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Between Flogging and Imprisonment: The Disparity Effect of the Sharia Court's Decision on the Supremacy of the *Qanun Jinayat* of Aceh

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Abstract

This research aims to map the same cases with different sentencing decisions, determine the causes for the disparities in penalties in those decisions, and elaborate on the reasons for judges in making decisions. Qanun *Jinayat* of Aceh has designated flogging as the primary punishment for qanun violators. Nonetheless, many Sharia Court judges sentence offenders of sexual crimes to prison. This is empirical legal research with a normative juridical approach and a Sharia approach. Data were collected through interviews and the examination of decision documents. Those data were analyzed using data reduction, data display, and data verification. This research found that the same cases with different decisions include cases of rape, sexual harassment, and accusations of adultery. More prison sentences are imposed by Sharia Court judges in these cases than flogging and fines. The fundamental reason for these differences in decisions is due to the qanun's punishment choices, which are tinted by judges' perspectives in assessing Sharia-based qanun rules. Another factor for this disparity is the community's insistence that cases of rape and sexual harassment be punished by imprisonment

or the authority to be remanded to the District Court. Some people argue that flogging has not deterred the perpetrators because, if the judge decides on this sentence, it may be carried out in a short time. Then, the perpetrator immediately returns to society and has an opportunity to repeat his crimes, while the victim is still in a traumatized state.

Keywords: Disparity; flogging; *hudud*; imprisonment; *jinayat*

Introduction

The implementation of Qanun *Jinayat* Aceh has given rise to differences in judges' decisions regarding the punishment given, especially to perpetrators of sexual crimes. There are judges who impose prison sentences, fines and caning. Meanwhile, the main punishment of this Qanun *Jinayat* is flogging in accordance with the provisions of sharia law. This disparity is seen by Qanun observers as a condition that weakens Qanun Jinayat. The Aceh Regional Government has ratified 16 qanuns, one of which is referred to as a regional regulation. The Qanun Aceh Number 6 of 2014 concerning *Jinayat* Law has attracted the most attention from the public, both in Aceh and outside of Aceh. Al-Quran and Sunnah as the basic foundations of Islam become the first legal considerations for the formation of this qanun. Qanun *Jinayat* consists of 10 chapters and 75 articles. Article 2, point a, states that the implementation of *jinayat* law is based on Islam. Article 3 paragraph (1) mentions that this qanun regulates perpetrators of jarimah, jarimah, and 'uqubat. Paragraph (2) states that the jarimah as referred to in paragraph (1) includes *khamar*, *maisir*, *khalwat*, *ikhtilath*, adultery, sexual harassment, rape, *qadzaf*, *liwath*, and *musahaqah*. According to Article 4 paragraph (1), *'uqubat* as referred to in Article 3 paragraph (1) letter c, consists of *hudud* and *ta'zir*. Paragraph (2) states that the *'uqubat hudud* as referred to in paragraph (1) letter a is in the form of flogging. Paragraph (3) states that the *'uqubat ta'zir* as referred to in paragraph (1) letter b consists of the main *'uqubat ta'zir* and additional *'uqubat ta'zir*. Paragraph (4) states that the main *'uqubat ta'zir* as referred to in paragraph (3) letter a consists of flogging, fines, and restitution. Paragraph (5) stipulates that additional *'uqubat ta'zir* as mentioned in paragraph (3) letter b consists of coaching by the state, restitution by parents/guardians, returns to parents/guardians, termination of marriage, revocation of permits and revocation of rights, confiscation of certain goods and social work.

In the articles above it is explained that the punishment for violators of the Qanun Jinayat is not only caning but also other punishments such as imprisonment and paying fines in gold. It's just that there is a tendency for judges to impose prison sentences on perpetrators of sexual crimes. This is due to the view that caning does not require a long period of time, so that the perpetrator can return to society and meet his victims again. The perpetrator's meeting with the victim is seen by critics as a weakness that has a negative

impact on the victim both psychologically and physically. There are concerns among some people that meeting the perpetrator with the victim within a short period of time will open up opportunities for repeat crimes. The existence of this view among some judges has led them to different decisions (disparity) between prison sentences and caning and the caning sentences are becoming less and less over time. Disparities in sentencing are a crucial aspect of criminal law and, in some situations, become an issue of public concern. In simple terms, the disparity in sentencing refers to differences in punishments imposed by judges in court in cases with similar characteristics.

