in the Criminal Code or criminal provisions outside the Criminal Code, the rules in this *Qanun* apply.”

As a consequence of the different legal materials used, the judges' punishments will also be different. In general, District Courts will impose a sentence of imprisonment for the perpetrators of criminal matters. As in Bireun District Court Decision No. 101/Pid.Sus/2016/PN Bir, the offender is sentenced to 5 (five) years in prison and fined Rp1.000.000.000,- (one billion Rupiah), with the condition that if the fine is not paid, it is replaced by a month of imprisonment, since a finding of guilt is made without against the Law and convicted of “Child Sexual Abuse.” The sexual offense violates the provisions of Article 82 paragraph (1) juncto Article 76 E of Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on the Child Protection.

The same decision was practiced by Bireun District Court that imposed a jail sentence on the offender for 7 (seven) years and a fine of Rp1.000.000.000,- (one billion Rupiah), under the condition that if the offender does not pay the fine, he shall be in prison for another three months.

The sentence is different if the offender of sexual abuse is children. In the case of children who commit sexual abuse, the judge pronounces a sentence of imprisonment as stated in Banda Aceh District Court Decision No. 5/Pid.Sus-Anak/2019/PN Bna. Another judge has imposed a community sentence on children who were convicted of sexual abuse. Calang District Court has also decided a similar judgment, as in Decision No. 2/Pid.Sus. Anak/2019/PN Cag.

Empirical facts show that the Syari'ah Courts often resolve sexual abuse cases by sentencing either punishment of public caning (*cambuk*) or imprisonment. It is recorded in Judge's Decision No. 1/JN/2018/MS.Mbo imposing *'Uqubat Ta'zir* (discretionary punishments) on the accused by 30 strokes of *'Uqubat cambuk* (caning) deducted entirely from the detention period that the accused has served, where the accused was ordered to serve 30 days in prison for *'uqubat* (punishments).

Additionally, other judges of Syari'ah Courts pronounce imprisonment on the offender of child sexual abuse, as in Meulaboh Syari'ah Court Decision No. 17/JN/2018/MS.MBO. In the decision, the judge sentenced *'Uqubat Ta'zir* on the accused to 90 days in prison (*'Uqubat penjara*) detracted from the prison terms the accused has served, with a detention order.

Patterns of Juvenile Case Resolution at District Courts

In adjudicating sexual abuse cases, the resolution patterns used by the judges at District Courts certainly implement the mechanism which has been stipulated in the Law. The legal basis for this is recognized in Law No. 11 of 2012 on the Juvenile Criminal Justice System, Criminal Procedure Code (KUHP), Government Regulation No. 65 of 2015 concerning the Implementation of Diversion and Handling of Children Not Aged 12 (Twelve) Years Old, and Supreme Court Regulation No. 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System.¹¹

According to Ismail Syam, based on judicial perspective (*ius constitutum*), the District Courts are authorized to adjudicate sexual abuse cases¹². Article No. 84 paragraph (1) of the Criminal Procedure Code states that the District Courts have the authority to adjudicate all cases concerning criminal acts committed within their jurisdiction. Therefore, the

11 Tim Lindsey and Simon Butt, *Indonesian Law* (Oxford University Press 2018).

12 'Ismail Syam, Head of Intelligence Section of Calang State Prosecutor's Office, Interviewed on 6 March 2020.'

public prosecutors have submitted the cases to the District Courts until now since it is not prohibited. Syarifah also stated the same argument that the District Courts have the authority given by the Legislation to prosecute sexual abuse or rape cases.¹³

The reason for delegating the cases to the District Courts is that the threat of punishments stipulated in the Child Protection Law is higher than stated in the *Qanun*. Yudhi Saputra mentioned that the public prosecutors refer to the Child Protection Law as their reference, which quantitatively provides a deterrent effect to the perpetrators.¹⁴ In line with Daijal Usrin Siregar, who stated that sexual abuse is an extraordinary form of crime, the appropriate punishment to be imposed is the sentence stipulated in the Child Protection Law.¹⁵ Syarifah also confirms this statement that the reason for delegating the sexual abuse cases to the District Courts is:

