

DUALISM IN THE SETTLEMENT OF JINAYAT CASES IN SABANG CITY

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Abstract

Implementing *jinayat* law enforcement in Sabang of Aceh Province experiences a dualism of settlement, which causes legal uncertainty. This can be observed in practice where the Sabang District Court instead adjudicates cases that should be under the jurisdiction of the Sabang Sharia Court. This article elaborates on the dualism in the settlement that occurs and identifies the causes of the dualism in the settlement of criminal cases using Soerjono Soekanto's law enforcement factor theory. Based on that, efforts were found that could be made to overcome this dualism. The analysis results indicate that the dualism of settlement can be observed through 6 (six) cases that should be under the jurisdiction of the Sabang Sharia Court but were adjudicated by the Sabang District Court, the majority of which are minor-related cases. There are cases where the same defendant is tried in close succession in both judicial institutions for similar acts with different victims. It happens due to various factors, such as the legal factor: inadequate provisions regarding minors at Qanun Jinayat. Law enforcer factor: other views on minor-related cases and a lack of

precision in implementing existing law. Facilitating factor: unavailability of detention rooms at Sabang Sharia Court and budget for executions. Society factors: public lack of legal knowledge. Based on the results of this identification, efforts can be made to include professional law enforcement, harmonization of judicial authority through internal agency regulations, and evaluation of moral offenses in the Qanun Jinayat.

Keywords: the dualism of authority, *jinayat* cases, Aceh Qanun

Introduction

The criminal law enforcement in Aceh Province has specificities following the enactment of Law Number 11 of 2006 on the Aceh Government, namely the application of Islamic Sharia in criminal law enforcement (*jinayat*). This was achieved after a peace agreement between the Government of the Republic of Indonesia and the Free Aceh Movement (GAM) was stated in a Memorandum of Understanding (MoU) signed in Helsinki, Finland, on 15 August 2005.¹ One of the contents of the agreement states that

Aceh will exercise authority within all sectors of public affairs, which will be administered in conjunction with its civil and judicial administration, except in the fields of foreign affairs, external defense, national security, monetary and fiscal matters, justice and freedom of religion, the policies of which belong to the Government of the Republic of Indonesia in conformity with the Constitution.²

Then another section of the agreement states that "Qanun Aceh will be re-established for Aceh respecting the historical traditions and customs of the people of Aceh and reflecting contemporary legal requirements of Aceh".³ This agreement was then ratified with the issuance of President's Instruction Number 15 of 2005 on the Implementation of a Memorandum of Understanding between the

¹ Liza Agnesta Krisna and Rini Fitriani, "Dualisme Kewenangan Mengadili Perkara Anak Sebagai Pelaku Kejahatan Pelecehan Seksual Di Kota Langsa-Aceh", *Yuridis*, Vol. 5 No.2 (2018), p. 263.

² See Article 1.1.2.a *Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement*.

³ See Article 1.1.6 *Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement*.

Government of the Republic of Indonesia and GAM, which then became the basis for the preparation and formulation of the Aceh Government Bill to be passed into law.⁴

The provisions for enforcing *jinayat* law are regulated in Aceh Qanun Number 6 of 2014 on Jinayat Law (hereinafter referred to as Qanun Jinayat), Aceh Qanun Number 7 of 2013 on Jinayat Procedure Law (hereinafter referred to as Qanun Jinayat Procedure Law) and Aceh Governor Regulation Number 5 of 2018 on Implementation of Jinayat Procedure Law (hereinafter referred to as Governor's Regulation on Jinayat Procedure Law). In Qanun Jinayat, prohibited acts (*jarimah*) include *kehamar*, *maisir*, *kehalwat*, *ikhtilath*, adultery, sexual harassment, rape, *qadzaf* and *liwath*.⁵ The Sharia Court is given the authority to try these cases.⁶ Of the ten *jarimah*, three types of *jarimah* are also regulated in the Criminal Code or other criminal provisions outside the Criminal Code, such as *maisir*, adultery, sexual harassment, and rape (*jinayat* criminal offenses, which are included in general crimes). Therefore, in these three types of *jarimah*, there is an intersection of adjudicatory authority between the Sharia Court and the District Court.

The intersection of the authority to resolve these three crimes causes a problem of dualism in authority. In the period from 2020 to 2023 in the city of Sabang, six cases that should have been under the jurisdiction of the Sabang Sharia Court were instead adjudicated by the Sabang District Court. The data says 5 (five) of which are minor-related cases. There was also a case where the same convict was tried in the Sabang District Court and the Sabang Sharia Court in close succession for a series of sexual harassment acts committed against minors and adults. None of them had been sentenced between the times of each fact occurring. The convict (hereinafter referred to as convict X) was sentenced to caning by the Sabang Sharia Court and

⁴ Gusti Ayu Indira Syahrani Putri, et al, "Status Memorandum Of Understanding (MOU) Perdamaian Antara Indonesia Dengan Gerakan Aceh Merdeka (GAM) Menurut Hukum Perjanjian Internasional", *Media Komunikasi Pendidikan Pancasila Dan Kewarganegaraan*, Vol. 4 No. 2 (2022), p. 58.

⁵ See Article 3 Paragraph (2) Aceh Qanun Number 6 of 2014 on the Jinayat Law.

⁶ See Article 128 of Law Number 11 of 2006 on the Aceh Government.

sentenced to imprisonment by the Sabang District Court.⁷ There are *concursum* regulations in criminal law, so the case should ideally be prosecuted together in one court. This problem has created legal uncertainty in the criminal proceedings arising in Sabang. The settlement of criminal cases is related to the protection of human rights. Therefore, the issue must be overcome immediately by researching it.

In several previous studies, research was found that focused on the dualism of resolving sexual violence crimes by and against minors, as well as the dualism of resolving disputes between the Sharia Court and the Customary Court. In this research, the issues are not only sexual violence against minors but also other crimes using specific theories and approaches, such as judicial or non-judicial approaches. The research uses adjudicated cases to describe the law enforcement issues related to the application of *jinayat* law. Through various theories and methods, it is hoped that a solution can be found to overcome the problem.

