



The Ijtihad of Female Judges in Aceh's Sharia Courts: Disparity in Sentencing for Child Sexual Abuse

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Abstract

This study examines the *ijtihad* (independent reasoning) undertaken by female judges in the Sharia Court when imposing sentences on perpetrators of child sexual abuse. It highlights the variations in the judges' verdicts, which include punishments such as caning and imprisonment, as well as sentences that differ either higher or lower—from the demands of the Public Prosecutor. This study utilized an empirical juridical method, combining statutory analysis with the *maqashid al-sharia* (objectives of Islamic law) approach. Data were gathered through interviews with female judges and a review of judicial decisions, journal articles, books, research reports, and legal regulations. The findings reveal that female judges' *ijtihad* in sentencing child sexual abusers has been driven by trial evidence and the best interests of the child. The judges typically approve of imprisonment as a means of limiting contact between the perpetrator and the victim, in order to safeguard the child from further trauma. Within the framework of *maqashid al-sharia*, the verdicts of these female judges have been in line with the principles of protecting the interests and security of the child, as the main objective of Islamic law. This study suggests that courts review the caning rules in the Qanun Jinayat and consistently prioritize the child's best interests while imposing penalties.

Keywords: *Ijtihad* of the Judge, Female Judges, Sentencing Disparity, Abusers, Child Sexual Abuse, Qanun Jinayat

Abstrak

Penelitian ini mengkaji ijtihad (penalaran independen) yang dilakukan oleh hakim perempuan di Mahkamah Syariah dalam menjatuhkan hukuman kepada pelaku kekerasan seksual terhadap anak. Penelitian ini menyoroti variasi putusan hakim yang mencakup hukuman cambuk dan penjara, serta vonis yang berbeda—baik lebih ringan maupun lebih berat dari tuntutan Jaksa Penuntut Umum. Penelitian ini menggunakan metode yuridis empiris dengan menggabungkan analisis peraturan perundang-undangan dan pendekatan maqashid al-shariah (tujuan hukum Islam). Data diperoleh melalui wawancara dengan hakim perempuan serta telaah terhadap putusan pengadilan, artikel jurnal, buku, laporan penelitian, dan regulasi hukum. Temuan menunjukkan bahwa ijtihad hakim perempuan dalam menjatuhkan hukuman bagi pelaku kekerasan seksual terhadap anak didasarkan pada bukti persidangan dan pertimbangan kepentingan terbaik bagi anak. Para hakim umumnya menyetujui hukuman penjara sebagai cara untuk membatasi kontak antara pelaku dan korban, guna melindungi anak dari trauma lebih lanjut. Dalam kerangka maqashid al-shariah, putusan para hakim perempuan ini sejalan dengan prinsip perlindungan terhadap kepentingan dan keamanan anak, sebagai tujuan utama dari hukum Islam. Penelitian ini merekomendasikan agar pengadilan meninjau kembali aturan tentang hukuman cambuk dalam Qanun Jinayat dan secara konsisten mengutamakan kepentingan terbaik bagi anak dalam menjatuhkan hukuman.

Kata kunci: *Ijtihad Hakim, Hakim Perempuan, Disparitas Pidana, Pelaku, Kekerasan Seksual terhadap Anak, Qanun Jinayat*

Introduction

For the majority of Muslim-majority countries in the Islamic world, female judges remain a contentious issue. Several Muslim nations in the Middle East and North Africa have approved the appointment of women as judges, including Iraq in 1959, Morocco in 1961, Tunisia and Lebanon in 1966, Yemen in 1971, Syria in 1975, and Sudan in 1976. This trend briefly halted in the 1970s and 1980s but saw a massive resurgence in the 1990s, with Libya in 1991, Jordan in 1996, Egypt in 2003, Bahrain in 2006, the United Arab Emirates (UAE) in 2008, Qatar in 2010, and Mauritania in 2013. Saudi Arabia followed suit in 2016.¹

In South Asia, Pakistan appointed four female judges in Punjab in 2013, with a significant increase in 2020. Similarly, in Southeast Asia, Malaysia decided to appoint female judges in 2003, and by 2006, the National Fatwa Council of Malaysia

¹Muhammad Abdelhay, "Female Judges in Islamic Law: An analytical reading of the related texts and their contextual interpretations," *Bulletin of The Faculty of Languages & Translation* 9, No. 2 (2015), p. 30-66. Karen Bauer, "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law," *Journal of the American Oriental Society* 130, No. 1 (2010), p. 1-21.

officially supported this decision.² Meanwhile, in Indonesia, women have been appointed as judges in Religious Courts since the 1960s, with formal appointments becoming standardized in 1989. To a certain extent, Indonesia is considered to be at the forefront of providing opportunities for women to become judges.³

This is an important issue to address because female judges possess the same competence as their male counterparts in adjudicating cases. To a certain extent, they even demonstrate a stronger bias towards women than men. Their role, however, still appears to be underutilized in deciding cases across various matters handled by the Sharia Court in Aceh, which operates as part of Aceh's special autonomy and the principle of *systematic lex specialis*.⁴ The Sharia Court in Aceh possesses a broader jurisdiction compared to Religious Courts outside of Aceh. In addition to handling matters of family law such as divorce, inheritance distribution, child custody, and endowments, it also deals with legal issues outlined in the Qanun Jinayat. These include cases related to alcoholic beverages, *khalwat* (close proximity between unmarried individuals of opposite sexes), *zina* (illicit sexual intercourse), gambling, lesbianism, and child sexual abuse.⁵