“If this case is submitted to the Syari’ah Courts, the sentence will be too light, while if it is presented to the District Courts, it will be much more fulfilling the sense of justice since the imprisonment is imposed. For this reason, it will be less effective to submit this case to the Syari’ah Courts as it might not give a deterrent effect to the offenders.”¹⁶

The most common reasons stated by the judges who work at District Courts and prosecute the sexual abuse cases include:

1. Judges Not Allowed to Reject the Cases

The basic principle is that the judges are not allowed to reject a case submitted to them for the reason of non-existing or unclear Law that regulates a particular case. This provision has been stipulated on Law No. 4 of 2004, Article 16 paragraph (1) stating that the Supreme Court may not refuse to examine, prosecute, and decide a certain case submitted to them by stating that the Law is not existing or unclear, they are obliged to examine and prosecute the case instead. A similar statement is also mentioned in Law No. 48 of 2009, Article 10 paragraph (1) on Judicial Authority stating that “The Courts are prohibited from refusing to examine, adjudicate, and decide a certain case submitted to them by saying that the Law is not existing and unclear, rather they have to examine and prosecute the case.”

This provision provides instructions for the judges who carry out their duties in the judicial sector. Even though there has no legal rule, the judges have to try the cases handed to them. According to Mukhtaruddin, a judge at the Bireuen District Court, judges may not reject a case due to the non-existing rules; the judges can seek legal principles that develop in the lives of society.¹⁷

No Regulation on Prohibition is Available

According to Mukhtaruddin, as long as the existing regulations still provide the authority, the Courts have to adjudicate. Unless there is a rule stating that the District Courts no longer have authority to prosecute the case¹⁸. In principle, there is no special regulation stating that the District Courts have no authority to prosecute sexual abuse cases. However, in general, relating to the authority of Syari’ah Courts, Law No. 11 of 2006 on Governing Aceh underlines that the Syari’ah Courts are authorized to adjudicate the cases in *mu’amalah*

13 ‘Syarifah, Banda Aceh State Prosecutor’s Office, Interviewed on 19 March 2020.’

14 ‘Yudhi Saputra, Head of Intelligence Section of Calang State Prosecutor’s Office, Interviewed on 6 March 2020.’

15 ‘Daijal Daijal Usrin Siregar, Calang District Court Judge, Interviewed on 25 February 2020.’

16 ‘Syarifah, Banda Aceh State Prosecutor’s Office, Interviewed on 19 March 2020.’ (n 13).

17 ‘Mukhtaruddin, Bireuen District Court Judge, Interviewed on 7 January 2020.’

18 *ibid.*

(civil law matters), *jinayat* (criminal law matters), and *munakahat* (marriage) as governed in Article 128 paragraph (3) stating that the Syari'ah Courts are authorized to examine, adjudicate, decide, and settle *ahwal al-syakhsiyah* (family law matters), *mu'amalah* (civil law matters), dan *jinayat* (criminal law matters) based on Islamic Law (*Syari'at Islam*).

The provisions mentioned above provide a sign to the law enforcement officials that the Syari'ah Courts have legality to prosecute *jinayat* cases. Therefore, the judges at Syari'ah Courts who prosecute *jinayat* cases have followed the rules based on what is stated in the legal principles. The legal principle refers to the Courts implementing its functions based on the rules of Law; that is, acting to the Law accordingly, not arbitrarily.¹⁹ According to Tanto Lailam, the legality principle aims to ensure legal certainty (applies forward, not backward). Certainty means that there is a guarantee of a legal action that is ordered or prohibited and having a fundamental law or is a basic guarantee for individual freedoms appropriately.²⁰ In other words, the existence of Article 128, paragraph (3) of the Law on Governing Aceh aims to provide legal certainty to which the judicial administration refers.

In the science of Law, the *lex specialist derogate lex generalis* principle is widely recognized, which essentially means that a more special rule will prevail over more general rules.²¹ The application of *lex specialist derogate lex generalis* principle is likely to be appropriate to handle sexual abuse cases in which the pattern of resolving child sexual abuse cases still overlaps between the District Courts and the Syari'ah Courts. The Law on Governing Aceh basically deals with Aceh's cases in general; meanwhile, the Law on the Juvenile Criminal Justice System regulates the handling patterns of children in conflict with the Law in the national context. By referring to this principle, the Syari'ah Courts have the authority to adjudicate sexual abuse cases. This also refers to Article 128 paragraph (3), which mentioned that the Syari'ah Courts are authorized to prosecute *jinayat* cases. The category included in *jinayat* cases can be seen in the Aceh *Qanun* No. 6 of 2014 on *Jinayat* Law which mentions that the sexual abuse case is one of *jarimah* (criminal acts) as mentioned in the paragraph.