This research uses a socio-legal type of research known as non-doctrinal research that generates empirical data to answer research questions.⁸ The data used is primarily obtained through direct interviews with sources from the Sabang District Prosecutor's Office, Sabang Sharia Court, and Sabang District Court. This article will elaborate on three main issues. First, to describe the reality of dualism in the *jinayat* settlement cases in Sabang. Second, to elaborate on the factors causing the dualism in the settlement of *jinayat* cases in Sabang. Third, to find the efforts that can be made to overcome this dualism. Through this research, it is hoped that the legal objectives of justice, legal certainty, and public benefit can be achieved while still respecting the Islamic culture in Aceh, which is based on Islamic Sharia.

Dualism in the Settlement of *Jinayat* Cases in Sabang City

The establishment of the Sharia Court in Aceh was declared valid after the Decision of the President of the Republic of Indonesia Number 11 of 2003. The Sharia Court automatically replaced the

⁷ See Sabang District Court Decision Number 32/Pid.Sus/2022/PN Sab and Sabang Sharia Court Decision Number 3/JN/2022/MS.Sab.

⁸ Salim Ibrahim Ali, et.al, "Legal Research of Doctrinal and Non-Doctrinal", *International Journal of Trend in Research and Development*, Vol. 4 No. 1 (2017), p. 494.

authority and function of the Religious Court, and the Provincial Sharia Court replaced the authority of the Religious High Court.⁹ Since then, gradually, in all districts/cities in Aceh Province, two types of courts can examine and try cases by statutory provisions. Sabang City has the Sabang Sharia Court and the Sabang District Court. The Sabang Sharia Court has the authority to try criminal acts regulated in the Qanun Jinayat in Sabang City. In general, the Sharia Court is given the authority to examine, try, decide, and settle cases covering the fields of *jinayat* (criminal law), *muamalah* (civil law), and *ahwal al-syakhsiyah* (family law) based on the principles of Islamic sharia.¹⁰ In the field of *jinayat*, based on data from the 2020-2023 period, the Sabang Sharia Court has tried 19 cases, with the most details being *maisir* with 9 (nine) cases, *ikhtilath* with 6 (six) cases, adultery with 2 (two) cases, rape with 1 (one) case and 1 (one) case of sexual harassment. It can be concluded that the Sabang City Sharia Court exists and carries out its authority by the provisions of the applicable laws and regulations.

The Sabang District Court is given the authority to try criminal cases unrelated to criminal acts of corruption, human rights, and *jarimah* as regulated in the Qanun Jinayat. Based on data in the 2020-2023 period, the Sabang District Court has tried 183 cases. In those 183 cases, some offenses should be adjudicated by the Sabang Sharia Court but are instead adjudicated by the Sabang District Court. The data are as follows:

Table 1.

Data on Jinayat Cases Tried by the Sabang District Court, 2020-2023

No.	Case Registration Number	Case Classification
1	25/Pid.Sus/2020/PN Sab	Minors Rape
2	55/Pid.B/2021/PN Sab	Rape
3	10/Pid.Sus/2022/PN Sab	Minors Rape

⁹ Raihan Azzahra and Farid Sufian Shuaib, "Religious Courts in Indonesia and Malaysia: History, Structure, and Jurisdiction", *Indonesian Comparative Law Review*, Vol. 4 Issue 2 (2022), p. 119.

¹⁰ See Article 128 Paragraph (3) Law Number 11 of 2006 on the Aceh Government.

4	15/Pid.Sus/2022/PN Sab	Minors Rape
5	32/Pid.Sus/2022/PN Sab	Minors Molestation
6	20/Pid.Sus/2023/PN Sab	Minors Rape

Source: Sabang District Court Archives, 2024

The defendant's actions have been proven and sentenced to imprisonment in all six cases. On the other hand, Sabang Sharia Court has previously adjudicated both rape and sexual harassment cases. There are also criminal cases where the convict is tried by the Sabang District Court and the Sabang Sharia Court for the same act, but the difference is the time and the victim. Convict X sexually assaulted several women over a certain period; some of the victims were still minors, and some were adults. Convict X was then tried at the Sabang District Court with the case registration number 32/Pid.Sus/2022/PN Sab, for what he has done, convict X, sentenced to 6 (six) years in prison and a fine of Rp. 10.000.000- (ten million rupiah). If the fine is not paid, it will be replaced with 4 (four) months in prison.¹¹ In the next month, Convict X was also tried by the Sharia Court with case registration number 3/JN/2022/MS.Sab, for his crime, Convict X was sentenced with *'Uqubat Ta'zir* punishment in the form of 39 (thirty-nine) canes in public.

Convict X knew that his act was a crime, but he didn't understand the specific provision of Qanun Jinayat. He got the explanation about the indictment article during the investigation and prosecution process, but because he was scared and anxious, he didn't understand the explanation. The fear and anxiety caused him to feel there was something wrong with the law application for his case, but then simply surrender to the situation. In this case, the judges appointed a public lawyer to accompany and help him. However, during the trial at the Sabang District Court, they never made any exceptions regarding the absolute competence of the court.¹² Ultimately, he was sentenced to 39 (thirty-nine) caning in public and 6 (six) years in prison.

¹¹ Sabang District Court Case Tracking System (SIPP), <https://sipp.pn-sabang.go.id> accessed 15 Jan 2024.

¹² Results of Interview with Defendant X in The Sabang Class II B Detention Center on 15 June 2023.

