

Eliminating Qanun Jinayat in Resolving Sexual Violence in Indonesia: A Comparative Study of the TPKS Law and Qonun Jinayat

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ABSTRACT

Law Number 12 of 2022 concerning Crimes of Sexual Violence (UU TPKS) was passed in April 2022 after waiting almost 12 years when it was submitted as an initial draft law to the DPR. Unlike other laws, TPKS Law was designed using a bottom-up system to address the problem of overcoming sexual violence in Indonesia, the number of which increases every year. However, not all regions in Indonesia will use the TPKS Law when cases of sexual violence occur. Aceh Province is the only province that, based on special autonomy, is allowed to have its criminal law called Qanun Jinayat. This research looks at the implications of implementing 2 laws and regulations on resolving sexual violence cases in Indonesia. This research is normative legal research, which analyzes statutory regulations. The results of the research show that TPKS Law regulates the prevention of sexual violence more comprehensively than the Qanun Jinayat, which requires more comprehensive protection for victims than the Qanun Jinayat. There are also articles in the Qanun Jinayat that tend to cause revictimization, rather than protecting victims.

Keywords: *Settlement of Sexual Violence Cases Based on the TPKS Law and Qonun Jinayat*

Introduction

Efforts to eradicate criminal acts of sexual violence in Indonesia reached a phenomenal milestone after the passing of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (UU TPKS) in April 2022. Through this law, all criminal acts of sexual violence regulated outside the TPKS Law are recognized. as sexual violence, such as rape in the Criminal Code (KUHP), criminal acts of sexual violence in Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT) or sexual violence in Law Number 21 of 2004 2007 concerning Eradication of the Crime of Human Trafficking (TPPO Law), etc. All laws and regulations governing sexual violence are oriented towards the TPKS Law (Article 4, TPKS Law).

Before the passing of the TPKS Law above, national figures for sexual violence cases based on year-end records of the National Commission on Violence against Women (Komnas Perempuan) for the past 3 years were 4,472 cases of sexual violence occurring in 2019, 2020 there were 5,372

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cases of violence recorded. sexual violence and 4,673 cases of sexual violence. Based on data from the Central Statistics Agency for 2021, there are 10 provinces with a sharp increase in the number of rapes, one of the provinces with the highest number of rapes is Aceh Province. Aceh is ranked 8th with the most rape cases in Indonesia (Rezaty, 2022).

Regional autonomy is one of the state's efforts to realize equitable development and as a form of guarantee for the protection of the values that exist in local communities. Through regional autonomy, regional governments have the rights, authority, and obligations to organize and manage government affairs and the interests of the community themselves. There are several things related to basic services that regions have through regional autonomy based on Law Number 23 of 2014 concerning Regional Government, including education, health, public works, and spatial planning, public housing and residential areas, peace, public order, and community and social protection

Along the way, several regions have received special and special powers and authorities according to the characteristics of the local community. 5 provinces have been given special autonomy by the Indonesian government for their reasons. The Special Region of Yogyakarta has become a special region based on Law Number 18 of 2018 concerning Specialties of the Special Region of Yogyakarta. Aceh Province through Law Number 11 of 2006 concerning Aceh Government. DKI Jakarta through Law Number 29 of 2007 concerning the Government of the Special Capital Region of Jakarta. Finally, Papua and West Papua through Law Number 2 of 2021 concerning the Second Amendment to Law Number 21 of 2001 concerning Special Autonomy for Papua Province. Based on Law Number 11 of 2006 concerning the Government of Aceh, the Aceh Government is given several special authorities in managing its region. One of the authorities possessed by the Aceh Government is the application of Islamic sharia values to the local community which is regulated based on the *Qanun*. *Qanun* itself is a type of provincial/district/city regional regulation that regulates government administration and the lives of the people of Aceh.

Islamic law implemented in Aceh includes *aqidah*, *syar'iyah*, and morals. Further parts of Islamic law include *ahwal al-syakshiyah* (family law), *muamalah* (civil law), *Jinayat* (criminal law), *qadha'* (judiciary), *tarbiyah* (education), *da'wah*, *syiar*, and defense of Islam. Specifically for *Jinayat* or criminal law, the Aceh People's Representative Council has issued Aceh *Qanun* Number 6 of 2014 concerning *Jinayat* Law, and its implementation is regulated in Aceh *Qanun* Number 7 of 2013 concerning *Jinayat* Procedural Law.

Qanun Jinayat is a unit of criminal law that applies to the people of Aceh which was formed based on the values of Islamic law. *Qanun Jinayat* regulates Jarimah, which means all acts prohibited by Islamic law, perpetrators of Jarimah, and uqubat or punishment that can be imposed by a judge on perpetrators of Jarimah. The existence of *Qanun Jinayat* and its implementation deviates from the principle of nationalist unity of criminal law that applies in Indonesia, namely what is regulated in the Criminal Code and the Criminal Procedure Code.

All criminal acts that have been regulated in the *Qanun Jinayat* are no longer subject to entrapment in the Criminal Code, for example in the gambling article. The criminal act of gambling regulated in Article 303 bis of the Criminal Code does not apply if it is committed in the Aceh Province area, because it is regulated in Article 18 Aceh *Qanun* Number 5 of 2014 concerning *Jinayat* Law. Not all criminal acts are regulated in the Aceh *Qanun*. Based on the Aceh *Qanun*, there are only 10 groups of jarimah (criminal acts) that are included and regulated therein.