Punishment Stipulated in the Law Higher than *Qanun*

The punishments stipulated to the perpetrators who commit sexual abuse are public canning (*hukum cambuk*), imprisonment, and penalties. Conceptually, when the quantity of punishment is compared to what is stipulated in the *Qanun* and what is stated in the Child Protection Law, it is found that the quantity of punishment stated in the Child Protection Law is higher than in the *Qanun*. According to Article 47 of the *Qanun Jinayat*, it is mentioned that anyone who deliberately commits *jarimah* of sexual abuse on children, as referred to the Article 46, shall be threatened with '*Uqubat Ta'zir*' by a maximum of 90 (ninety) caning or a maximum fine of 900 (nine hundred) grams of pure gold or imprisonment of 90 (ninety) months.

Meanwhile, the Child Protection Law as stipulated in Article 81 of the Child Protection Law states that "Everyone who violates the provisions referred to Article 76D shall be sentenced to imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp5,000,000,000.00 (five billion Rupiah)." Article 76D regulates that "Every person is prohibited from committing violence or threats of violence

19 Abdul Manan, *Mahkamah Syar'iyah Aceh Dalam Politik Hukum Nasional* (Kencana 2018), 49; Ratno Abdul Manan, *Mahkamah Syar'iyah Aceh Dalam Politik Hukum Nasional* (Kencana 2018), 49; Ratno Lukito, 'Shariah and the Politics of Pluralism in Indonesia: Understanding State's Rational Approach to Adat and Islamic Law' (2019) 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 14 <<http://petita.ar-raniry.ac.id/index.php/petita/article/view/8>>.

20 Tanto Lailam, *Teori & Hukum Perundang-Undangan* (Pustaka Pelajar 2017), 92.

21 *ibid*, 87.

by forcing children to have sexual intercourse with him or other people.

When the types of punishment are compared, it can be understood that the Child Protection Law provides a higher penalty than the *Qanun* does. The Child Protection Law stipulates a minimum of five years and a maximum of 15 years in prison or a fine of 15 billion (Article 81 Paragraph 1). In addition, the Child Protection Law provides different penalties if the perpetrator of sexual harassment is a parent, guardian, child caregiver, educator, or educational staff by adding 1/3 of the sentence above (Article 81 Paragraph 3).

With regards to the provisions above, Abrari Rizki Falka is more consent that sexual abuse cases are resolved at District Courts. According to him, child cases are more suitable to be submitted to the District Courts as the Child Protection Law has severe and comprehensive threats.²² The prosecutor from Bireun Prosecutor's Office emphasizes the punishment as a form of retaliation against the perpetrators instead of a coaching process. When this case is scrutinized in the perspective of the objective of punishments which are classified into three groups, the prosecutor is more in accordance with the absolute theory (*vergeldingstheorien*) developed by Immanuel Kant, mentioning that the purpose of punishment is to retaliate against the perpetrators due to committing crime to others. In addition, the prosecutor's opinion is in accordance with the relative theory stated in the theory of the purpose of punishment. According to this theory, the objectives of punishment are:²³ to provide a deterrent effect to the perpetrators who commit a crime and to improve the convicted individuals in terms of treatment and education provided while serving their sentence in prison. Hasanuddin, as one of the judges at a Syari'ah Court, often sentenced imprisonment to the perpetrators who commit sexual abuse toward children. This aims to provide protection to the children from meeting the perpetrators if they are only punished by caning.²⁴ Based on the research conducted by Mansari, empirically, it is not impossible that the judge at the Syari'ah Court imposes a public caning even though the prosecutor prosecutes imprisonment; this condition can happen in a reverse way that the judge might sentence imprisonment even the prosecutor demands a public caning.²⁵ The judges at Syari'ah Courts have the authority to disagree with the sentence submitted by the public prosecutors. According to Article 178 paragraph (6), the '*Uqubat* (punishments) that is imposed might be less than the amount that is suggested by public prosecutors in the '*Uqubat*. Therefore, it makes sense when the judges, along with their independency, decide a certain case that might be higher or lower from the prosecutors' demand.²⁶

Imposing a higher amount of punishment can definitely benefit the children. They are feeling calmer and secured without any intimidation and threats from sexual abuse perpetrators. The effort to take this benefit is in accordance with the *maqasid Syariah* principle which was developed by Syatibi.²⁷ Asy-Syatibi explains that the existence of

22 'Abrari Rizki Falka, JPU Bireuen, Interviewed on 17 January 2020.' (n 7).