Sentences handed down by female judges in child sexual abuse cases vary significantly from one verdict to another. This disparity is clearly evident in the types of punishment imposed, whether caning or imprisonment.⁶ Some judges opt for caning, while others lean towards imprisonment as a long-term preventative measure and a means of protecting the victim.⁷ Differences are also apparent in how closely the verdicts align with the demands put forth by the public prosecutor.⁸ Some female judges tend to impose sentences that align with the prosecutor's demands, while

²Ramizah Wan Muhammad and Ahmad Muslim Rozlan, "Women as Shari'ah Court Judges with Reference to Judicial Creativity: A Comparative Study of Malaysia and Indonesia," *US-China Law Review* 15, No. 1 (2018). Abdulraheem Taofeeq Abolaji, "Appointment of Female as a *Qāḍi* (Judge) of Shari'ah Court of Appeal in Nigeria: A Gender Battle or Religious Stance," *Shariah Journal: Academic of Islamic Studies Universiti Malaya* 31, No. 1 (2023).

³Euis Nurlaelawati and Arskal Salim, "Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia," *al-Jami'ah: Journal of Islamic Studies* 51, No. 1 (2013). Arskal Salim and Euis Nurlaelawati, *Demi Keadilan dan Kesetaraan*, Jakarta: Puskumham dan Asia Foundation, 2009.

⁴Syahrizal Abbas and Ramzi Murziqin, "Sharia-Based Regional Regulations in the Indonesian National Law System," *Jurnal Ilmiah Peuradeun* 9, No. 3 (2021).

⁵Analiensyah Analiensyah and Ali Abubakar, "Children Handling Procedure in Islamic Criminal Offense in Aceh," *Ahkam* 21, No. 1 (2021). La Gurusi, et al., "Islamic Legal Perspective on Data of Child Victims of Sexual Violence: A Case Study of the Indonesia's Court," *De Jure* 16, No. 2 (2024).

⁶Mansari and Hasnul Arifin Melayu. "Caning Sentence Reversal for Jarimah Criminal in Decision Number 07/Jn/2016/Ms. Aceh." *Jurnal Hukum dan Peradilan* 7, no. 3 (2018), p. 425-440.

⁷Salman Abdul Muthalib, et al., "Analisis Kepentingan Terbaik Bagi Anak Dalam Hukum Jinayat Aceh." *Al-Mashlahah Jurnal Hukum Islam dan Pranata Sosial* 9, no. 02 (2021).

⁸Mansari and Muslim Zainuddin. "Independensi Hakim Mahkamah Syar'iyah dalam Menjatuhkan 'Uqubat bagi Pelaku Pelanggaran Jarimah Qanun Jinayat." *Proceeding of Seminar Penguatan Implementasi Kewenangan Mahkamah Syar'iyah dalam Perkara Jinayah di Aceh*, Banda Aceh, 21 October 2019, p. 159-179.

others rule for penalties either higher or lower than what was sought. In this context, some judges might believe caning is more consistent with Sharia principles and the need for a deterrent effect. Others, however, may view imprisonment as a more effective means of protecting victims and preventing repeat offenses by the perpetrator.⁹

The alternative punishments stipulated in Article 47 provide judges with the discretion (*ijtihad*) to impose sentences.¹⁰ A panel of judges may impose sentences of caning, fines, or imprisonment. All three of these punishments significantly impact the aspect of child protection. If the use or selection of punishment is done wisely and considers the best interests of the child, it can certainly have a positive effect on a child's development. Conversely, an inappropriate choice of punishment can have detrimental effects on a child's life.

The selection of alternative punishments regulated in the Qanun Jinayat Law requires judges to exercise *ijtihad* (independent reasoning) so that the verdict handed down truly results in the best interests of the child.¹¹ *Ijtihad* is the maximum intellectual effort by a qualified scholar to uncover truth from its sources across various fields of Islamic knowledge.¹² Judges of the Sharia Court, as individuals vested with the authority to rule on cases brought before them, are no stranger to engaging in *ijtihad*, particularly when adjudicating child sexual abuse cases. Through the *ijtihad* exercised by judges, it is hoped that high-quality and beneficial decisions can be reached for children, encompassing both the perpetrator and the victim.

This present study aims to analyze the model of *ijtihad* employed by female judges in Aceh's Sharia Court when imposing '*uqubat* (punishments) on child sexual abuse perpetrators. It also seeks to explore the appropriate type of '*uqubat* for such perpetrators in Aceh, and the reasoning behind female Sharia Court judges' decisions that deviate from Supreme Court Circular Letter No. 10 of 2020. This study used an empirical juridical legal research method, with statutory and *maqashid al-sharia* approaches.¹³ Data were collected through interviews with female judges and a literature review of materials found in judicial decisions, journal articles, books, research reports, and other relevant theoretical sources.

⁹Muslim Zainuddin, "Penjatuhan Hukuman Cambuk Terhadap Pelaku Pelecehan Seksual Terhadap Anak." *Legalite: Jurnal Perundang Undangan dan Hukum Pidana Islam* 8, no. 1 (2023), p. 58-74.

¹⁰Syahrizal Abbas, *Antologi Pemikiran Hukum Syariah di Aceh*, Banda Aceh: Nasa Aceh, 2018, p. 9-10.

¹¹Salman Abdul Muthalib, et al., "Analisis Kepentingan Terbaik Bagi Anak Dalam Hukum Jinayat Aceh." *Al-Mashlahah: Jurnal Hukum Islam dan Pranata Sosial* 9, No. 02 (2021). Zulfia Hanum Alfi Syahr, et al., "The Role of Indigenous Peoples, Social Workers, and the Syar'iyah Court in Diversion of Children Perpetrators of Jinayah," *al-Manahij* 17, No. 1 (2023).