Even though there are 5 provinces that are given special regional autonomy, only Aceh is given the freedom to have its own criminal law system, compared to the other 4 special provinces. Providing freedom to regulate the criminal system itself ignores the principle of nationalism in criminal law. This research looks at the comparison of overcoming sexual violence based on the *Qanun Jinayat* and the TPKS Law and its implications for victim protection. Based on the background above, This article discusses the resolution of sexual violence cases by comparing the use of the TPKS Law and *Qanun Jinayat*, as well as the implications of the use of both for victim protection.

Methods

This research is a normative juridical legal research (Soekanto, 1984) that discusses the comparison of arrangements for handling cases of sexual violence based on the Aceh *Qanun Jinayat* and the TPKS Law. This research is a comparative study between existing laws and regulations due to regional autonomy and national laws and regulations, as well as their impact on the protection of victims of criminal acts of sexual violence. This research uses a literature review to obtain answers to questions in the problem formulation (Narbuko & Ahmadi, 2007). Literature review in the form of analysis and observation of statutory regulations in the form of *Qanun* and the TPKS Law. Even though they are not equal, the position of *Qanun* is equal to the law in its implementation. In the legal hierarchy, the TPKS Law and the *Qanun Jinayat* have the same status, namely equal laws. However, their usage is different. The TPKS Law is used throughout Indonesia, while the *Qanun Jinayat* only applies in Nanggroe Aceh Darussalam Province. This research uses secondary data confirmed by interviews with Islamic legal experts as a comparison. The secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Data processing uses editing, coding, and data analysis (Hadi, 1983:54). This research uses a human rights perspective in its analysis, taking into account that the discussion of human rights is formally stated in the 1945 Constitution.

Sexual Violence in Islamic Behavior and Criminal Law in Indonesia

Criminal law policy is also defined as legal politics, namely efforts to create good regulations according to the circumstances and situations at a given time (Sudarto, 1981). Criminal law policy includes three stages, formulation policy, application policy, and execution policy. Formulation policy according to is a plan or program from the legislator regarding something that will be done in dealing with certain problems and how to do or implement something that has been planned or programmed (Arief, 1994).

Policy formulation is the beginning of planning in efforts to tackle crime, so it is natural that policy formulation is part of criminal policy which functionally can be seen as part of the planning and procedures for efforts to tackle crime. Broadly speaking, crime prevention planning or policies outlined in the legislation include: First, planning or policies regarding prohibited acts that will be addressed because they are considered dangerous or detrimental. Second, planning or policies regarding sanctions that can be imposed on perpetrators of prohibited acts (either in the form of criminal or action) and the implementation system. Third, planning or policies regarding procedures or mechanisms of the criminal justice system in the context of enforcing criminal law (Muladi & Arief. 1998).

Of the entire stages of criminal law enforcement, the formulation stage is very important, because it is at this stage that principles or guidelines are formulated which form the outline of policies relating to the three basic problems in criminal law, namely criminal acts, mistakes and crimes (Atmasasmita, 2011). Apart from that, it also serves as a legal basis for the operationalization of the next stages, namely the application stage by the judicial body and the execution stage by the executive body. Considering the importance of a policy formulation in crime prevention efforts, the formulation must be made as well as possible so as not to cause problems in the implementation of subsequent stages. Policy formulation is also related to criminal law reform because in essence criminal law reform is part of criminal law policy, criminal policy, and social policy in the context of protecting society and achieving social welfare. Criminal law reform also means an effort that is continuously implemented through criminal legislation with legal principles and values that develop in society both at the national and international levels (Jaya, 2000). The criminal law reform carried out by the Indonesian people today is by adding, subtracting, changing and completing the existing Criminal Code.

Sexual violence in the Criminal Code and outside the Criminal Code, there are several articles that can be imposed, articles on rape, articles on sexual harassment or obscene acts, sexual violence which is regulated in the PKDRT Law, the Human Trafficking Crime Law, the Child Protection Law, and Sexual Violence which is regulated in the Sexual Violence Crime Law (Soesilo, 1976). *Qanun* as a form of legal regulation in Indonesia is not new. Especially in Aceh, *Qanun* has been known for a long time. One of the texts that can be referred to is writing from Tengku in Mulek in 1257 entitled *Qanun Syara'* of the Kingdom of Aceh (Jaya, 2000). Al Yasa' Abu Bakar, as quoted by Ahyar, explained that according to Liaw Yock Fang, the term *Qanun* is synonymous with custom and is usually used to differentiate between law contained in fiqh and law stated in custom (Jaya, 2000). For the current context and specifically in Aceh, *Qanun* based on the UUPA is a type of regional regulation that regulates the administration of the Aceh government and the lives of the Acehnese people (Article 1 UU 11/2006).

This definition is actually not commonplace. *Qanun* at the state level is usually equivalent to a law. Linguistically, *Qanun* means law. According to Jasser Audah, *Qanun* is a positive law constructed from fiqh and 'urf. The term *Qanun* is usually seen as synonymous with the terms sharia (*syariah*), fiqh (*fiqh*), and customs ('urf). Basically, these three terms have fundamental differences. Sharia (*syar'ah*) is a term that represents the divine side of Islamic law, while fiqh (*fiqh*) represents the cognitive side of Islamic law, namely something that is extracted from the texts and of course, is the result of the construction of ijtiḥad by legal experts (*fuqahâ'/faqih*). The blurring of the boundaries between fiqh and *syar'âh* results in claims of 'sanctity' towards the results of legal ijtiḥad carried out by humans which in the next level will lead to violence on accusations of heresy and heresy. Meanwhile, *Qanun* and 'urf each represent a specific legal system and customs (Gayo, 2017).