In this case, he should be tried simultaneously because he is known to have committed multiple criminal offenses concurrently (*concursum*). Among these acts, there has not yet been a court decision. Furthermore, suppose the District Court and the Syar'iyah Court of Sabang impose the maximum prison sentence for *Uqubat*. In that case, he will receive 15 years in prison and 90 caning in public (equivalent to 90 months/7.5 years in prison). So, the total sentence he received was 22.5 years in prison. This violates the 20-year maximum temporary jail sentence stipulated in Article 12 paragraph (4) of the Criminal Code.

The condition of this dualism in authority indeed results in legal uncertainty for the community in the City of Sabang. Of course, some factors cause this dualism. Therefore, it is necessary to identify and subsequently make efforts to overcome the issue.

Analysis of Factors Causing Dualism in the Settlement of Jinayat Cases, Which Included General Crimes in Sabang City

Criminal law enforcement should be able to create a sense of justice and certainty and provide public benefits for the entire society. Soerjono Soekanto stated that various factors can influence law enforcement, namely the law itself, law enforcement, facilities that support law enforcement, society, and culture.¹³ If studied according to this theory, the factors that influence the dualism of law enforcement authority in Sabang City can be described, namely:

Law Factor

This factor means that if there is a provision in a law, that provision affects the implementation of law enforcement, whether it supports good law enforcement or becomes an obstacle to law enforcement. There are obstacles to enforcing *Jinayat* law, namely the absence of adequate provisions for minors. There are special provisions about *jarimah*, in which the victim and the defendant are minors in Qanun Jinayat. The provision regarding minors as a victim or a defendant stated in Article 66 and Article 67 of Qanun Jinayat, for minors as the victim is stated in each article regarding *jarimah*. Those articles aggravate the punishment if a minor commits a criminal act.

¹³ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, (Jakarta: Raja Grafindo Persada, 2013), p. 7.

Then procedurally, in minors-related *jinayat* cases, there are provisions in the Governor's Regulation on Jinayat Procedure Law starting from Article 37 to Article 47. However, the formal provision for minors as defendants does not yet follow the standard as intended in Law Number 11 of 2012 on the Juvenile Criminal Justice System and Law Number 35 of 2014 on the amendments to Law Number 23 of 2002 on Minors Protection. There are no clear regulations regarding the technicalities of diversion, trial, arrest, detention, and so on relating to minors. Even though there are transitional provisions that state that the provisions in the Criminal Code or other statutory regulations regarding criminal procedural law (in this case, the Juvenile Criminal Justice System Law) remain in effect as long as they are not regulated in the Qanun¹⁴, However, the provisions of the Juvenile Criminal Justice System Law are intended to be held by district courts, not the Sharia courts.

Furthermore, there is also confusion regarding the provisions on adultery involving minors. The provisions of Qanun Jinayat Article 33 regulate the general offense of adultery, which is committed voluntarily by one or more men and women. Then, further in Article 34, the offense of adultery by an adult is qualified if it is committed against minors so that the punishment is increased. However, what needs to be evaluated is whether minors commit adultery. These provisions have not been regulated, making their application confusing. If you want to use Article 33, it is not appropriate because minors are involved in it. In contrast, if you use Article 34, there must be an adult, so the provisions regarding this offense should be evaluated.

The increased punishment for adultery against minors in Article 34 is similar to the *statutory rape* concept. The defendant is still considered to have committed a crime despite the absence of any force (or fraud or coercion) and even the presence of the victim's factual consent. The concept contends that persons below the age of consent lack the maturity and judgment to give sufficiently informed consent. So, juveniles are considered to be incapable of giving valid

¹⁴ See Article 285 Paragraph (3) Aceh Qanun Number 7 of 2013 on the Jinayat Procedure Law.

consent.¹⁵ Therefore, adultery against minors should be qualified as rape. However, if it's based on the concept of sin in Islamic Sharia, all forms of adultery should be punished. Therefore, there should be a provision regarding adultery, which is committed by minors against minors. Whatever concept wants to be implemented must still prioritize the principle of minor protection.

Law Enforcer Factor

In this factor, what is meant is law enforcers who directly or indirectly apply the norms of statutory regulation. In terms of the concept of law enforcement based on the subjective perspective, law enforcement institutions must ensure and ascertain that legal rules are correctly implemented.¹⁶ However, in implementing criminal law enforcement in Sabang City, there is a dualism in authority to judge, which is caused by diverging opinions of law enforcers about minors-related cases and the lack of accuracy of law enforcers in implementing existing legal provisions.

In *jinayat* cases involving minors, there are diverging opinions about the authority of the Sabang District Court and the authority of the Sabang Sharia Court. There is an opinion that criminal acts involving minors, even those that qualify as criminal acts regulated in the Qanun Jinayat, are still within the authority of the Sabang District Court because the Juvenile Criminal Justice System Law and the Minors Protection Law are more specific than the Jinayat Qanun and the Jinayat Procedural Law Qanun.¹⁷ This opinion also seems to agree with the Sabang District Court, which is based on the 5 (five) cases described previously in Table 1, which involve minors, all of which were processed and tried at the Sabang District Court. Likewise, the legal advisor in this case did not submit an exception regarding the authority to judge, so this authority was not considered in the

¹⁵Russell L. Christopher and Kathryn H. Christopher, "The Paradox of Statutory Rape", *Indiana Law Journal*, vol. 87, issue 2, (2012), pp.514-515.

¹⁶Yahman, "Understanding Law Enforcement in the Perspective of Expediency and Justice", *Ius Positum (Journal of Law Theory and Law Enforcement)*, Vol. 3 Issue 1 (2024), p. 33.

¹⁷ Results of Interview with the Head of the General Crimes Section of the Sabang District Prosecutor's Office on 24 July 2023.

decision.¹⁸ As previously explained, this opinion is also influenced by the absence of adequate regulations in the Qanun regarding handling cases involving minors.