Previous researchers have produced a lot of research on disparities in judges' decisions in various types of crimes, such as disparities in judges' decisions in cases of murder, drug abuse, corruption and others. Below are the results of their research briefly. Hamzah & Waluyo said that the state grants the judges authority as law enforcers who are free to take sides or not take sides with litigants (impartial judges). This aims to uphold the functions of the judiciary, as well as to ensure the fulfilment of human rights. As a result, the court is required to realize the equal position of every citizen before the law.[1] Nonetheless, as stated in Law Number 48 of 2009 concerning Judicial Power, judges' freedom to exercise judicial authority is not absolute. Justice must continue to be based on the ideals enshrined in each of the Pancasila precepts. The qualitative justice administered by these judges frequently results in contentious decisions. It is also common to find a judge's decision with a serious sentence against a criminal offender, while a judge imposes a light sentence or even acquits another convict in instances charged with the same articles, resulting in disparity in decisions.

Langkun et al said that the disparity is the opposite of the concept of parity, which means equivalence in value or quantity. Parity in sentencing refers to the equality of penalty for similar offenses committed under similar conditions. It is logical to have differences in sentence determination because it is incredibly difficult to conclude that two cases are exactly the same. However, disparities in sentencing become a separate issue when the range of punishments issued by judges in similar cases is too wide,[2] creating injustice and raising concerns in society as Saragih said.[3] Other scholars like Kleden offers different approaches, such as the victimological approach, to reduce this disparity in

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[1] Andy Hamzah and Bambang Waluyo, *Delik-Delik Terhadap Penyelenggaraan Peradilan (Contempt of Court)* (Jakarta: Sinar Grafika, 1998).

[2] Tama. S Langkun et al., *Studi Atas Disparitas Putusan Pemidanaan Perkara Tindak Pidana Korupsi* (Jakarta: Indonesia Corruption Watch, 2014).

[3] Benny Leonard Saragih, Ediwarman Ediwarman, and Muaz Zul, "Disparitas Penuntutan Pada Perkara Tindak Pidana Penganiayaan dalam Sistem Pemidanaan di Indonesia," *ARBITER: Jurnal Ilmiah Magister Hukum* 1, no. 1 (May 2, 2019): 66–78, https://doi.org/10.31289/arbiter.v1i1.107.

sentencing because the sentencing process is more focused on the perpetrator's situation rather than the victim's,[4] and there are also other legal rule approaches to better guarantee legal justice in Wahyudi & Anggraeny's research.[5,6] Muladi & Gulo said that the disparity in court rulings arises[7] because the judge's administration of punishment in identical criminal cases (same offense) is not the same.[8] The disparity is supposedly caused by a variety of variables. For example, judicial decisions basically refer to the appearance of legal facts submitted by the Public Prosecutor in an indictment and then processed during court hearings such as the results of Kamarusdiana's research,[9] and sometimes judges differ in using the basis of consideration by Novita & Syafrani,[10] or even take the legal basis incorrectly by Qosim[11] or inappropriately according to Febriandi et al & Masnun.[12,13] The authority to try a case can also be a source of disparity in Salsabila's research results.[14] Aside from that, Wibowo in his research said that the disparities arise mostly as a result of the personal judges who preside over trials, both in terms of their attitude, values, and personality in responding to a case they are handling.[15] As a result, Romdoni & Fitriasih found

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[4] Kristoforus Laga Kleden, "Pendekatan Viktimologi Meminimalisir Disparitas Pidana," *Jurnal Hukum Magnum Opus* 2, no. 2 (July 14, 2019): 206, https://doi.org/10.30996/jhmo.v2i2.2611.

[5] Muhamad Isna Wahyudi, "Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage," *Al-Jami'ah: Journal of Islamic Studies* 55, no. 1 (June 26, 2017): 127–54, https://doi.org/10.14421/ajis.2017.551.127-154.

[6] Kurnia Dewi Anggraeny, "Disparitas Pidana Dalam Putusan Hakim Terhadap Tindak Pidana Psikotropika di Pengadilan Negeri Sleman," *Jurnal Hukum Novelty* 7, no. 2 (August 1, 2016): 225, https://doi.org/10.26555/novelty.v7i2.a5469.