Such an explanation places the *Qanun* as not at all Islamic law which has a divine dimension (not sharia) in Audah's eyes. However, in reality, the terms of the Sharia are actually linked to the *Qanun* in Aceh. The Aceh *Qanun Jinayat* is even described by law as a *Qanun* containing Islamic law (Article 235 Paragraph (2) Law 11/2006). This is proven by the inclusion of *jarîmah* and *'uqûbât hudûd* in the *Qanun*. *Hudûd* in the Aceh *Qanun Jinayat*. are rules that are adopted as is from the text and are outlined in the *Qanun* (Abbas, 2015). Such claims are certainly dangerous and can be called claims of sanctity. In other words, Syahrizal places the *Qanun* in two dimensions, namely the divine dimension with its *hudûd* rules, and the human dimension with its *ta'zîr* rules.

A victim is a person who experiences physical, mental suffering and/or economic loss resulting from a criminal act that will, is currently, or has occurred (Article 1 paragraph (3) of Law Number 13 of 2006 concerning Protection of Witnesses and Victims as amended by Law Number 31 of 2014). The position and role of the victim is as a witness, so the victim also has a very important role in the criminal justice process (Waluyo, 2012). The meaning of victim is very diverse, there are several opinions of legal experts regarding the meaning of victim which are quoted in this article. Victims are people who, individually or collectively, have suffered harm, including physical or mental, emotional, or economic harm or substantial interference with their fundamental rights, through acts or commissions that violate criminal law in their respective countries, including abuse of power (Muladi, 2005). The definition of the victim can also be a person who has been injured mentally or physically suffering, loss of property or death resulting from an actual or attempted criminal offense committed by another (Mansyur et al, 2007). According to Arief Gosita, victims are those who suffer physically and spiritually as a result of the actions of other people who seek to fulfill their own or other people's interests which conflict with the interests and human rights of those who suffer (Widiartana, 2014).

Comparison of Regulations for Handling Sexual Violence in the *Qanun Jinayat* and the TPKS Law

The Criminal law policy includes three stages, namely formulation policy, application policy, and execution policy. Policy formulation is a plan or program from a lawmaker regarding something that will be done in dealing with certain problems and how to do or implement something that has been planned or programmed (Arief, 1994).

Of the entire stages of criminal law enforcement, the formulation stage is very important, because it is at this stage that principles or guidelines are formulated which form the outline of policies relating to the three basic problems in criminal law, namely criminal acts, mistakes and crimes (Kartanegara, 1988:78). Apart from that, it also serves as a legal basis for the operationalization of the next stages, namely the application stage by the judicial body and the execution stage by the executive body. Considering the importance of a policy formulation in crime prevention efforts, the formulation must be made as well as possible so as not to cause problems in the implementation of subsequent stages. Policy formulation is also related to criminal law reform because in essence criminal law reform is part of criminal law policy, criminal policy, and social policy in the context of protecting society and achieving social welfare (Setiono, 2004).

Nawawi said that what is meant by the term overcoming criminal law has 2 main elements, namely prevention efforts and repressive efforts after a criminal act occurs. One way to prevent it is by formulating criminal acts that are realistic and can be implemented. Regarding this matter, it will be explained how 2 laws that are the same but have different dimensions of location can guarantee prevention and protection against the same crime, namely the crime of sexual violence.

In this article, the substance of *Qanun Aceh* Number 6 of 2014 concerning *Jinayat Law (Qanun Jinayat)* and the TPKS Law is explained. The two statutory regulations have the same status as laws, only the dimension of location differentiates the application of the two regulations. *Qanun Jinayat* is only intended for people who live and reside in the Province of Nangroe Aceh Darussalam (NAD), while the TPKS Law applies nationally in the territory of the Republic of Indonesia. The similarity between the TPKS Law and *Qanun Jinayat* is that they act as laws in the statutory hierarchy according to Law Number 11 of 2012 concerning the Formation of Legislative Regulations. Apart from that, there are several similarities regarding forms of sexual violence, namely that both the TPKS Law and *Qanun Jinayat* regulate rape and sexual harassment.

Comparison is not only used to see the differences between the two regulations but is also used to see the similarities between the two. These similarities have implications for choosing the use of regulations which, if the same case occurs, have been regulated by both. The criminal act of sexual violence is not recognized in the Criminal Code or *Qanun Jinayat*. The term sexual violence is only recognized in several regulations outside the Criminal Code, one of which is the TPKS Law. Both the *Qanun Jinayat* and the Criminal Code only regulate several forms of sexual violence without mentioning it as sexual violence (Soerodibroto, 1979). For example, in the *Qanun Jinayat* regulates rape, even in the Criminal Code there is a rape article (Estrich, 2022). *Qanun Jinayat* and the TPKS Law have the same intersection in regulating several things. Both are *lex specialist* regulations when viewed from their position with the Criminal Code. *Lex specialist* means that if the same criminal act as regulated in the Criminal Code occurs, then that regulation will be applied, not the Criminal Code (Article 72 *Qanun Jinayat*).