23 Sigit Suseno, *Sistem Pidana dalam Hukum Pidana Indonesia Di Dalam Dan Di Luar KUHP (Suatu Analisis)* (Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM 2012), 45.

24 'https://modusaceh.co/news/mahkamah-syar-iyah-meulaboh-lazim-putusan-hukuman-penjara-untuk-pelaku/index.html', accessed on 29 February 2020.

25 Mansari, 'Pembatalan Hukuman Cambuk Bagi Pelaku Jarimah Pencabulan Anak Dalam Putusan Nomor 07/Jn/2016/Ms.Aceh' (2018) 7 *Jurnal Hukum dan Peradilan* 427.

26 Mansari, 'Independensi Hakim Mahkamah Syar'iyah Dalam Menjatuhkan 'Uqubat Bagi Pelaku Pelanggaran Jarimah Qanun Jinayat' (Mahkamah Agung 2019), 173.

27 Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law* (International Institute of Islamic Thought 2008); Richard C Taylor and Luis Xavier López-Farjeat, *The Routledge Companion to Islamic Philosophy* (Richard C Taylor and Luis Xavier López-Farjeat eds, Routledge 2015). Sajjad Rizvi, 'The Routledge Companion to Islamic Philosophy. Richard C. Taylor, Luis Xavier López-Farjeat (Eds.):' (2017) 4 *Nazariyat Islam Felsefe ve Bilim Tarihi Araştırmaları Dergisi* (Journal for the History of Islamic Philosophy and Sciences) 147; Roy Jackson, *What Is Islamic Philosophy?* (Routledge 2014).

maqaashid is to provide welfare to humans in this world and hereafter.²⁸ The most essential case of *mashlahah mursalah* is that the Law is established for the goodness of society and not for its deprivation.²⁹ Therefore, the determination of community goodness in law implementation is likely to be a fundamental aspect for the greater good of the community in the future.

The effort to Resolve Court Dualism in Prosecuting Jarimah of Sexual Abuse

The existence of institutional dualism in adjudicating and resolving sexual abuse cases shows legal uncertainty for society. The best solution to address this issue should be taken by law enforcement officials, in this case, the Supreme Court. The Supreme Court has a strategic role in drafting new policies, especially those related to the existence of Syari'ah Courts. This can be done in many ways, including the initiative to increase human resource capacities to perform excellent qualities and improve professionalism in dealing with *jinayat* cases as what has been stated in the Aceh *Qanun* No. 6 of 2014 on *Jinayat* Punishment.

After the Central Government granted a privileged to the Aceh Government to enforce Islamic Law in Aceh, the Supreme Court, as an institution with greater authority, regulates the judiciary under its position and performs higher contribution to the Syari'ah Courts. According to Amran Suadi, several approaches have been taken by the Supreme Court as a way of its concern toward the Syari'ah Courts, including:³⁰

First, the Supreme Court has built adequate amenities and infrastructure to handle *jinayat* cases, either in physical buildings or detention areas for perpetrators committing *jinayat*. *Second*, strengthening the regulations that can be used as a reference by the Supreme Court in adjudicating *jinayat* cases, such as establishing a PERMA (Supreme Court Regulation) or SEMA (Circular Letter of the Supreme Court) as references for the judges who worked at Syari'ah Courts. One of the examples is PERMA No. 4 of 2006 concerning the Enforcement of Result of the 2016 Chamber's Plenary Meeting of the Supreme Court 2016 as Guidelines of Task Implementation for the Courts. According to item number 4 of the formulation of the Chamber of the Supreme Court, judges at Syari'ah Courts in Aceh who have not been certified as juvenile court judges have the authority to examine *jinayat* cases where the perpetrators or victims are children as long as no other judges who are certified as juvenile court judges.³¹ *Third*, increasing the technical capacity of human resources by providing comprehensive understanding and training related to the handling of *jinayat* cases for judges, providing education and training on the Juvenile Criminal Justice System for judges, 68 judges have been certified as juvenile court judges, including two higher judges.³² According to Mul Irawan, the competency of a judge in prosecuting and deciding a case submitted to him depends on the education quality and the training³³ he participated