Another opinion states that the authority to adjudicate the *jarimah* in the Qanun Jinayat, even though it concerns minors, is the absolute authority of the Sharia Court as stipulated in the Qanun Jinayat. There are also juvenile justice procedural law regulations in the Qanun on *Jinayat* Procedural Law and the Governor Regulation on *Jinayat* Procedure Law. Technically, all judges at the Sabang Sharia Court already have certification to adjudicate minors as mandated by law. However, in practice, the Sharia Court as a judicial institution only hears submitted cases, so it only waits for cases.¹⁹ There is nothing they can do about this.

Furthermore, the obstacle to this factor is the lack of accuracy by law enforcement officials in implementing the existing legal provisions. This can be seen through the rape case number 55/Pid.B/2021/PN Sab, which the Sabang District Court tried. Even though the act of rape is a type of rape regulated in the Qanun Jinayat and the convict is a Moslem. The specificity of the provisions of *jarimah* in the Qanun Jinayat towards criminal provisions in the Criminal Code or other criminal provisions outside the Criminal Code has been stated in several provisions, such as in Article 72 of the Aceh Qanun Number 6 of 2014, which the Indonesian Prosecutor's Office subsequently internalized through Attorney General of the Republic of Indonesia Circular Letter (SEJA) Number: SE:-2/E/Ejp/11/2020 on the Guidelines for Handling of Criminal Case and Islamic Criminal Case in the Aceh Province. Based on these provisions, all *jarimah* actions regulated in the Qanun Jinayat should be delegated and tried at the Sabang Sharia Court.

Facilities to Support the Law Enforcement Factor

Facilities that support law enforcement also influence law enforcement itself. Facilities are tools to achieve goals within their scope, especially the physical facilities. Law enforcers cannot optimize their role as they should if no well-prepared facilities accompany law

¹⁸ Sabang District Court Case Tracking System (SIPP), <https://sipp.pn-sabang.go.id>, accessed 15 Jan 2024.

¹⁹ Results of Interview with Judges of the Sabang Sharia Court on 31 July 2023.

enforcement.²⁰ In the context of criminal law enforcement in Sabang City, this factor is an obstacle: the unavailability of temporary detention space for defendants who will undergo trial at the Sabang Sharia Court and budget constraints in executing the judge's decision.

Unlike the Sabang District Court, which has a detention room for defendants who will stand trial, the Sabang Sharia Court does not yet have such a room, so the defendant, while waiting for trial, is detained in the Prosecutor's room. The construction of a detention room is currently in the procurement process, so there will also be a detention room available for future *jinayat* trials in the not-too-distant future.²¹ Therefore, it will be difficult if there are a large number of detainees to be tried.

Furthermore, in terms of budgeting constraints on executions at the execution stage of criminal cases, it is generally carried out by the Prosecutor, the same as in *jinayat* cases, it is the Prosecutor who carries out the execution, but specifically for the *'Uqubat* caning, the Prosecutor is assisted by an executor (*jallad*) from the Civil Service Police (*Satpol PP*) and Wilayatul Hisbah Service of the Regency/City.²² The punishment is carried out in an open place. The public can witness it by complying with the provisions in Articles 262 to Article 275 of the Qanun *Jinayat* Procedural Law. Its implementation requires extra costs such as officers' honorarium, stage, and sound system rental fees, etc.²³ However, budgeting is not in the Sabang District Prosecutor's Office but in the regional government budget. This is because the budget implementation list (DIPA) of the Republic of Indonesia Prosecutor's Office does not provide space regarding the execution of *jinayat* cases. After all, it is generally applicable to all work units in Indonesia.²⁴ Therefore, the execution several times could not

²⁰ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum...*, p. 44.

²¹ Results of Interview with Judges of the Sabang Sharia Court on 31 July 2023.

²² See Article 1 Number 37 Aceh Governor Regulation Number 5 of 2018 on the Implementation of the *Jinayat* Procedure Law.

²³ See Article 59 of Aceh Governor Regulation Number 5 of 2018 on Implementation of the *Jinayat* Procedure Law.

²⁴ Attorney General of the Republic of Indonesia Circular Letter (SEJA) Number: SE:-2/E/Ejp/11/2020 on the Guidelines for Handling of Criminal Cases and Islamic Criminal Cases in the Aceh Province Point E Regarding Budgeting.

run as mandated by the Qanun due to budget constraints both in terms of coordination and budget availability.²⁵

Society Factor

Society factors in law enforcement are closely related to community compliance or awareness. The higher the public compliance or awareness level, the better law enforcement functions. Compliance or awareness correlates with people's legal knowledge. People will be more obedient to the law if they know the law as one of the important principles in law enforcement, namely *nemo ius ignorare constetur*, which means that everyone is considered to know the law (written law) or also known as a legal fiction. The consequence of this principle is that ignorance of the law is not a reason to be forgiven (*ignorantia juris non excusat*).²⁶ Sufficient knowledge about the law is not the only condition for compliance with the law. However, knowledge of the law is clearly an indispensable element of legal competence.²⁷ Therefore, public knowledge of the law is important for law enforcement.

The public's low knowledge of the law can be observed in the case of convict X, who was tried in Sabang District Court and Sharia District Court in the adjacent period. He did not know that the criminal provisions he had violated fell within the authority of the district or sharia court.²⁸ Moreover, with other principles of criminal law, such as *ne bis in idem*, *lex specialis derogate lex generalis* atau *concursum realis*, which became an important principle in the case he experienced. His ignorance of this principle and the negligence of the accompanying legal advisor were some of the causes of the dualism of authority in this case, not to mention the other cases mentioned previously. People who commit criminal acts will surrender to being tried anywhere due to ignorance.

Cultural Factor

²⁵ Results of Interview with the Head of the General Crimes Section of the Sabang District Prosecutor's Office on 24 July 2023.

²⁶ Zainal Arifin Mochtar dan Eddy OS Hiarej, *Dasar-Dasar Ilmu Hukum*, (Jakarta: Red & White Publishing, 2021), p. 131.

²⁷ István H. Szilágyi, "Social Legal Consciousness or Legal Culture?", *Public Governance, Administration and Finances Law Review*, Vol. 7 No. 2 (2022), p. 10.