Qanun Jinayat and the TPKS Law both regulate criminal acts of sexual harassment. Although the definition of sexual harassment between the two is different. Sexual harassment is an immoral or obscene act that is intentionally committed by someone in public or against another person as a victim, both male and female, without the victim's consent (Article 1 Paragraph (27) *Qanun Jinayat*). Meanwhile, sexual harassment regulated in the TPKS Law is divided into 2, namely physical sexual harassment and non-physical harassment. Non-physical harassment is any person who commits

non-physical sexual acts aimed at the body, sexual desires, and/or reproductive organs to degrade a person's honor and dignity based on their sexuality and/or morality, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (nine) months and/or a maximum fine of Rp. 10,000,000 (ten million rupiah) (Article 5 of the TPKS Law).

Meanwhile, there are 3 forms of physical sexual harassment in the TPKS Law. First, people who commit physical sexual acts aimed at the body, sexual desires, and/or reproductive organs degrade a person's dignity based on their sexuality and/or morality. Second, people who commit physical sexual acts aimed at the body, sexual desires, and/or reproductive organs to place someone under their power unlawfully, both inside and outside marriage (Hairi, 2023). Third, a person who abuses a person's position, authority, trust, or trust arising from deception or circumstances or takes advantage of a person's vulnerability, inequality, or dependency, forces or through misdirection moves that person to commit or allow sexual intercourse or obscene acts to be carried out with him or her. others (Article 6 of the TPKS Law).

Another regulatory similarity between the *Qanun Jinayat* and the TPKS Law is that both have a form of sexual violence with complaints. Not all forms of sexual violence regulated in the *Qanun Jinayat* and the TPKS Law are ordinary offenses, there are also offenses of complaints. Although they both regulate sexual violence in the form of a complaint offense, this means that if there is no complaint then law enforcement officials cannot process it (Nurtjahyo & Ramadhan, 2016). Even though they both have complaint offenses, the criminal acts are different. In *Qanun Jinayat*, criminal acts which are not absolute complaints are Jarimah Khalwat and Jarimah Ikhtilat. Meanwhile, in the TPKS Law, absolute complaint offenses include sexual harassment, both physical and non-physical, and electronic-based sexual violence. Above we have explained several similarities between the regulations regarding sexual violence in the *Qanun Jinayat* and the TPKS Law. Below, a diagram of the differences between the *Qanun Jinayat* and the TPKS Law will be shown as a reference and analysis.

Table 1.

Differences Regulation of Sexual Violence in TPKS Law and Qanun Jinayat

No	Characteristics	TPKS Law	Qanun Jinayat
1	Number of Types of Sexual Violence	There are 9 types of sexual in UU TPKS, and criminal acts also recognized outside the law	There are 9 forms of criminal acts (Jarimah) that are regulated, and 7 of the 9 forms of Jarimah regulate sexual violence.
2	Types and forms of sexual violence	Non-physical sexual harassment, physical sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence. Types and forms of sexual violence	Khalwat (being together between 2 people of different genders), Ikhtilath (making out), Adultery, Sexual Harassment, Liwath (the practice of sexual relations between men and men), <i>Musa-haqoh</i> (the practice of sexual relations between women and women), Rape.
3	Principles	Respect for human dignity, non-discrimination, best interests of victims, justice, expediency, and legal certainty.	Islam, legality, justice and balance, benefit, protection of human rights, learning for society.
4	Legal Subject	All Indonesian citizens and corporations (Administrators, controllers, beneficial owners of corporations, corporations).	1) Muslims 2) Not Muslims who commit Jarimah with Muslims and submit themselves to <i>Jinayat</i> law 3) Not Muslims but commit criminal acts that are not regulated in the Criminal Code but regulated in <i>Jinayat</i> Law 4) Business entities in Aceh.

No	Characteristics	TPKS Law	Qanun Jinayat
5	Punishment	Imprisonment, fines, and other penalties by the law include: 1) Revocation of child custody or revocations Forgiveness, 2) announcement of the perpetrator's identity 3) Confiscation of profits and/ or assets obtained from criminal acts of sexual violence. 4) Medical rehabilitation and social rehabilitation measures, 5) Confiscation of profits and/ or assets obtained from criminal acts of sexual violence (for corporations), 6) Revocation of certain permits, 7) Announcement of court decisions, 8) Permanent prohibition of committing acts certain, 9) Suspension of all or part of corporate activities, 10) Closure of all or part of the business premises corporation. 11) Dissolution of the Corporation.	unishment is in the form of 2 types of Hudud (which has been determined in the <i>Qanun</i> and must be imposed) and Ta'zir which can be an alternative, in the form of fines, flogging, and imprisonment. If the corporation is the perpetrator, then the penalty is a fine. For companies, business license revocation is added.
6	Victims	1) All citizens, whether women, men, and children, can be victims of criminal acts, 2) The child is a victim of absolute vulnerability, 3) No victim is also the perpetrator	1) Men, women, and children, 2) Children are not seen as victims with absolute vulnerability, 3) Allows victims to also be perpetrators in several criminal acts
7	Law Enforcement Officials	Police, prosecutors, judges, UPTD, LPSK, Community-based Service Provider Institutions, and companions.	Police, Prosecutor, Judge, Satpol PP or Wilayatul Hisbah
8	Criminal Aggravation	The crime can be made worse if the perpetrator is a superior, teacher, etc. who has a higher relationship than the victim, the condition of the victim, and the impact on the victim	It is aggravated if there is repetition, if the victim is a child if the crime is committed with one's mahram
9	Proofing	1) Disability testimony is recognized as full testimony accompanied by personal judgment, 2) Admission of electronic evidence, 3) Acknowledgment of the certificate of a clinical psychologist and/ or psychiatrist/specialist in mental medicine, 4) Medical records, 5) Forensic examination results, 6) Bank account examination results as documentary evidence, 7) The victim's report and 1 piece of evidence can be used to determine guilt.	1) In certain criminal acts, it is possible for there to be a confession from the perpetrator or another person, 2) If someone makes an accusation, then the person responsible must prove it, if it is not proven, the person accused will be punished, 3) In the crime of rape, the victim is required to collect initial evidence first, 4) The prosecutor in evidence is passive in waiting for evidence from the person making the confession or reporting.
10	Victim or Perpetrator Confession	There is no confession, only a report	There is confession from the victim/ perpetrator