[7] Muladi, *Lembaga Pidana Bersyarat* (Semarang: Universitas Diponegoro, 1992).

[8] Nimerodi Gulo, "Disparitas Dalam Penjatuhan Pidana," *Masalah-Masalah Hukum* 47, no. 3 (July 30, 2018): 215, https://doi.org/10.14710/mmh.47.3.2018.215-227.

[9] Kamarusdiana Kamarusdiana, "Qânûn Jinâyat Aceh dalam Perspektif Negara Hukum Indonesia," *AHKAM : Jurnal Ilmu Syariah* 16, no. 2 (December 11, 2016): 151–62, https://doi.org/10.15408/ajis.v16i2.4445.

[10] Widya Novita and Andi Syafrani, "Studi Analisis Disparitas Putusan Mahkamah Agung Atas Pembatalan Merek Terkenal Untuk Barang Tidak Sejenis; Perbandingan Kasus Merek SKYWORTH dengan Merek BMW " 1, no. 1 (2019).

[11] Sarah Qosim, Serlika Aprita, and Mona Wulandari, "Disparitas Putusan Peradilan Agama terhadap Wasiat Wajibah Anak Angkat," *SALAM: Jurnal Sosial dan Budaya Syar-i* 9, no. 5 (August 2, 2022): 1407–20, https://doi.org/10.15408/sjsbs.v9i5.27491.

[12] Yogi Febriandi, Muhammad Ansor, and Nursiti Nursiti, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *QIJIS (Qudus International Journal of Islamic Studies)* 9, no. 1 (July 29, 2021): 103, https://doi.org/10.21043/qijis.v9i1.8029.

[13] Muhammad Ali Masnun, "Disparitas Putusan Mengenai Persamaan Pada Pokoknya Pada Merek Predator (Studi Putusan Nomor 1146 K/Pdt.Sus-Hki/2020)," *SASI* 27, no. 4 (December 31, 2021): 463, https://doi.org/10.47268/sasi.v27i4.539.

[14] Zakiyah Salsabila, "Disparitas Putusan Hibah: Studi Analisis Di Pengadilan Agama Malang, Pengadilan Tinggi Agama Surabaya Dan Mahkamah Agung," n.d.

[15] Ari Wibowo, "Kebijakan Kriminalisasi Delik Pencemaran Nama Baik di Indonesia" 7 (2012).

that it is difficult to prevent when a judge's state of mind influences his thinking in reading, assessing, observing, and making conclusions on a case being handled.[16] Disparities in court decisions essentially create their own challenges in law enforcement. On the one hand, judges are given legal authority to hear instances of people seeking justice according to the results of Parawita's research.[17] On the other hand, according to the results of Romdoni & Fitriasih, this disparity presents legal uncertainty and leads to public discontent or litigation parties in the world of justice and the law.[18] Therefore, criminal standardization is required for criminal law administration. That is, the rules for an offense in the Criminal Code and other rules outside it are arranged according to the same criminal standard in an effort to minimize disparities in court decisions according to Kim.[19]

In Indonesia, law enforcement is frequently challenged with the issue of decision disparities in the same offenses. To achieve the purpose of restorative justice more effectively, existing regulations must be improved and reinforced by law according to Akbar's research results.[20] Mustafa found the same result that the judges play an important role in balancing and interpreting the law as an essential part of determining sentences because the legal process in court is more than just applying relevant legal rules.[21] Moreover, Karimullah and Murdoko found that it is alleged that there is a more visible disparity when the law deals with children, women, the weak, minority group and those with money and power.[22] Some argue that the primary cause leading to disparity in court decisions in children as criminal offenders, in particular, is the freedom of judges, in addition to the law, which allows for differences in punishment, and

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[16] Muhamad Romdoni and Surastini Fitriasih, "Disparitas Pemidanaan Dalam Kasus Tindak Pidana Khusus Narkotika Di Pengadilan Negeri Tangerang," *Masalah-Masalah Hukum* 51, no. 3 (July 30, 2022): 287–98, https://doi.org/10.14710/mmh.51.3.2022.287-298.