¹²Ahmad Khisni, *Metode Ijtihad dan Istimbad Ijtihad Hakim Peradilan Agama*, Semarang: Unissula Press, 2018, p. 16.

¹³Jonaedi Efendi and Prasetijo Rijadi, *Metode Penelitian Hukum: Normatif dan Empiris*, Jakarta: Kencana, 2022.

***Ijtihad* of Female Judges in Cases of Child Sexual Abuse**

Female judges, as enforcers of Jinayat laws in Aceh, have the duty to use *ijtihad* when examining Jinayat issues, including child sexual assault. When faced with such circumstances, female judges do not depend merely on existing legal texts; they also engage in *ijtihad* to achieve rulings that are both just and beneficial to all parties concerned, particularly the victims. Female judges utilize their *ijtihad* to assess the most appropriate sentence, whether it is caning in Islamic law or imprisonment, which is more typically used in modern legal systems.

The *ijtihad* exercised by female judges in deciding sexual abuse cases aims to achieve two primary goals of law enforcement for children: justice and utility. First, justice must be upheld by ensuring that the punishment meted out is proportionate to the offense committed, and that the rights of the victim are respected and protected. Second, utility means that the punishment should have a positive effect on society as a whole, specifically by deterring perpetrators and preventing similar crimes from recurring in the future. In handing down verdicts, there is a disparity among judges across various Sharia Courts.¹⁴ This disparity raises important questions about consistency and standards in the application of law, as well as how the best interests of the child as a victim can be optimally protected in every verdict. A number of verdicts with sentencing disparities can be seen in the following table.

**Table 1: Forms of Sharia Court Verdicts in Aceh
Child Sexual Abuse Cases**

No.	Case Number	Year	Court	Prosecutor's Demand	Sentence Imposed
1	3/JN/2023/MS.Sgi.	2023	Sigli	90 months	80 months
2	24/JN/2023/MS.Sgi	2023	Sigli	65 lashes	65 lashes
3	6/JN/2023/MS.Lsk	2023	Lhoksukon	25 lashes	30 lashes
4	26/JN/2022/MS.Jth	2022	Jantho	80 months imprisonment	60 months imprisonment
5	1/JN/2023//MS.Mrd	2023	Meureudu	90 months imprisonment	90 months imprisonment
6	6/JN/2023//MS.Mrd	2023	Meureudu	60 months imprisonment	60 months imprisonment
7	4/JN/2022/MS.Lsm	2022	Lhokseumawe	45 lashes	45 lashes

Data Source: Aceh Sharia Court, 2024.

The use of *ijtihad* by female judges in making decisions in these cases is a major contributing factor to this variation. As a method of independent legal

¹⁴ Salma Salma, "Between Flogging and Imprisonment: The Disparity Effect of the Sharia Court's Decision on the Supremacy of the Qanun Jinayat of Aceh," *Istinbath* 9, No. 2 (2024).

reasoning, *ijtihad* allows judges to take into account a number of variables, such as the impact on the victim, the social context, and the case context. However, *ijtihad* can also lead to notable differences in legal interpretation and application among judges. The *ijtihad* undertaken by female judges considers several factors: the psychological and social condition of the victim, the long-term impact of sexual abuse on the victim, and societal views on justice. In addition to applying the law mechanically, female judges who practice *ijtihad* also take morality, ethics, and humanitarian considerations into account when rendering decisions. This strategy strives for court rulings that give victims the best possible protection, lessen their suffering, and foster a genuine sense of justice in the community.

According to Wafa, a judge at the Sharia Court in Idi, female judges in Aceh follow a systematic process when exercising *ijtihad* in child sexual abuse cases. Firstly, they carry out *mubahasah al-qadhaya*, which comprises a careful analysis of all factual and legal matters, including a close look at the evidence that was used in the trial. Secondly, they rely on legal evidence from the Qur'an, Sunnah, and Qanun Jinayat, which together form the main foundation for their *ijtihad*. Thirdly, they acquire a thorough comprehension of Aceh's legal texts and principles, as well as the sociological and psychological elements of the community. Lastly, they proceed and make inferences (*natijah*) and formally establish the legal ruling (*konstituir*) against the sexual perpetrator.¹⁵

It is clear from Wafa's explanation that Acehnese female judges regularly apply *ijtihad* when deciding cases involving child sexual abuse. However, unlike traditional *fiqh* (Islamic jurisprudence) scholars, this does not indicate that these female judges are creating up new laws. Instead, the *ijtihad* exercised by the female judges in the Sharia Court means applying the law's current provisions to the unique circumstances of each case. To put it simply, even though these judges do not generate new legal theories, their rulings still amount to *ijtihad* since they carefully consider the appropriate penalties that should be imposed in light of the offense committed and the victim's experience.

Wafa further elaborates that a judge's *ijtihad* in imposing '*uqubat* on child sexual abuse perpetrators involves considering several key factors. These include the future of the abused child, the identity of the abuser, the child's environment, and naturally, the compliance with the national laws and Qanun.¹⁶ Wafa's statements confirm that the panel of judges hearing child sexual abuse cases consistently engages in *ijtihad*. However, this does not imply that these judges are creating entirely new laws, as *fiqh* scholars might.

¹⁵Interview with Wafa, Judge of Sharia Court in Idi, East Aceh, March 28, 2024.

¹⁶Interview with Wafa, Judge of Sharia Court in Idi, East Aceh, March 28, 2024.