No	Characteristics	TPKS Law	Qanun Jinayat
11	Prevention	There are prevention efforts regulated in Chapter VII Prevention, Coordination, and Monitoring.	There is no article about preventing <i>Jinayat's</i> actions
12	Protection	1) Victims cannot be reported back either civilly or criminally, 2) People with disabilities have their testimony considered complete, accompanied by a personal assessment, 3) The existence of a Victim Trust Fund Institution	1) A woman who becomes pregnant outside of marriage cannot be accused of adultery without strong evidence, 2) Confessing adultery is made into a long process so that those who confess can think again
13	Restitution	1) Restitution does not eliminate the victim's guilt and punishment, 2) There is no restorative justice in resolving crime, 3) Distinguish between restitution and compensation. Restitution from the perpetrator, compensation from the stat	1) Eliminating the crime, given by the perpetrator to the victim at the victim's request, 2) The state/ government does not provide compensation.
14	Compensation	1) Compensation for victims, not for perpetrators, 2) The mechanism is that if the perpetrator cannot pay restitution, the state will provide compensation, 3) People who are wrongly arrested without following procedures can ask for compensation according to the Criminal Procedure Code by filing a pre-trial hearing	1) Intended for people who are arrested and detained but are found to be acquitted by the judge, 2) Intended for people who are arrested and detained not according to procedures
15	Regulation of Rape and Adultery	Adultery is not sexual violences, rape is sexual violence. Both are regulated in the Criminal Code	Both are criminal acts with the same evidence, even though the criminal acts are very different
16	Prevention and Countermeasures	There is a flow of case handling, protection, and recovery for victims and perpetrators as well as prevention, coordination, and monitoring	It does not regulate prevention, it only regulates response mechanisms, namely after a criminal act has been committed

The table above explains the differences in the regulation of sexual violence in the *Qanun Jinayat* and the TPKS Law. It will not be discussed in detail and there is an explanation in the table above. The next explanation is about the regulations in these two regulations which do not have a victim's perspective and thus criminalize victims. The two regulations have different bases, so they look at the roots of criminal acts from different perspectives, which causes the regulated criminal acts to also experience differences. In the *Qanun Jinayat*, it is not explicitly stated which criminal acts are sexual violence and which are not sexual violence. The regulation of criminal acts in the *Qanun Jinayat* is divided from the perspective of moral provisions, which are permitted and which are not permitted based on religious law. This fulcrum makes criminal acts have a private dimension and a social dimension. For example, the criminal acts of *Khalwat*, *Ikhtilad*, *Liwath*, and *Musahaqoh*, which in national law are not criminal acts, are criminal acts in *Qanun Jinayat* because they conflict with community morals. If further identified in the crime above, the victim and perpetrator are the same person, as in narcotics crimes. Meanwhile, in the TPKS Law, a legal and not moral perspective is used so that it is clear that the victim is not the perpetrator. This difference makes proof and punishment confusing. Several arrangements are of concern in this paper that do not have a victim perspective (Herisasono, 2023).

Implications of Regulations for Handling Sexual Violence in the *Qanun Jinayat* and the TPKS Law for Victim Protection

The differences in regulations regarding sexual violence in the *Qanun Jinayat* and the TPKS Law have different consequences for the protection of victims. In the research, several articles were found that not only did not provide protection for victims but also cornered the victim's position. These articles are often found in *Qanun Jinayat* regulations rather than in the TPKS Law. Several articles harm victims instead of protecting them.

First, the position of children in the *Qanun Jinayat* and the TPKS Law have significant differences. In both regulations, a child has the same definition as in the Child Protection Law, namely someone who is not yet 18 years old. Even though they have the same definition, the placement of children in the two regulations is very different. In the TPKS Law, children are considered to have full/absolute vulnerability when they become victims of sexual violence. This means that the child's consent is not considered when having sexual relations with other people. A child's consent is considered not consent because it is done by a minor. If a child has sexual relations, the child will not be punished. Adults who have relations with children will be punished. In contrast to the *Qanun Jinayat* regulations, in the criminal acts of *Khalwat* and *Ikhtilath*, children are one of the criminal aggravations. However, it is not explained in more detail whether children will also be punished if they are proven to have committed *Khalwat* and *Ikhtilath*.

Including children as perpetrators in the crime of *Khalwat* and *Ikhtilath* instead of including the crime of sexual harassment proves the view that the *Qanun Jinayat* recognizes that children can give consent in a crime related to sex. This can be seen from the difference in definition between *Khalwat/Ikhtilath* and Sexual Harassment in *Qanun Jinayat*. *Khalwat* is the act of being in a closed or hidden place between 2 (two) people of the opposite sex who are not Mahram and without marriage ties with the consent of both parties which leads to the act of Zina (Article 1 Paragraph (23) *Qanun Jinayat*). *Ikhtilath* is an act of affection such as making out, touching, hugging and kissing between a man and a woman who are not husband and wife with the consent of both parties, whether in a closed or open place (Article 1 Paragraph (24) *Qanun Jinayat*), compare with the definition of sexual harassment is that sexual harassment is an immoral or obscene act that is intentionally committed by someone in public or against another person as a victim, whether male or female, without the victim's consent (Article 1 Paragraph (27) *Qanun Jinayat*).