[17] Andiniya Komalla Parawita, "Law Enforcement towards Online Mass Media Abuse According to the Press Law," *Ius Poenale* 2, no. 2 (December 31, 2021): 103–12, https://doi.org/10.25041/ip.v2i2.2229.

[18] Romdoni and Fitriasih, "Disparitas Pemidanaan Dalam Kasus Tindak Pidana Khusus Narkotika Di Pengadilan Negeri Tangerang."

[19] Sowoong Kim, "Pendekatan Keadilan Melalui Silaisme Dan Standarisasi Pidana (Penyusunan Pola Pidana)," N.D.

[20] Muhammad Fatahillah Akbar, "Pembaharuan Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia," *Masalah-Masalah Hukum* 51, no. 2 (April 28, 2022): 199–208, https://doi.org/10.14710/mmh.51.2.2022.199-208.

[21] Cecep Mustafa, Margaret Malloch, and Niall Hamilton Smith, "Judicial Perspectives on the Sentencing of Minor Drug Offenders in Indonesia: Discretionary Practice and Compassionate Approaches," *Crime, Law and Social Change* 74, no. 3 (October 2020): 297–313, https://doi.org/10.1007/s10611-020-09896-0.

[22] Murdoko, "Disparitas Penegakan Hukum Di Indonesia (Analisis Kritis Kasus Nenek Minah Dalam Perspektif Hukum Progresif)," *Perspektif Hukum* 16, no. 2 (2016): 221–30.

the child himself as the perpetrator.[23] All research results on disparities in judge's decisions above, refer to disparities in judge's decisions in district courts in many different cases and are not related to disparities in decisions in the Sharia Courts in Aceh.

Nevertheless, legal disparities occur not only in the District Court but also in the Religious Courts especially at the Sharia Court in Aceh. According to the finding of Amirulkamal et al and supported by Fajriyyah & Alfitri, there is no obligation for judges at the Religious Courts to use the KHI as a legal consideration in deciding a case.[24] In addition, they are also not required to refer to the opinions of scholars in classical *fiqh*.[25] Fuad also found that this policy has the potential to produce disparities in Religious Court decisions because there are differences of opinions within *fiqh* that can impact legal certainty for justice seekers.[26] These three research groups both found disparities in judges' decisions in cases of children's rights after divorce.

A similar disparity exists in Aceh Province's Syar'iyah Court, which is another term for the Religious Courts. For example, in Aceh Province, sexual offenses are governed by Qanun Aceh Number 6 of 2014 Concerning *Jinayat* Law (Qanun *Jinayat*). However, while settling cases in the field, law enforcement officers also employ other rules such as the Child Protection Act and the Sexual Violence Act, resulting in disparities in Sharia Court decisions.[27] To this day, the experience of women victims of sexual violence in Aceh seeking justice is seen in their way of expressing their disapproval of the Qanun *Jinayat's* implementation in Aceh.[28] Scholars pointed out that the Qanun *Jinayat* Aceh, which was initially introduced to abolish sexual violence, has limits in

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[23] Agus Maksum Mulyohadi, "Disparitas Pidana Putusan Hakim Atas Perkara Pidana Anak Dalam Perspektif Perlindungan Hak-Hak Anak (Studi Kasus Pengadilan Negeri Boyolali Tahun 2009-," n.d.

[24] Said Amirulkamar et al., "Administration Reagent of Aceh Family Law Qanun: Siri Marriage Motives Towards the Legality of Polygyny," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 1 (July 23, 2023): 129–43, https://doi.org/10.18860/j-fsh.v15i1.21352.

[25] Latifatul Fajriyyah and Alfitri Alfitri, "Hearsay Evidence Admissibility: Due Process and Evidentiary Rules in Muslim Marriage Legalization (Isbat Nikah)," *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 3 (October 4, 2022): 269–96, https://doi.org/10.25041/fiatjustisia.v16no3.2464.

[26] Zainul Fuad, Surya Darma, and Muhibbuthabry Muhibbuthabry, "Wither *Qanun Jinayat*? The Legal and Social Developments of Islamic Criminal Law in Indonesia," *Cogent Social Sciences* 8, no. 1 (December 31, 2022): 2053269, https://doi.org/10.1080/23311886.2022.2053269.