The judges base their *ijtihad* on four main considerations, as follows:

1) The Perpetrator and Environment

Judges consider who the sexual abuser is and the environment surrounding the abused child. Perpetrators can come from various backgrounds, including biological fathers, close relatives, neighbors, educators, and so forth. For instance, if the perpetrator is the child's parent or a close family member, a judge would likely not impose caning. To safeguard the child's well-being and keep the perpetrator away from the child, the court will opt for imprisonment. This serves as a lesson for both the perpetrator and the wider community. Imprisonment ensures that the victim and perpetrator cannot meet again while the perpetrator serves their sentence in prison.

Imprisonment serves to separate the perpetrator from the victim, thereby offering the victim greater protection. By serving a prison sentence, the perpetrator will have no opportunity to interact with or harm the victim again. Imposing a prison sentence ensures that the perpetrator will not be able to meet the victim again during their time in correctional facilities. This measure is a crucial strategy to prevent the recurrence of sexual abuse. A judge's decision to avoid imposing caning, based on the consideration that it could lead to the child victim encountering the perpetrator again, is a logical step. In the context of child sexual abuse, maintaining distance between the victim and the perpetrator is the top priority for protecting the child's psychological and physical well-being.

The decision to avoid imposing caning demonstrates a mature understanding of the psychological impact an abused child might experience. Re-encountering the sexual abuser can cause significant stress, trauma, and various other psychological problems for the child. This is especially true in cases of sexual abuse where the perpetrator is someone within the child's environment; without a prison sentence, it is highly likely they could meet the child victim again. The aim is to prevent the possibility of repeat offenses or situations that threaten the child's well-being in the future.

2) Legal Regulations

The panel of judges in the Sharia Court refers to written law when deciding cases of child sexual abuse. Article 47 of the Qanun Jinayat Law specifically governs the penalties for perpetrators of child sexual abuse. Written legal guidelines are crucial in Aceh's justice system as they help ensure legal certainty, utility, and justice for the community. The panel of judges assesses trial facts to determine the elements of the article violated by the perpetrator, such as whether the offense constitutes sexual abuse or rape.¹⁷ Rubaiyah states that there is no difference between female and male judges in resolving *jinayat* (criminal) cases. All judges adhere to the

¹⁷Nurul Huda, et al, *Formulasi Jenis 'Uqubat Terhadap Pelaku Jarimah Pemerkosaan dan Pelecehan Seksual terhadap Anak*, Jakarta: Kencana, 2021, p. 60.

regulations set forth in the Qanun, covering both *'uqubat* and procedural law (i.e., Qanun Number 6 of 2014 concerning Jinayah Law and Qanun Number 7 of 2013 concerning Jinayah Criminal Procedure Law). If a matter is not regulated by the Qanun, it falls outside the jurisdiction of the Sharia Court.¹⁸

The information shared by Rubaiyah highlights the equality between female and male judges when handling *jinayat* cases in the Sharia Court. This indicates that there is no difference in how female and male judges are treated, as both adhere to the guidelines set out in the Qanun, the regulations pertaining to *jinayah* law and its procedural aspects. Both male and female judges refer to Qanun Number 6 of 2014 concerning Jinayah Law and Qanun Number 7 of 2013, which governs Jinayah Criminal Procedure Law. Essentially, they all abide by the positive legal rules applicable in Indonesia. However, if a case is not regulated by the Qanun, it falls outside the jurisdiction of the Sharia Court. This signifies that the Sharia Court's authority is limited to cases explicitly covered by the applicable Qanun.

3) Best Interests of the Child

The safety and well-being of the child are the primary focus when determining sentences for perpetrators of sexual abuse. This is the top priority for judges when delivering verdicts. Concern for the protection and justice of child victims of sexual crimes must be prioritized as a form of protection provided by the judge through their decision.

The numerous cases of sexual abuse in Aceh must serve as a fundamental consideration for judges when imposing sentences on perpetrators. Judges must seriously consider the social and cultural conditions in the region and how these influence the sexual abuse cases that occur. Judges can render appropriate and successful decisions to give victims justice and stop future occurrences of sexual abuse by being aware of this context. Particularly in situations where children have been sexually abused, judges must actively defend children's rights and make sure that their rulings respect the legal and justice ideals that are widely held in society.

4) Evidence Presented in Court

Judges rely heavily on the facts and evidence presented during the trial to inform their decisions. Judges use the information at their disposal to make decisions. This is consistent with a Hadith that states, "*Nahnu nahukmu bi aldhawahir wa Allahu yatawalla al-sarair*" (We judge only by what is apparent, and Allah determines what is hidden in the hearts).¹⁹ The fundamental principle in the Islamic judicial system emphasizes that a judge can only rule based on evidence presented before them or provable facts.

According to Nurismi Ishak, a judge at the Sharia Court in Sigli, judges

¹⁸Interview with Rubaiyah, Judge of Sharia Court in Sigli, Pidie, March 27, 2024.

¹⁹Syamsul Bahri, Hakim; Besar di Rantau, Tua di Jalan, Retrieved April 16, 2024 from: <https://badilag.mahkamahagung.go.id/suara-pembaca-badilag/suara-pembaca/hakim-besar-di-rawan-tua-di-jalan-12-12>

adhere to existing regulations by uncovering facts during trial when imposing sentences. Therefore, there is no difference in considerations between male and female judges when delivering a decision.²⁰ Similarly, Ervy Sukmarwati mentions that when judges apply '*uqubat* to child abusers, they use *ijtihad*, concentrating mainly on the victim's healing from trauma and the deterrent effect on the abuser.²¹ Ervy emphasizes the deterrent effect that should be imposed on perpetrators of sexual abuse, ensuring that the defendant truly feels the consequences of their actions.