²⁸ Results of Interview with Convict X, 15 June 2023.

Cultural factors in law enforcement have similarities with societal factors but are differentiated because the values at the core of spiritual or material culture are emphasized in this factor.²⁹ In the context of the existence of Qanun Jinayat as a concretization of the values that live in the people of Sabang City, there is no problem because the people of Sabang City, who are predominantly Muslim, have long applied the principles of Islamic Sharia in their daily lives, like the people of Aceh in general. As the traditional saying goes, "*hukom ngoen adat lage dzat ngoen sifeut*" means that there is an inseparable attachment between the implementation of the Sharia and customs, like a substance and its properties.³⁰ According to data as of 2022, the population of Sabang City is 42,297 Muslims, 144 Protestants, 55 Catholics, and 229 Buddhists.³¹

Sabang City is a tourist city for local or foreign tourists. Based on 2022 data, 254,048 tourists came to Sabang City, with details of 251,685 local tourists and 2,363 foreign tourists.³² Therefore, the people who live in Sabang City are not only native residents. The challenge is that some people who are not native residents of Sabang City are resistant to the existence of Qanun Jinayat. This resistance can be seen from various efforts to prevent the implementation of Qanun Jinayat in Aceh carried out by various civil societies by forming the Civil Society's Network Concerning Sharia (*Jaringan Masyarakat Sipil Peduli Syariah*). Ultimately, they succeeded in delaying the implementation of the Qanun Jinayat but could not cancel it.³³ Some argue that the validity of Qanun Jinayat would be marginalized women. The position of women is unequal to that of the state. There

²⁹ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum...*, p. 59.

³⁰ See the Explanation of the General Section of Aceh Qanun Number 6 of 2014 on the Jinayat Law.

³¹ Badan Pusat Statistik Kota Sabang, *Kota Sabang Dalam Angka*, (Sabang: BPS Kota Sabang), 2023, p. 99.

³² Dinas Pariwisata Kota Sabang, "Data Kunjungan Wisatawan", https://dispar.sabangkota.go.id/media/2023.02/data_kunjungan_wisatawan_2022_desember1.pdf, accessed 23 July 2023.

³³ Reza Idria, "Cultural Resistance to Shariatism in Aceh", in *Regime Change, Democracy and Islam: The Case of Indonesia*, ed. by Kees van Dijk (Leiden: Universiteit Leiden, 2013), p. 188.

are so many prohibitions that control over the body of Aceh's women.
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The challenge also comes from foreign tourists whose countries adhere to liberal principles. It is possible for couples to make families without formal marriage. They potentially violate the law, such as *ikhtilath*, *khalwat*, and adultery, because Qanun Jinayat still applies to people who are not Muslim who commit acts of *jarimah* in Aceh, which other criminal provisions outside the Qanun do not regulate these acts.³⁵

The Possible Effort to Overcome Dualism in the Settlement of Jinayat Cases, Which Included General Crime in Sabang City

One approach to the criminal justice system in Indonesia is through law enforcement. The criminal justice system was undoubtedly created with particular aims and objectives. Generally, the criminal justice system aims to reduce crime and do justice.³⁶ Other criminal justice systems, such as the juvenile criminal justice system or the *jinayat* criminal justice system, have more specific aims and objectives. In the juvenile criminal justice system, there is a more specific goal, namely the realization of justice that guarantees the protection of the best interests of children who conflict with the law as the nation's successors.³⁷ Likewise, in Qanun Jinayat, the specific aim is to accommodate Islamic principles inherent in the Acehnese people in enforcing criminal law.³⁸ These goals can be achieved nobly if they are in line with the goals of the law itself. This problem of dualism is the opposite direction of the objectives of law.

Philosophically, Gustav Radbruch stated that the law has three values/objectives: public benefit, legal certainty, and justice. Sometimes, the values/objectives are not always united

³⁴ Zuly Qodir, et.al, "The Formalization Of Sharia In Aceh To Discipline The Female Body", *Al-Jami'ab: Journal of Islamic Studies*, Vol. 60, no. 1 (2022), p. 81.

³⁵ See Article 5 point (c) Aceh Qanun Number 6 of 2014 on the Jinayat Law.

³⁶ Matthew Robinson and Marian Williams, "The Myth of a Fair Criminal Justice System", *Justice Policy Journal*, Vol. 6 No.1 (2009), p. 4.

³⁷ See the General Section of the Explanation of Law Number 11 of 2012 on the Juvenile Criminal Justice System.

³⁸ See the General Section of the Explanation of Aceh Qanun Number 6 of 2014 on the Jinayat Law.

harmoniously.³⁹ However, the values/objectives should be included in every single general crime case settlement in Sabang City. Based on this opinion, efforts that can be made to overcome the dualism and achieve the legal objectives are as follows:

Professional Law Enforcement

In carrying out law enforcement activities at any time and anywhere, there are bound to be obstacles and hindrances that cause the function of law enforcement to be less than optimal. In implementing the provisions of the Qanun Jinayat in the criminal justice system in Sabang City, these obstacles and constraints have resulted in a dualism of authority caused by various factors, as previously described. One of the efforts that is expected to be able to realize legal objectives in implementing the provisions of Qanun Jinayat is to carry out professional law enforcement. Professional law enforcement is closely related to the law enforcement profession, namely law enforcement officers from the level of investigation, inquiry, prosecution, and court examination to execution. Law enforcement is a profession that is a role model in society. It should have specific abilities to society's aspirations and be able to provide a good example.⁴⁰

As previously explained, the dualism in resolving criminal and general criminal cases in Sabang City is still hampered by law enforcement aspects, such as the diverging opinions of law enforcers about cases involving minors and a lack of accuracy in law enforcement. These things create injustice for the victims and defendants who are tried. Based on the data in Table 1, of the 6 (six) cases that should fall under the authority of the Sabang Sharia Court, 5 (five) of these cases are minor-related cases as victims of sexual abuse and rape. As explained previously, diverging opinions of law enforcers are one of the causes. Law Number 35 of 2014 on the Amendments to Law Number 23 of 2002 on the Minors Protection is considered to be a more specific provision than the provisions in Law Number 11 of 2006 on the Aceh Government, which is the legal umbrella for the

³⁹ Gustav Radbruch, "Five Minutes of Legal Philosophy (1945)." *Oxford Journal of Legal Studies* Vol. 26 No. 1 (2006) p. 14.