In the definition above, it can be seen that children can still be charged with the crimes of *Khalwat* and *Ikhtilath*, meaning that the child is deemed capable of giving consent to commit *Ikhtilat* and *Khalwath*. Instead of including criminal acts against children in the criminal act of sexual harassment which has a more serious punishment, *Qanun Jinayat* opens up the opportunity for children to become perpetrators of criminal acts of *Khalwat* and *Ikhtilath*. These differences in regulation have serious impacts, in criminal acts of *Khalwat* and *Ikhtilath* children can be perpetrators, but in criminal acts of sexual abuse children cannot be declared as perpetrators. Children are just victims.

Second, it is still related to the regulation of children in *Qanun Jinayat*. If a child reports that sexual harassment has occurred, then law enforcement officers will see whether it is true that it is sexual harassment or whether it is a consensual act that falls within the limits of *Khalwat* and *Ikhtilath*. The perpetrator will prove that the child wanted the crime, not sexual harassment. The perpetrator only needs to prove that the child did not mind when the act was carried out against him. This is because the criminal threat of sexual harassment is heavier than the criminal threat of *Khalwat* and *Ikhtilath*. For sexual harassment, the criminal threat is regulated as follows: ... *threatened with Uqubat Ta'zir being whipped a maximum of 45 (forty-five) times or a fine of a maximum of 450 (four hundred and fifty) grams of pure gold or imprisonment for a maximum of 45 (forty-five) month* (Article 47 *Qanun Jinayat*). Meanwhile, the criminal threat for the crimes of *Khalwath* and *Ihktilath* is regulated as follows: ... *threatened with Uqubat Ta'zir whipping a maximum of 10 (ten) or a fine of a maximum of 100 (one hundred) grams of pure gold*

or imprisonment for a maximum of 10 (ten) months (Article 23 *Qanun Jinayat*). Meanwhile, the regulation of criminal threats for the crime of *Ikhtilat* is as follows: ...threatened with *Uqubat* whipping a maximum of 30 (thirty) times or a fine of a maximum of 300 (three hundred grams) of pure gold or imprisonment for a maximum of 30 (thirty) months (Article 25 *Qanun Jinayat*). Victims, in this case children, experience criminalization. The child must be able to prove that what the perpetrator did to him was completely against the child's wishes so that the perpetrator is charged with sexual harassment. If the child cannot prove that the act was against his will, then the child will become a perpetrator of *Khalwat* or *Ikhtilath*.

Third, the regulation of adultery and rape is ambiguous in the *Qanun Jinayat*. In the TPKS Law, rape and adultery are regulated in the old and new Criminal Code. Rape is recognized by the TPKS Law as sexual violence which is regulated outside the TPKS Law (Article 4 Paragraph (2) of the TPKS Law). Adultery is not a criminal act recognized as sexual violence under the TPKS Law. In the *Qanun Jinayat*, the definitions of rape and adultery do have differences, but in the process of proving these two criminal acts the proof is the same. The following is the definition of rape and adultery in the *Qanun Jinayat*. Sexual intercourse occurs between one or more men and one or more women without marriage with the consent of both parties (Article 1 Paragraph (26) *Qanun Jinayat*). Meanwhile, the definition of rape is sexual intercourse between 1) the vagina or anus of another person as a victim with the perpetrator's penis or other objects used by the perpetrator or 2) against the victim's vagina or anus with the perpetrator's mouth or 3) against the victim's mouth with the perpetrator's penis, violence or coercion or threats to the victim (Risal, 2022).

In *Qanun Jinayat*, adultery and rape are differentiated by the following elements: 1) *Zina* is committed based on mutual agreement, while sexual rape is committed due to violence, coercion, or threats against the victim. 2) Adultery is committed outside the bonds of marriage, rape does not require outside or within the bonds of marriage, 3) The act of adultery in the article is not explained in detail, while the elements of rape are included in the article in full (Lamintang & Lamintang, 2011). What is most striking is that these two acts, one of which was carried out willingly and the other was carried out because of violence/coercion/threats against the victim. However, in terms of evidence, the two criminal acts are similar.

Proving the crime of adultery committed by someone other than a husband and wife is different from proving adultery accused by their partner (husband and wife) (Marpaung, 1996). Proving the crime of rape is the same as proving the crime of adultery committed by a husband and wife. The following is a comparison of the evidence:

Table 2.

Comparison Proof Between Rape and Adultery

No	Comparative Aspects	Rape	Adultery
1	Characteristic	Coercion, Violence, Threats	Consent
2	Reporter	Everyone/Victim	Partner (Husband/Wife)
3	Proof	Victim looks for initial evidence	Preliminary evidence is not required
4	Oath	The perpetrator and the victim can both swear	The perpetrator and the victim can both swear
5	Legal Impact	Both of them free from punishment	Both of them free from punishment
6	Threats to the Victims	The victim is threatened <i>Qodzaf</i> , and the Perpetrator can report the victims	The victim is threatened with <i>Qodzaf</i> and can't reconciled