The basis for judges' *ijtihad* in imposing '*uqubat* on *jinayat* offenders, as explained by Choiratunnisa, involves a comprehensive review, which includes victim testimonies, witness statements, defendant's statements, and all evidence presented in court. These components are then combined with legal regulations (i.e., both local Qanun and national positive law). All these elements are woven together to form a legal fact. A judge must thus be able to exercise *ijtihad* in light of these considerations in order to render a fair and advantageous decision.²²

According to Hadatul Ulya, a judge has the freedom to apply their legal reasoning based on their knowledge and conviction when reaching a verdict in a case, and this reasoning does not have to be identical to others'.²³ Hadatul Ulya describes a perspective where a judge has the freedom to exercise legal discretion when making decisions in a court case. This freedom allows a judge to offer their legal considerations when ruling on a matter brought before the court.

Currently, in every case of child abuse or rape, judges impose a prison sentence: up to 16 years for child rape and a maximum of 90 months for child sexual abuse. Sentencing a defendant to such a lengthy prison term is believed to have a positive impact on the child, helping them overcome the trauma they have experienced.²⁴

Emphasizing the best interests of the child is a fundamental principle in Indonesian national law regarding the fulfillment of children's rights. Female judges understand the importance of prioritizing the well-being and protection of children in every legal decision they make, thus imposing prison sentences as an appropriate step toward realizing these best interests. Female judges possess a deep understanding of the vulnerability of child victims in *jinayat* cases. They recognize that children are often the most vulnerable party in the justice system and require special protection and a sensitive approach.

It is crucial to emphasize that statutory regulations serve as the primary foundation for judges' legal decisions. However, other legal sources, such as customary law, jurisprudence, international treaties, and legal doctrines, are also relevant, though they hold a lower position in the legal hierarchy compared to

²⁰Interview with Nusismi Ishak, Judge of Sharia Court in Sigli, Pidie, April 16, 2024.

²¹Interview with Ervy Sukmarwati, Judge of Sharia Court in Tapaktuan, South Aceh, April 18, 2024.

²²Interview with Choiratun Nisa', Judge of Sharia Court in Singkil, March 28, 2024.

²³Interview with Hadatul Ulya, Judge of Sharia Court in Lhokseumawe, March 28, 2024.

²⁴Interview with Wafa, Judge of Sharia Court in Idi, East Aceh, March 28, 2024.

statutes.²⁵ Similarly, Qodry Azizy states that laws serve as a source of legal norms, establishing binding and enforceable rules. Consequently, any violation of these rules will lead to clear and tangible sanctions for those who break them.²⁶

There are three main objectives in the enforcement of Jinayat law in Aceh. The first objective is to establish and uncover material truth. This entails thoroughly and accurately revealing the factual circumstances of Jinayat cases criminal matters governed by Islamic law by properly applying the principles and procedures outlined in Jinayat criminal law. The aim is to ensure justice in all legal and judicial proceedings.²⁷ The second objective is of the Qanun to offer legal certainty and protection to all parties involved in the Jinayat legal procedure. This involves victims, complainants, witnesses, the surrounding community, suspects, and defendants. These legal protections must be balanced and consistent with Islamic principles, ensuring that the rights of all individuals are completely recognized, respected, and secured.

The third objective is of the Qanun to promote genuine repentance. It strives to assure that those who have committed offenses (*jarimah*) truly reflect on their wrongdoing and decide not to repeat acts that violates Islamic law. This objective represents the concepts of moral development and reform that are central to Islamic doctrine. Repentance is seen as a process that begins with intense remorse for past transgressions, followed by a solid commitment and determination to renounce harmful practices and adopt a righteous path in accordance with religious guidelines.²⁸ The purpose of criminal sentencing is not solely focused on the well-being of the offender; it also considers the well-being of the victim and the interests of society as a whole, as a system disrupted by crime. In Islam, criminal sentencing has a dual dimension: worldly and after worldly.²⁹

When a judge receives a case, he/she must first question and determine whether the defendant genuinely committed the accused act. Establishing guilt naturally involves examining the evidence presented in court and deciding if that

²⁵Siti Syafa Az Zanubiya and Marjan Miharja, "Pertimbangan Hakim dalam Memutus Perkara Tindak Pidana Kekerasan Dalam Rumah Tangga," *Mimbar Keadilan* 16, No. 2 (2023), p. 277-287. Nur Iftitah Isnantiana, "Legal Reasoning Hakim dalam Pengambilan Putusan Perkara di Pengadilan," *Islamadina: Jurnal Pemikiran Islam* 18, No. 2 (2017), p. 41.

²⁶Qodri Azizy, *Elektisisme Hukum Nasional Kompetisi antara Hukum Islam dan Hukum Umum*, Yogyakarta: Gama Media, 2004, p. 226.

²⁷Novi Susanti and Nursiti Nursiti. "Penentuan Jenis Uqubat dan Pelaksanaan Putusan dalam Penerapan Qanun Nomor 6 Tahun 2014 tentang Hukum Jinayat." *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana* 1, No. 2 (2017), p. 57.