⁴⁰ John Kenedi, *Kebijakan Hukum Pidana (Penal Policy) Dalam Sistem Penegakan Hukum di Indonesia*, (Yogyakarta: Pustaka Pelajar, 2017), p. 214.

existence of Aceh Qanun Number 6 2014 on the Jinayat Law. This is following the principle of *lex specialis derogate lex generalis*. For this reason, minor-related cases were transferred and tried at the Sabang District Court⁴¹

In criminal law teachings, principles are known *lex specialis derogate lex generalis*, which regulates the specifics of the application of criminal law, which is more specific than general criminal law. In the context of legal provisions in Indonesia, criminal law is often referred to as the Criminal Code. In contrast, other criminal provisions outside the Criminal Code are referred to as specific criminal law. The Minors Protection Law and Qanun Jinayat provisions are both specific criminal law provisions, thus raising questions about their applicability in the jurisdiction of Sabang City as part of the Aceh Province. The principle of *lex specialis derogate lex generalis* has derivatives if there is a conflict between special criminal laws, namely the principle of *lex spesialis systematis*. In determining the validity of a particular provision, some parameters can be used, namely:⁴²

1. There are material criminal provisions that deviate from existing general provisions.
2. There are criminal procedural laws that also deviate from general criminal procedural provisions.
3. Law subject (*adresar*) int that law has a particular characteristic.

If we analyze the first two provisions above, both contain a material criminal provision that deviates from the existing general criminal provisions. In this context, the material criminal provisions regarding sexual harassment and rape against minors, both in the Minors Protection Law and Qanun Jinayat, and both deviate from the general provisions in Chapter XIV of the Criminal Code regarding crimes against morality.

Then, the analysis in the second parameter found that although the Minors Protection Law does not contain criminal procedural provisions that deviate from general criminal procedural provisions, its specifics are regulated in Law Number 11 of 2012 on the Juvenile Criminal Justice System, which regulates the series of processes for

⁴¹ Results of Interview with the Head of the General Crimes Section of the Sabang District Prosecutor's Office on 24 July 2023.

⁴² Edward Omar Sharif Hiarej, "Asas Lex Specialis Systematis Dan Hukum Pidana Pajak", *Penelitian Hukum De Jure*, Vol. 21 No. 1, Maret 2021, p. 5.

resolving cases involving minors in conflict with the law. Similar to the provisions of Qanun Jinayat, there are Qanun Jinayat Procedure Law and Governor's Regulation on Jinayat Procedure Law, which deviate from criminal procedure provisions in general.

In the context of the specificity of the address or subject addressed by a statutory regulation. Qanun Jinayat describes the address or subject addressed more explicitly than the provisions of the Minors Protection Law. The provisions in the Minors Protection Law regulate sexual harassment and rape involving minors; the target audience is minors who are not yet 18 (eighteen) years old in total. Meanwhile, in the provisions of the Qanun Jinayat, the intended target is a minor who is not yet 18 (eighteen years old) and unmarried. Then, it must be remembered again that the Aceh Qanun applies throughout the Aceh region and is based on respect and appreciation for the principles of Islamic Sharia, so the additional target is minors who carry out these acts of *jarimah* in the Aceh region. Therefore, for minors who conflict with the law in the context of acts of rape and sexual harassment committed in Aceh, the provisions of Qanun Jinayat are more specifically addressed to them. Based on these things, it can be concluded that if there is a conflict between the Minors Protection Law and the Qanun Jinayat in resolving criminal cases, including jinayat cases in Sabang City, then the Qanun Jinayat based on the principle of *lex specialis systematis*.

In addition to the same opinion of law enforcers about minor-related cases, the accuracy of law enforcers is also needed to avoid dualism of authority as previously described. Law enforcers are expected to be able to exercise their authority by following the norms in statutory regulations. In implementing law enforcement authority in the City of Sabang, negligence or inaccuracy in law enforcement can still be seen in case number 55/Pid.B/2021/PN Sab. The convict was proven guilty of committing rape as regulated in Article 285 of the Criminal Code.⁴³

In the Qanun Jinayat it has been emphasized that if offenses are regulated in the Qanun Jinayat and also regulated in the Criminal Code or criminal provisions outside the Criminal Code, the *jarimah* rules in

⁴³ Sabang District Court Case Tracking System (SIPP), <https://sipp.pn-sabang.go.id>, accessed 16 Jan 2024.

this Qanun will be applied.⁴⁴ These provisions are also emphasized to be guided in pre-prosecution activities at the Indonesian Prosecutor's Office through the Attorney General of the Republic of Indonesia Letter (SEJA) Number: SE:-2/E/Ejp/11/2020 on the Guidelines for Handling of Criminal Case and Islamic Criminal Case in the Aceh Province. In the judicial environment, the Supreme Court also issued Supreme Court Circular Letter (SEMA) Number 2 of 2019 on the implementation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court that criminal acts charged based on Qanun Number 6 of 2014 on the Jinayat Law, are within the authority Sharia Court. Based on these provisions, it can be concluded that when there is an act of *jarimah* which is also regulated in criminal provisions in the Criminal Code or outside the Criminal Code in Sabang City, then it is entirely under the authority of the Sabang Sharia Court.