It can be analyzed from the table above that the crimes of adultery and rape have different characteristics, adultery occurs due to the consent of both parties, while rape occurs due to violence, threats, or coercion. However, in the crime of rape, when reporting, the victim must

bring initial evidence before it can be processed by law enforcement officials (Article 52 Paragraph (1) *Qanun Jinayat*). This of course burdens the victim, even though based on *Bewisj Voering*, the burden of proof in criminal law should be the responsibility of the Public Prosecutor (Hiariej, 2012). If the victim cannot collect initial evidence, investigators will look for initial evidence. If the evidence is insufficient, the victim can submit an oath as additional evidence (Article 52 Paragraph (3) *Qanun Jinayat*). The oath was taken 5 times, the first 4 oaths stating that the victim had been raped by the perpetrator, and the last oath stated that the victim was willing to accept Allah's curse if she lied (Article 53 *Qanun Jinayat*). If the victim has signed the BAP and is willing to swear an oath, but in front of the judge does not want to swear, then the victim is considered to be making a false accusation and can be charged with the crime of *Qodzaf* with the Hudud threat of being whipped 80 times (Article 54 *Qanun Jinayat*). The perpetrator appointed by the victim will be summoned and has the right to defend himself with the evidence he has, including being able to take the same oath as the victim above (Article 55 *Qanun Jinayat*). If the perpetrator and victim both take an oath, then both are exempt from criminal threats (Article 56 *Qanun Jinayat*). The victim is free from the criminal threat of *Khalwat*, *Ikhtilat*, and *Qodzaf* while the perpetrator is free from the crime of rape.

Proving the crime of adultery is the same as the process and steps of the crime of rape. If a wife accuses her husband of adultery or vice versa, then the accuser must prove it, one of which is by oath. The oath in question explains that the accuser saw his partner commit adultery, if he lies then he will receive curses and punishment from Allah (Article 60 *Qanun Jinayat*). The accused of adultery will also take the same oath, namely to deny the accuser's accusations (Article 61 *Qanun Jinayat*). If both of them have sworn to their respective beliefs, the judge will release them both with the condition that they must divorce and are not allowed to reconcile at any time (Article 62 *Qanun Jinayat*).

Proving the crimes of adultery and rape should not have the same method of proof. There are losses and even violence that overshadows the crime of rape that the victim must bear. In terms of dimensions, rape victims should receive protection by guaranteeing the victim's rights, but the resolution of cases is left to religious legal mechanisms that do not show justice. The problem is different with the crime of adultery. The dimension of the loss is more private and does not threaten the life of the accuser. Rape victims under *Qanun Jinayat* do not receive the same protection as victims under the TPKS/KUHP Law. *Qanun Jinayat* in regulating rape corners the victim, criminalizes the victim, is unable to provide justice for the victim, and negates the principles of victim protection.

Fourth, the differences in regulations regarding restitution in the TPKS Law and *Qanun Jinayat* are also interesting to discuss. In the TPKS Law, there are 2 compensation mechanisms to which victims are entitled, Restitution and Compensation. Restitution is regulated by several laws such as the Terrorism Law, the Human Rights Courts Law, the Witness and Victim Protection Law, the Human Trafficking Law, the Juvenile Justice Law, and the TPKS Law. Restitution and Compensation are two different things according to the TPKS Law. Restitution is the payment of compensation that is charged to the perpetrator or third party based on a court ruling or decision that has permanent legal force, for material and/or material losses suffered by the victim or his heirs (Article 1 Paragraph (20) of the TPKS Law).

The TPKS Law and *Qonun Jinayah*, have origins rooted in different principles. The TPKS Law is based on human rights principles that prioritize individual rights, especially those of victims. In contrast, *Qonun Jinayah* is formed based on Islamic law principles that prioritize creating a communal society based on monotheism, justice, goodwill and evil, independence, equality, mutual assistance, and tolerance (Anwar, November 2023).

Meanwhile, compensation in the TPKS Law is defined as follows, Victim assistance funds are state compensation funds for victims of sexual crimes (Article 1 Paragraph (21) of the TPKS Law). Restitution in the TPKS Law takes the following forms: First, compensation for loss of wealth

or income. Second, compensation for losses incurred as a result of suffering directly related to criminal acts of sexual violence. Third, Reimbursement of medical or psychological treatment costs. Fourth, compensation for other losses suffered by the victim as a result of criminal acts of sexual violence (Article 30 of the TPKS Law).

Restitution in the TPKS Law originates from the perpetrator and does not eliminate or erase the perpetrator's mistakes. Perpetrators are still processed under criminal law, even the TPKS Law prohibits restorative justice mechanisms in resolving sexual violence. In *Qanun Jinayat*, restitution is interpreted as a certain amount of money or property, which must be paid by the perpetrator, his family, or a third party based on a judge's order to the victim or his family, for suffering, loss of certain assets or compensation for costs for certain actions.

In *Qanun Jinayat* there is no regulation regarding compensation, but in *Qanun Aceh* Number 7 of 2013 concerning the *Jinayat* Procedural Law, compensation for victims is called compensation, not restitution. In the TPKS Law, what is meant by restitution is compensation from the perpetrator, the perpetrator's family, or a third party, while compensation is compensation for losses borne by the state if the perpetrator is financially unable to pay restitution. In *Qanun Jinayat* there is only restitution without compensation, so the state is not forced to provide compensation to victims. Compensation is compensation charged to the state because the state cannot protect its citizens.