²⁸Abd al-Hamīd Ibrāhīm al-Majāli, *Masqathath al-'Uqūbah at-Ta'zīriyyah*, (Riyād: Dār an-Nasr, 1412 H/1992 M), p. 105

²⁹Ocktoherrinsyah Ocktoherrinsyah. "Tujuan Pemidanaan dalam Islam." *IN RIGHT: Jurnal Agama dan Hak Azazi Manusia* 1, No. 1, (2011), p. 37.

evidence is compelling enough to prove the defendant's culpability.³⁰ The next step is to decide whether the act is a criminal violation under the relevant statute after the judge has determined that the defendant did, in fact, commit the act. This entails evaluating the case's pertinent legal laws and determining whether the defendant is guilty and should be punished.

4. No Minimum Sentence in Qanun Jinayat Law

Another factor contributing to the disparity in sentences among judges is the absence of a minimum sentence specified in Article 47 of the Qanun Jinayat Law. According to Nurismi Ishak, the severity of the sentence in sexual abuse cases is determined by the findings and facts presented during trial. This is because the Qanun only states the maximum possible punishment, not a minimum. Therefore, it is permissible to make decisions based on the evidence presented in court, taking into account both aggravating and mitigating circumstances.³¹

The available data clearly shows that the absence of a minimum sentence in child sexual abuse cases allows judges significant room for *ijtihad* when deciding these matters. The Qanun Jinayat Law specifies the maximum punishment that can be imposed but does not set a minimum. Without a lower limit, judges have the authority to consider various factors that emerge during trial, including both aggravating and mitigating circumstances, before delivering a sentence. These factors include the evidence presented, witness testimonies, the victim's psychological state, and any other relevant elements of the case.

Appropriate '*Uqubat* (Penalties) for Child Sexual Abusers

Penalization is a key method for preventing criminal acts by imposing sanctions or punishments on offenders. The term penalization is "pemidanaan" in Indonesian, derived from the root word "pidana" (penalty) with the prefix "pe-" and suffix "-an," forming a noun. This term "pemidanaan" is defined as the act of imposing a penalty or administering a criminal sanction.³² Sentencing perpetrators or individuals who commit crimes is carried out based on court examination, once they are legally and convincingly proven guilty.

Choiratun Nisa', a judge at the Sharia Court in Singkil, describes that minimizing contact between the defendant and the child is an effective preventative measure so that the defendant does not repeat similar offenses against children in the future, and referencing Supreme Court Circular Letter No. 10 of 2020 concerning the Enforcement of the Results of the 2020 Supreme Court Chamber Plenary

³⁰Novi Susanti and Nursiti Nursiti. "Penentuan Jenis Uqubat dan Pelaksanaan Putusan dalam Penerapan Qanun Nomor 6 Tahun 2014 tentang Hukum Jinayat." *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana*, Vol. 1, No. 2 (2017), p. 60.

³¹Interview with Nurismi Ishak, Judge of Sharia Court in Sigli, Pidie, April 16, 2024.

³²Sigit Suseno, *Sistem Pemidanaan dalam Hukum Pidana Indonesia di dalam dan di Luar KUHP (Suatu Analisis)*, Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM, 2012, p. 45.

Meeting, specifically point C, number 3 (three), letter (b) as mentioned above, the appropriate *'uqubat* to be imposed on the defendant is imprisonment as *'uqubat ta'zir*.³³

The appropriate type of punishment for the defendant is imprisonment as *'uqubat ta'zir*. This is an internal directive recommended by the Supreme Court through SEMA Number 10 of 2020, concerning the Implementation of the Results of the 2020 Supreme Court Chamber Plenary Meeting.

Analyzing this directive from the perspective of the goals of criminal sentencing in Islamic criminal law reveals its strong appropriateness. In *fiqh jinayat* (Islamic criminal jurisprudence), the aim of punishment is to provide lessons and education for the surrounding community, while also containing a rehabilitative value for the offender.³⁴

According to Choiratun Nisa, caning is not an appropriate punishment when the victim is a child. She explains her reasoning by referencing Supreme Court Circular Letter No. 10 of 2020. This circular, specifically point C, number 3 (three), letter (b), states that in cases of rape or sexual abuse where the victim is a child, the defendant must be sentenced to *'uqubat ta'zir* in the form of imprisonment to ensure the child's protection. This measure also aims to prevent the defendant from encountering the victim again, or from potentially repeating the same offense against other children in the community.³⁵

Zuhrah, a senior judge at the Syar'iyah Court in Sigli, expresses concern over the incidents of sexual abuse and rape in Aceh, especially when children are the victims. In the opinion of Zuhrah, the proper punishment for sexual abusers should be a cumulative sentence, not only incarceration.³⁶ This suggests that in addition to a prison sentence, it is more appropriate for the perpetrator to also receive a caning. Both forms of punishment should be combined within the verdict, as they serve not only as a lesson for the offender but also for others. The public can draw lessons from the caning, as it can be witnessed by the general community.

The issue, however, is that there are currently no rules allowing judges to impose cumulative sentences on defendants. The alternative most predominantly chosen by judges right now is imprisonment, considered a severe punishment. As a proposed solution to eliminate alternative sentencing options for judges, Rani Yuliana, a judge at the Sharia Court in Lhoksukon, suggests revising the Qanun Jinayat Law. Rani Yuliana states that if the goal is to prevent varying sentences,

³³Interview with Choiratun Nisa', Judge of Sharia Court in Singkil, March 28, 2024.

³⁴Abdul Syatar, "Relevansi Antara Pemidanaan Indonesia Dan Sanksi Pidana Islam." *Diktum: Jurnal Syariah dan Hukum* 16, No. 1, (2018), p. 128. Misran Misran and Desi Royanti, "Teori Gabungan Hukuman Dalam Hukum Positif Ditinjau Menurut Hukum Pidana Islam," *Legitimasi: Jurnal Hukum Pidana dan Politik Hukum* 9, No. 2 (2021), p. 237.