Then, the same convict in case number 32/Pid.Sus/2022/PN Sab and number 3/JN/2022/MS Sab should not be prosecuted multiple times. In the teachings of criminal law, the term concurrent criminal acts is known (*concursum/samenloop*), which in the Criminal Code is regulated in Chapter VI starting from Articles 63-70. *Concursum/samenloop* can be divided into 3 (three) forms, namely first, *concursum idealis*, if someone commits an act that violates several provisions of criminal law. Second, *concursum realis*, if someone commits several acts, and each act stands alone as a criminal act. Third, continuous action is when a person performs the same action several times, and between these actions, there is a close relationship, so the series of actions must be considered as a continuing action.⁴⁵ From those three forms of *concursum* above in the case Number 32/Pid.Sus/2022/PN Sab and case Number 3/JN/2022/MS Sab should be able to use the *concursum realis* type.

In *concursum realis*, independent criminal acts are committed by someone, and between the times each of these facts occurs, no/not yet criminal decision has been made against any of them. These facts do not need to be related to each other and do not need to be similar

⁴⁴ See Article 72 Aceh Qanun Number 6 of 2014 on the Jinayat Procedure Law.

⁴⁵ Tofik Yanuar Chandra, *Hukum Pidana*, (Jakarta: Sangir Multi Usaha, 2022), p. 142-143.

facts.⁴⁶ Based on the legal facts in the two decisions, the convict committed acts of sexual abuse against minors and adults during that period and has never been tried by the judiciary. Therefore, the convict in this case does not need to be tried twice; he just needs to be accused of his actions cumulatively using the *concursum realis* method. As previously explained, the prosecution was also carried out at the Sabang Sharia Court due to the specificity of the Qanun Jinayat.

Sentencing of criminals charged with *concursum realis* can be carried out using a sharpened absorption method. The '*uqubat* punishment for the sexual abuse that targeted an adult is 45 (forty-five *uqubat*) maximum or a fine amount of 450 (four hundred and fifty) gram pure gold or 45 (forty-five) months in prison maximum while the threat of '*uqubat* against perpetrators of sexual abuse against minors victims, namely '*uqubat ta'zir* whip 90 (ninety) times or fined amount 900 (nine hundred) gram of pure gold or 90 (ninety) months in prison maximum.⁴⁷ Based on the Criminal Code provisions, which determine that when these acts are threatened with the same primary crime, only one penalty is imposed. Then, the maximum penalty imposed is the maximum amount of punishment that is punishable for the act, but it may be more than the maximum penalty plus one-third. Therefore, the maximum penalty that can be threatened for this act is *uqubat ta'zir*, a maximum of 120 (one hundred and twenty) lashes or a maximum fine of 1,200 (one thousand two hundred) grams of pure gold or a maximum imprisonment of 120 (one hundred and twenty) months. This method of *concursum* in criminal acts can also be used for other acts that meet the qualifications for the types of concurrent criminal acts in the Qanun Jinayat. Even though the provisions for concurrent criminal acts in the Qanun Jinayat are not clearly regulated, the provisions in the Criminal Code can still be used as the transitional provisions in Article 71 of the Qanun Jinayat.

The success in realizing justice as a legal goal requires the role of professional law enforcers. Professional law enforcers must be able to carry out their duties and authority well, one of which is understanding and applying legal provisions properly and correctly. Then, adding other values such as integrity, accountability, credibility, and so on will

⁴⁶ Tofik Yanuar Chandra, *Hukum Pidana....*, p. 144.

⁴⁷ See Article 46 and Article 47 Aceh Qanun Number 6 of 2014 on the Jinayat Law.

further increase the professionalism of law enforcement. Even though the existing regulations are adequate, the poor quality of law enforcers will still cause problems. On the other hand, if the rules are inadequate and the quality of law enforcers is good, problems may also arise.⁴⁸ Law enforcers must instill in themselves that laws and regulations must aim at protecting the community, they must be able to work together by taking into account the inter-subsystems, and there must be no discrimination in any measure.⁴⁹

Harmonization of Judicial Authority through Internal Institution Regulation

As explained previously, the dualism in law enforcement for criminal and general crimes is partly caused by the diverging opinions of law enforcers due to disharmony and/or un-synchronization of regulations regarding the resolution of *jinayat* and general criminal cases in Aceh Province. The situation of regulatory disharmony places citizens seeking justice who will become victims.⁵⁰ Therefore, it is necessary to harmonize and synchronize the laws and regulations governing the resolution of *jinayat* and general criminal cases so that this dualism can be mitigated in order to achieve legal certainty.

Regulatory harmonization is an effort to harmonize or harmonize several legal provisions. Gandhi further stated that harmonization in law includes adjustments to various statutory regulations, judges' decisions, legal systems, and legal principles, which aim to increase legal unity, legal certainty, justice (*gerechtigheid*), and comparability (*equit, billijkeid*), usefulness and clarity of law, and without obscuring and sacrificing legal pluralism if needed.⁵¹ Gandhi also stated that harmonization could be operationalized first by identifying or diagnosing things that constitute disharmony and cause problems. Next, determine which issues require harmonization. If these things are clear, then steps for harmonization will be taken.⁵²

⁴⁸ John Kenedi, *Kebijakan Hukum Pidana.....*,p. 216-217.

⁴⁹ Rofingi, et. al, "Problems of Law Enforcement in Realizing The Principle of Equality Before The Law in Indonesia", *Law Reform*, Vol. 18 No. 2 (2022), p. 232.

⁵⁰ L.M. Gandhi, *Harmonisasi Hukum Menuju Hukum Progresif*, Inauguration Speech at the Ceremony for Professor at the Faculty of Law, University of Indonesia on 14 October 1995, p.9.

⁵¹ L.M. Gandhi, *Harmonisasi Hukum Menuju Hukum Progresif.....*, p. 5.

⁵² L.M. Gandhi, *Harmonisasi Hukum Menuju Hukum Progresif.....*, p. 8-9.