28 Abi Ishaq Ibrahim al-Lakhmi al-Gharnati al-Syatibi, *Al-Muwafaqat Fi Ushul Al-Ahkam* (Darul Fikr), 4-5.

29 Abu Ishaq Al-Syatibi, *Al-Muwafaqat Fi Usul Al-Ahkam* (Jilid 1, Dar al-Ma'rifah 2004), 350.

30 Amran Suadi, 'Kebijakan Mahkamah Agung Mendukung Kewenangan Mahkamah Syar'iyah Dalam Penyelesaian Perkara Jinayah Di Aceh', *Proceeding Seminar Penguatan Implementasi Kewenangan Mahkamah Syar'iyah dalam Penyelesaian Perkara Jinayat di Aceh, Mahkamah Agung* (Mahkamah Agung 2019), 14-15.

31 Nurhadi, 'Implementasi Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Dalam Perkara Jinayat Di Mahkamah Syar'iyah', *Proceeding Seminar Penguatan Implementasi Kewenangan Mahkamah Syar'iyah dalam Penyelesaian Perkara Jinayat di Aceh* (Mahkamah Agung 2019), 97.

32 Amran Suadi (n 30), 16-17.

33 Pendidikan dan pelatihan merupakan proses pembinaan pemahaman dan pengetahuan terhadap kelompok fakta, aturan serta metode yang terorganisasikan dengan mengutamakan pembinaan, kejujuran dan keterampilan. Lebih lanjut liha juga, John Suprihanto, *Managemen Modal Kerja* (BPFE 1988), 86.

and also their personal experiences in handling the cases.³⁴ *Fourth*, conducting education and training sessions for judges at Syari'ah Courts, as such the judges have adequate knowledge and skills in adjudicating *jinayat* cases submitted to them.

Abrari Rizki Falka, a Bireun's prosecutor, mentioned that it is prominent to ensure the absolute competence to adjudicate the cases so that court dualism which may lead to legal uncertainty, does not exist.³⁵ Legal certainty principles emphasize the importance of prioritizing the rules of Law, appropriateness, and fairness in every state of public administration.³⁶ According to Abrari Rizki Falka, the dualism in resolving sexual abuse cases may lead to inconsistency for the law enforcement officials/justice seekers, which might cause bias for them.³⁷ To end this dualism, the Supreme Court needs to draft a Memorandum of Understanding between the stakeholders and the law enforcement officials.³⁸ A similar practice was conducted in 2004 by developing a joint decision between the Governor of Aceh, the Head of the Regional Police, the Head of High Prosecutor's office, and the Chairperson of the Provincial Syari'ah Court, the Chairperson of the High Court, and the Head of the Regional Office of the Ministry of Justice and Human Rights of the Province of Nanggroe Aceh Darussalam based on the Decree No. 26/PKS/2004, No. SKEP/62/VIII/2004, No.MSY.P/KHK.009/ 614/2004, No. W1.D1.UM.01.10-1116, No. W1.UM.4.08-1604.³⁹ The decision becomes the basis for judicial institutions to settle sexual abuse cases. A similar statement conveyed by Mukhtaruddin, that the Supreme Court needs to develop a regulation declaring that Muslim communities should be tried at Syari'ah Courts while the non-Muslim cases should be resolved at District Courts.⁴⁰