³⁵Interview with Choiratun Nisa', Judge of Sharia Court in Singkil, March 28, 2024.

³⁶Interview with Zuhrah. Judge of Sharia Court in Sigli, April 17, 2024.

then a revision of the Qanun is necessary to remove sentencing choices.³⁷ The opinion expressed by Rani is understandable because, in a legal state like Indonesia, everything ultimately leads to the supremacy of law. The law must be enforced as it is written in statutory regulations. It is highly unlikely to punish someone without legal rules, as this could lead to violations of the law. The principle of legality must be the primary guide for a judge when imposing a sentence.

With respect to alternative punishments under the Qanun Jinayat, it appears that there is not universal opposition to their adoption. Some also agree with the provision of alternative sentences, as expressed by Heni Yuliana, a senior female judge at the Sharia Court of Banda Aceh. According to Heni Yuliana, while she fundamentally agrees with alternative punishments, the imposition of such sentences must strictly consider their impact on both the perpetrator and the victim.³⁸

The statements from Heni Yuliana and Rani Yuliana reveal two distinct perspectives on alternative sentencing. While Heni Yuliana supports the alternative punishments provided in Article 47 of the Qanun Jinayat Law, she emphasizes that courts must carefully evaluate the consequences when imposing sanctions on offenders, whether it is imprisonment, caning, or a fine. This implies that she still prioritizes the child's best interests, is mindful of what is appropriate and inappropriate, and recognizes the potential implications, whether the punishment is caning or incarceration.

Cumulative Punishment: A Dimension of the Best Interests of the Child in Sexual Abuse Cases

Imposing a cumulative punishment combining caning and imprisonment for child sexual abuse perpetrators not only provides a deterrent effect but also ensures justice and utility for both the victims and society. When perpetrators are sentenced to imprisonment, they are separated from the community, especially from their victims. This helps victims avoid deeper feelings of fear or trauma that might arise if the perpetrator were released too quickly. Imprisonment guarantees that the perpetrator will serve a relatively long sentence while caning, which is typically carried out in public, offers a direct and clear lesson for the community witnessing it.

As of right now, judges are still able to choose among caning, fines, and imprisonment under Article 47 of the Qanun Jinayat Law, without having to combine the three options. In the context of child protection, this option raises the possibility that those who commit acts of child sexual abuse may only receive a fine or caning, which is frequently regarded as unfair or insufficient. On the other hand, the chance of the offender committing another crime in the community is greatly decreased

³⁷Interview with Rani Sayulina, Judge of Sharia Court in Lhoksukon, North Aceh, April 17, 2024.

³⁸Interview with Heni Nurliana, Judge of Sharia Court in Banda Aceh, April 17, 2024.

when cumulative punishment is used, in which the offender is both caned and imprisoned. Furthermore, the psychological effects of the punishment are recognized by the public who observe the caning execution, acting as a deterrent to future acts of similar behavior.

Philosophically, cumulative punishment combining caning and imprisonment aligns with *maqashid al-sharia*. It prioritizes general and specific well-being, especially for victims, in this case, children. As a vulnerable group, children require robust legal protection, which includes reducing the potential for ongoing trauma due to the perpetrator's presence in their surroundings. The application of this cumulative punishment can fulfill Sharia's goals of protecting life, honor, and lineage, while also prioritizing the best interests of the child.

The principle of the best interests of the child is a crucial tenet in handling cases involving children, as stipulated in Article 2 of the Child Criminal Justice System Law (UU SPPA).³⁹ According to this principle, the child's best interests are given precedence over all other considerations in decisions and actions that impact them. In the opinion of Abintoro, the term "best interests of the child" means that the child's survival and development should always come first in any action or decision involving a child, whether it be taken by family, the community, or legal stakeholders. This implies that every choice must be made with the best interests of the child's physical, mental, and emotional growth in mind.

The interests of the child ought to always come first, and any decision should be made with the child's best interests in mind.⁴⁰ This emphasizes how critical it is for families, communities, and the government to safeguard and maintain the welfare of children. It places a high priority on children's needs and rights in all facets of their lives, highlighting the shared responsibility to make sure children obtain the care and support they need to develop into healthy, capable individuals.

Under Article 47 of the Qanun Jinayat Law, anyone who willfully commits the crime of sexual abuse against a child as defined in Article 46 faces a maximum penalty of 90 lashes, a fine of up to 900 grams of pure gold, or a maximum sentence of 90 months in prison. In essence, this provision asserts that, depending on the evidence and facts presented during the trial, the court may sentence perpetrators of child sexual abuse to one or more of the penalties specified in Article 47, which include imprisonment, a fine, or caning. The penalty is intended to serve as a fair punishment and prevent future cases of child sex abuse in the community.

The chosen punishment will be based on factors such as the perpetrator's level of culpability, the impact of the sexual violence on the victim, and other relevant circumstances. The Court will determine the punishment deemed most

³⁹Fuad Nur,. "Perlindungan Hukum Terhadap Anak Sebagai Pelaku Tindak Pidana dalam Penanganan Perkara Anak." *Innovative: Journal of Social Science Research* 4, No. 1 (2024), p. 124-138.

⁴⁰Beniharmoni Harefa. "Diversi Sebagai Perlindungan Hukum Terhadap Hak Asasi Anak dalam Sistem Peradilan Pidana Anak di Indonesia." *Jurnal Komunikasi Hukum (JKH)* 1, No. 1 (2015), p. 3.

appropriate for the case under consideration. The established punishment aims to impose a fitting sanction on the sexual abuser, deliver justice to the victim, and serve as a preventative measure to deter similar acts from recurring in society.