Conclusion

From the explanation and analysis above, it can be concluded that overcoming sexual violence is based on the *Qanun Jinayat* which regulates repressive efforts against criminal acts of sexual violence. Repressive means only regulating when a criminal act occurs, not holistically regulating prevention (before) and protection (after) of a criminal act. This is different from the TPKS Law which regulates the overall handling of sexual violence, starting from prevention, eradication, and protection of victims. The implications of regulating sexual violence in *Qanun Jinayat* lead to revictimization, especially for victims of rape and sexual abuse of children. The TPKS Law has positive implications for treatment arrangements that prioritize victims of sexual violence.

References

- Abbas, S. (2015). *Maqashid al-Syariah dalam Qanun Jinayat di Aceh*. Dinas Syari'at Islam. Banda Aceh.
- Atmasasmita, R. (2011). *Sistem peradilan pidana kontemporer*. Kencana Prenada Media Group. Jakarta.
- Arief, B. N. (1994). *Kebijakan legislatif dalam penanggulangan kejahatan dengan pidana penjara*. Disertasi. Universitas Diponegoro. Semarang.
- Estrich, S. (2002). Rape, dalam Kelly D. Weisberg, *Applications of feminist legal theory to women's lives: Sex, violence, work and reproduction*. Temple University Press. Philadelphia.
- Gayo, A. A. (2017). Aspek hukum pelaksanaan *Qanun Jinayat* di Provinsi Aceh. *Jurnal Penelitian Hukum De Jure*, Vol. 17, No. 2, Juni 2017. (Accessed on 27 March 2023)
- Hadi, S. (1983). *Metodologi research*. Yayasan Penerbitan Fakultas Psikologi UGM. Yogyakarta.
- Herisasono, A, dkk. (2023). Implementasi pembuktian tindak pidana kekerasan seksual dalam perspektif Undang-undang Nomor 12 tahun 2022. *Jurnal Preferensi Hukum*. Vol 4 No. 23, Nov 2023.
- Hairi, P. J. (2023). Implementasi undang-undang Nomor 12 Tahun 2022 tentang tindak pidana kekerasan seksual. *Jurnal Negara Hukum*, Vol.14 No. 2, Novemner 2023.
- Hiariej, E. O.S. (2012). *Teori dan hukum pembuktian*. Erlangga. Jakarta.

- Lamintang P. A. & Lamintang, T. (2011). *Kejahatan melanggar norma kesusilaan dan norma kepatutan*. Sinar Grafika. Jakarta.
- Mansyur, A, Dikdik M. & Gultom, E. (2007). *Urgensi perlindungan korban kejahatan: antara norma dan realita*. Raja Grafindo Persada. Jakarta.
- Marpaung, L. (1996). *Kejahatan terhadap kesusilaan dan masalah preverensinya*. Sinar Grafika. Jakarta.
- Muladi, A. & Barda N. (1998). *Teori-teori kebijakan pidana*. Penerbit Alumni. Bandung.
- Muladi. (2005). *Hak asasi manusia: Hakekat, konsep dan implikasinya dalam perspektif hukum dan masyarakat*. Refika Aditama. Bandung.
- Law Number 22 of 2022 on Concerning Crime of Sexual Violence
- Law Number 11 of 2006 on Aceh Government
- Law Number 81 of 1981 on Criminal Procedure Code
- Law Number 21 of 2007 on Eradicating the Crime of Human Trafficking
- Law Number 23 of 2004 on Elimination of Domestic Violence
- Law Number 39 of 1999 on Human Rights
- Law Number 23 of 2002 on Children Protection
- Narbuko, C & Abu, A. (2007). *Metodologi penelitian*. PT. Bumi Aksara. Jakarta
- Nurtjahyo, L. I & Ramadhan, C. R. (2016). *Kekerasan terhadap perempuan, dalam Ludwina Inge Nurtjahyo dan Choky Ramadhan. Peradilan pidana: Analisis konsistensi putusan*. MAPPI FHUI. Jakarta.
- Jaya, N. S. P. (2000). *Pembaharuan hukum pidana*. Badan Penerbit Universitas Diponegoro. Semarang.
- Waluyo, B. (2012). *Viktimologi perlindungan korban dan saksi*. Sinar Grafika. Jakarta.
- Widiartana, G. (2014). *Viktimologi perpektif korban dalam penanggulangan kejahatan*. Cahaya Atma Pustaka. Yogyakarta.
- Rezaty, M. A. (2022). 10 Provinsi dengan jumlah desa/kelurahan yang paling banyak terjadi perkosaan. <https://databoks.katadata.co.id/datapublish/2022/03/29/provinsi-dengan-kasus-perkosaan-tertinggi-nasional-ini-sebarannya>. accessed on 24 November 2023.
- Risal, M. C. (2023). *Perlindungan hukum terhadap korban kekerasan seksual pasca pengesahan undang-undang tindak pidana kekerasan seksual: Penerapan dan efektivitas*. *Jurnal Add-Daulah*. Vol. 11 No.1. Juni 2022.
- Kartanegara, S. (1988). *Hukum pidana 2*. Balai Lektur Mahasiswa. Bandung.
- Setiono. (2004). *Rule of law (supremasi hukum)*. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret. Surakarta.
- Soesilo, R. (1976). *Kitab undang-undang hukum pidana serta komentar-komentarnya lengkap pasal demi pasal*. Politeia. Bogor.
- Soerodibroto, S. (1979). *KUHP diengkapi arrest-arrest Hoge Raad*. Kejaksaan Agung. Jakarta.
- Soekanto, S. (1984). *Pengantar penelitian hukum*. UI Press. Jakarta.
- Sudarto. (1981). *Hukum dan hukum pidana*. Penerbit Alumni. Bandung.