According to Jakfar, the Supreme Court, as an institution providing shelter to the District Courts and Syari'ah Courts, should delegate the sexual abuse cases based on the authority stated in the *Qanun Jinayat*.⁴¹ A similar statement stated by Amiruddin, the Chief of Bireun Syari'ah Court, that the Chief Justice of Supreme Court was requested to immediately develop a strict rule by delegating the authority, which recently became a jurisdiction dualism between the District Courts and Syari'ah Courts in Aceh; it can be done by delegating the cases to the Syari'ah Courts.⁴² This statement was further supported by Daijal Usrin Siregar, that to end the dualism of authority in adjudicating between the District Courts and the Syari'ah Courts, it is essential to implement a strict rule to grant an authority both to the District Courts and Syari'ah Courts.⁴³ In addition, this idea was also mentioned by Muhibuddin, stating that MARI (the Supreme Court of the Republic of Indonesia) needs to launch SEMA immediately so that the District Courts could delegate the sexual abuse cases and all of *jarimah* cases stated in the Aceh *Qanun* to be prosecuted at the Syari'ah Court.⁴⁴

Delegating some parts of authority from the District Courts to the Syari'ah Courts has been practiced previously by issuing the Supreme Court Decree Number KMA/070/SK/X/2004. Initially, the case related to gambling issues became the authority of District

34 Mul Irawan, 'Urgensi Penguatan Kompetensi Hakim Mahkamah Syar'iyah Melalui Diklat Hukum Jinayah', *Proceeding Seminar Penguatan Implementasi Kewenangan Mahkamah Syar'iyah dalam Penyelesaian Perkara Jinayat di Aceh* (Mahkamah Agung 2019), 25.

35 'Abrari Rizki Falka, JPU Bireuen, Interviewed on 17 January 2020.' (n 7).

36 Dedah Jabaedah Pipin Syarifin, *Ilmu Perundang-Undangan* (Pustaka Setia 2012), 96.

37 'Abrari Rizki Falka, JPU Bireuen, Interviewed on 17 January 2020.' (n 7).

38 'Siara Nedy, JPU, Bireuen District Attorney, Interviewed on 17 January 2020.' (n 10).

39 Abdul Manan (n 19), 202.

40 'Mukhtaruddin, Bireuen District Court Judge, Interviewed on 7 January 2020.' (n 17).

41 'Jakfar, Hakim Mahkamah Syar'iyah Bireuen, Interviewed on 24 January 2020.' (n 6).

42 'Amiruddin, Bireuen Syar'iyah Court Judge, Interviewed on 23 January 2020.'

43 'Daijal Daijal Usrin Siregar, Calang District Court Judge, Interviewed on 25 February 2020.' (n 15).

44 'Muhibuddin, Aspikum, Interviewed on 19 March 2020.' (n 9).

Courts, then the case was delegated to the Syari'ah Courts. The basic principle for this refers to Point 1 of the Supreme Court Decree stating that delegating some authorities and general jurisdiction in Nanggroe Aceh Darussalam Province to the Syari'ah Courts in Nanggroe Aceh Darussalam. This relates to the *muamalah* cases for legal subjects who are Moslem and all of the cases that have been stipulated in the *Qanun* of Aceh Province. Then Point 2 of the Supreme Court Decree further explains the importance of delegating parts of authority and general jurisdiction in Nanggroe Aceh Darussalam Province to the Syari'ah Courts in Nanggroe Aceh Darussalam Province, that is, all *jinayat* cases for the legal subjects who are Muslim and all of the cases stated in the *Qanun* of Nanggroe Aceh Darussalam.

Conclusion

Based on the above description, it can be concluded that the resolution process over child sexual abuse cases still experiences dualism between the District Courts and Syari'ah Courts. This dualism takes place as some public prosecutors submit the cases to the District Courts while some others to the Syari'ah Courts. The reason is that the legal basis used by the District Courts refers to the Children Protection Law, which is higher compared to the *Qanun*. Besides, the rules in delegating authority from the Districts Courts to the Syari'ah Courts are not available yet. Also, the patterns in resolving sexual abuse cases against children depend on who the perpetrators are. The judges employ Juvenile Criminal Justice System if the perpetrators are children; on the contrary, the Criminal Code is referred to if the perpetrators are adults. To end the dualism in resolving the *jinayat* cases, the Supreme Court has not yet issued any policy in authority delegation. For this reason, the Supreme Court needs to delegate the authority from the District Courts to Syari'ah Courts. This can be done by drafting an MoU between Syari'ah Courts, Aceh High Prosecutor's Office, and the Aceh High Court. Thus, the practice of dualism in Aceh can be well addressed, which will then provide legal certainty for justice seekers.

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