Even though there are several internal regulations in several agencies, such as the Supreme Court Circular and the Attorney General's Circular, this is not enough to emphasize the specific authority of the Sharia Court in adjudicating criminal acts. The SEMA regulates the actions of *jarimah*, which are charged based on Qanun Number 6 of 2014 on Jinayat Law, which is the authority of the Sharia Court.⁵³ This circular letter cannot answer the problem of dualism that exists because SEMA can be interpreted to mean that if the criminal act is charged using an Article of the Criminal Code or criminal provisions outside the Criminal Code, then it falls under the authority of the general court. The Supreme Court needs to enact internal regulations to give the Chief Judge of the District Court authorization to delegate the case to the Sharia court if there are *jarimah* charged under the provisions of the Criminal Code or other criminal provisions outside the Criminal Code. This is similar to the provision in Articles 147-151 of the Criminal Procedure Code. Without these provisions, the district court will not reject a *jinayat* case, which includes a general crime, because it is also the district court authority, so there is no solid legal reason to deny it. Therefore, this regulation is needed to harmonize rules regarding the settlement of criminal acts between the district court and the sharia court.

Evaluation of Morality Offenses in Qanun Jinayat

In cases of offenses related to morality, such as adultery, sexual harassment, and rape, an evaluation needs to be carried out. As explained previously, the rules for the offense of adultery committed by a minor against a minor are not yet clear. Therefore, it is necessary to ensure legal provisions regarding this matter. Furthermore, regarding sexual harassment and rape in the current Qanun Jinayat it is not in line with the spirit of eradicating sexual violence, which has become a global issue recently. Indonesia has also updated regulations regarding the eradication of sexual violence by issuing Law Number 12 of 2022 on Sexual violence crimes. This law comprehensively

⁵³ Supreme Court Circular Letter (SEMA) Number 2 of 2019 concerning the Implementation of the Formulation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court.

regulates various matters ranging from qualifying multiple types of sexual violence crimes to regulating restitution and so on.

The procedural law regulations in this law are also more comprehensive, starting from the stages of inquiry, inquiry, and prosecution to examination in court without intimidation, upholding human rights and honor. Then, there are regulations regarding the victim's rights to treatment, protection, and recovery since the crime of sexual violence occurred and regulations regarding restitution given by the perpetrator.⁵⁴

The qualifications for sexual violence offenses in this law include non-physical sexual harassment, physical sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence.⁵⁵ Apart from that, the law also regulates rape, obscene acts, sexual intercourse with minors, obscene acts against minors and/or sexual exploitation of minors, acts that violate decency that is against the will of the victim, pornography involving minors or pornography that explicitly contains sexual violence and exploitation, forced prostitution, criminal acts of trafficking in persons aimed at sexual exploitation, sexual violence in the domestic sphere, criminal acts of money laundering originating from criminal acts of sexual violence and other criminal acts which are expressly designated as criminal acts of sexual violence in the Law on Sexual Violence Crimes.⁵⁶

These provisions are much more comprehensive when compared to the provisions on sexual harassment and rape in Qanun Jinayat. Moreover, in Qanun Jinayat some provisions are not in favor of rape victims, namely the provision that stipulates that a person who claims to have been raped includes initial evidence when making a complaint.⁵⁷ Although the following article also requires investigators to carry out an investigation every time a rape crime is discovered. However, the provisions that place the burden of preliminary evidence

⁵⁴ General Section Explanation of Law Number 12 of 2022 on Sexual Violence Crimes.

⁵⁵ See Article 4, paragraph (1) of Law Number 12 of 2022 on Sexual Violence Crimes.

⁵⁶ See Article 4, paragraph (2) of Law Number 12 of 2022 on the Sexual Violence Crimes.

⁵⁷ See Article 52, paragraph (1) Aceh Qanun Number 6 of 2014 on the Jinayat Law.

on rape victims are clearly not in line with the spirit of eradicating criminal acts of sexual violence because victims of sexual violence, especially minor victims, feel ashamed and afraid to complain. Psychologically, there have been obstacles in making complaints, let alone being charged with providing initial evidence. It should be the job of investigators or investigators to look for criminal incidents and collect evidence to shed light on criminal incidents to determine the perpetrator.

Improving the Qanun Jinayat by evaluating several offenses is important to carry out. Provisions that are considered more comprehensive and progressive can be absorbed into the refinement of Qanun Jinayat. Maintaining the existence of these offenses will undoubtedly complicate the performance of law enforcers and will not bring any good to the victims. Therefore, these matters need to be followed up by revising the Qanun Jinayat, which incorporates various more comprehensive provisions so that the existence of the Qanun Jinayat continues to maximize public benefit. So, if the legal provisions are adequate, it will clarify the understanding of law enforcers so that dualism does not occur again.

Conclusion/Concluding Remarks

There are problems in resolving criminal cases caused by the dualism of settlement *jinayat* cases, especially some *jinayat* criminal offenses, which are included in general crimes. This dualism of authority is caused by various factors, as previously described. If it is not overcome immediately, it will reduce the dignity of law enforcement because there is no legal certainty. The efforts to overcome the practice of dualism cannot be separated from the role of the Aceh People's Representative Council (DPRA) as a Qanun Legislator to pass several norms, as stated previously. Next, the significant role of law enforcers stationed in Aceh, whether at the investigation, prosecution, trial, or execution levels, in interpreting and implementing the special regulations of Aceh. This case also includes issuing regulations that bridge the implementation of Qanun Jinayat with the general criminal justice system. It is also recommended that studies be conducted in other cities regarding the implementation of sharia law to improve the provisions of sharia law in the Aceh Province. Besides the study of *jinayat* law, it can also be conducted on

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the implementation of *muamalah* (civil law) and *ahwal al-syakhsiyah* (family law) in another city in Aceh Province so that the existence of sharia law, as envisioned by the Acehnese and mandated by Law Number 11 of 2006 on the Aceh Government, can proceed harmoniously.

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