The aforementioned alternative provisions allow judges to select one of the three prescribed punishments. Judges can choose caning, a fine, or imprisonment and cannot combine two or all three simultaneously because the provision does not permit it. The existence of this provision influences several judicial decisions, where some currently impose caning and others imprisonment. However, a fine has never been decided by a Sharia Court judge in Aceh. Although Supreme Court Circular Letter (SEMA) Number 10 of 2020 has been issued, primarily directing that child victims of sexual abuse and rape must receive imprisonment, this SEMA is often not implemented, and caning is more frequently imposed instead.

According to Wafa, however, caning is not an appropriate punishment for sexual offenders. This is because the effects of such immoral acts do not fade immediately; instead, victims frequently experience intense and long-lasting distress. Therefore, if a victim is still recovering from trauma, an unexpected encounter with the perpetrator after they have received only a caning can be deeply distressing. The victim may take years to recover psychologically, while the offender is free to reintegrate into society after the caning, which often concludes in an hour. The victim may be forced to relive their traumatic experiences simply by looking at the offender. On the other hand, if the offender receives a prison sentence, the victim may feel more secure during that time, which may lessen their anxiety and fear of running into the offender and possibly help them recover.⁴¹

In cases of sexual abuse, imprisonment is preferable to caning. This is due to the fact that victims of sexual abuse may sustain severe scars, and the trauma they endure will not dissipate. Victims of caning executions still struggle to recover from and overcome the psychological effects of the ordeal. A punishment commensurate with the harm inflicted by the offender becomes crucial when victim's experiences chronic trauma.

Victims may feel more secure and shielded from unwelcome interactions with the offenders if they are sentenced to prison. Punishment should serve both the victim's protection and the upholding of justice. By lowering the possibility of unwanted interactions with the abusers, incarceration provides victims of sexual abuse with a higher degree of protection.

The concept of *maslahah* (public interest), which is the primary objective of *maqashid al-shariah*, places the interest or common good as the main foundation for policymaking and the enactment of legislation in a state.⁴² This illustrates the importance for a leader to consider and ensure that every piece of legislation

⁴¹Interview with Wafa, Judge of Sharia Court in Idi, East Aceh, March 28, 2024.

⁴²Galuh Nasrullah Kartika and Hasni Noor. "Konsep Maqashid al-Syari'ah dalam Menentukan Hukum Islam (Perspektif Al-Syatibi dan Jasser Auda)." *Al-Iqtishadiyah: Ekonomi Syariah dan Hukum Ekonomi Syariah* 1, No. 1 (2014), p. 50-69.

produced contributes to the realization of public well-being (*maslahah*). The principle of *maslahah* in Islamic law, which emphasizes that the purpose of Islamic sharia is to realize the well-being or good for individuals and society, becomes the foundation for a leader in formulating, enacting, and even ratifying legislative products within the context of governance and lawmaking.

The principle of *maslahah* stresses social justice and the general welfare of society. A leader must ensure that the policies they create will benefit the entire community and not harm specific parties. Islamic sharia emphasizes the importance of safeguarding the well-being of the community and avoiding all forms of harm. Therefore, an Islamic leader must ensure that every legislative product generated aligns with Islamic principles and does not contradict religious teachings. The principle of *maslahah* also highlights the importance of avoiding harm and accidents that can occur in society. Hence, a leader must ensure that the policies they create will not bring negative impacts or danger to the community.

In order to achieve *maslahah*, regulations must advance society's general welfare and advancement. A leader ought to consider about how their policies will affect community social life, health, education, and economic growth. It is therefore imperative to amend the Qanun Jinayat Law's provisions regarding child sexual abuse in order to give children the best possible legal protection.⁴³ Concerns about child protection are raised by the current provisions, especially those pertaining to alternative punishments where judges have the option of caning, incarceration, and fines. Judges' options for punishment, particularly caning, may be detrimental to the protection of children. The psychological and physical health of child sexual abuse victims may be at risk since offenders may be freed after being caned and may subsequently come into contact with their victims again. Therefore, the interests of child protection must be taken into account when reformulating these regulations, among other factors.

Tightening the laws governing the punishment of child sexual abusers is one way to make sure that the penalties imposed are appropriate for the seriousness of the offense and have the right kind of deterrent effect. Furthermore, efforts to prevent child sexual abuse need to be strengthened. This includes raising public awareness about the issue, educating children about their rights and how to protect themselves from abuse, and improving access to health and counseling services for victims of sexual abuse.

Conclusion

This study concludes that when deciding cases involving child sexual abuse, female judges apply *ijtihad*, or independent reasoning, which combines trial facts with legal regulations. Judges using this *ijtihad* approach have taken into account particular circumstances that are disclosed during the trial, such as the psychological

⁴³Muzakkir Muzakkir, "Dawn of Justice: Evaluating the Alignment of Women and Children in Aceh's Qanun Jinayat," *Ahkam* 32, No. 2 (2022).

effects and trauma endured by the child victim, in addition to the existing legal provisions. These judges also tend to impose prison sentences on child sexual abusers as a form of optimal protection and in the best interests of the child. Imprisonment is chosen because it is considered more effective than caning in separating the perpetrator from the victim, preventing further contact that could worsen trauma, and providing time and space for the victim's recovery. As part of Islamic legal objectives, these female judges' rulings in *maqashid al-shariah* are in line with the child's protection and interests. Additionally, this approach complies with international norms for safeguarding children's rights and making sure they receive justice and welfare within the legal system.

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