[27] Muhammad Rhazi, Iskandar A Gani, and Dahlan Dahlan, "Kewenangan Penerapan Aturan Terhadap Tindak Pidana Asusila Yang Korbannya Anak," *Media Iuris* 5, no. 1 (February 18, 2022): 85, https://doi.org/10.20473/mi.v5i1.27156.

[28] Dian Andi Nur Aziz et al., "Examining Qanun in Aceh from a Human Rights Perspective: Status, Substance and Impact on Vulnerable Groups and Minorities," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 1 (June 5, 2023): 37–56, https://doi.org/10.18326/ijtihad.v23i1.37-56.

accomplishing the desired initial purposes, such as enabling justice for women and other underprivileged people.[29] Based on the aforementioned background, this paper discusses the findings of a study on descriptive mapping of decisions in the same offenses with different sentencing decisions in cases of violations of the Qanun *Jinayat* on sexual violations in Aceh Province, involving perpetrators and victims. The research further clarifies the reasons for the disparity in punishment between flogging, imprisonment, and acquittal of perpetrators in those decisions. Furthermore, this research elaborates on the reasons for women observers to propose adjustments to the qanun. Based on the literature review stated above, it is known that the trend of judge's decisions determining prison sentences for perpetrators of sexual crimes continues to increase in Aceh province which uses Qanun *Jinayat* as its legal basis. In fact, in Qanun *Jinayat*, caning is the main option. The main aspects of this study have not been seen as significant in the studies of other researchers. Based on the description above, it can be said that the results of our research show significant differences with the research results of the scholars above

This is empirical legal research with a normative juridical approach and a Sharia approach. Data in this research were obtained from in-depth interviews with parties deemed competent to provide the researchers with the information they need. Among the key informants are Syar'iyah Court judges, academics who understand qanun, observers and critics of qanun, Acehnese women's NGOs such as Balai Shura, DPRA members, MPU members, members of DSI (Islamic Sharia Service), Hisbah Police, mosque *takmir*, several other community groups. In addition, data were also gathered by accessing the Supreme Court website to obtain decisions of the Sharia Court which have permanent legal force. Data were analyzed using data reduction by collecting, selecting and sorting data according to certain categories and then building temporary arguments. Then data display in this context is the data obtained and then displayed optimally with relevant arguments, and verification or drawing final conclusions.

Discussion

An Overview of Qanun Aceh Number 6 of 2014

The growth and development of Islam in Aceh have a long history. The religious life had developed unyielding attitudes and nationalism of the people in the face of colonialists, achieving and maintaining independence. Their religious practice upheld customs and placed Islamic scholars in an honorable position in society. After a long process, Aceh became an Islamic empire in the XIII century, and it continued to expand and develop until its peak in the XIV

[29] Febriandi, Ansor, and Nursiti, "Seeking Justice Through Qanun Jinayat."

century AD.[30] People of Aceh obey and submit to Islamic law, and they follow fatwas issued by Islamic scholars or ulema. This long-term reverence for Islamic teachings gave birth to Acehnese culture, which may be seen in traditional life. Adat or custom arose from the reflections of ulema, and it was practiced, developed, and preserved, and eventually evolved into a philosophy of *adat bak poteumeureuhom, hukom bak syah kuala*, *qanun bak putro phang*, and *reusan bak laksamana*. The adage suggests that the government has control over customary law, and Islamic experts or ulema have control over Sharia law.[31,32] This expression is a form of embodiment of Islamic law in the daily lives of the Acehnese.[33]

Aceh's political situation was different after the Declaration of Independence. Aceh, like the rest of Indonesia, supported the proclamation and helped defend the country's independence when the Dutch attempted to recolonize it. Aceh was proven to be the only Indonesian territory that the Dutch could never occupy. Efforts to defend Indonesia's independence could not be separated from the role of Acehnese ulema who guided the people to continue fighting. Based on this struggle, the state through the Prime Minister's Regulation in Lieu of Government Regulation Number 8/Des/WKPM/49 dated 17 December 1949 Aceh was declared an independent province. A year later, Aceh was designated as a Residency in North Sumatra Province through Government Regulation in Lieu of Law Number 5 of 1950. The people of Aceh were opposed to the change, resulting in an uprising in 1953. Finally, the government issued a policy through a special mission led by the Deputy Prime Minister that conferred Special Region Status by Decree of the Prime Minister of the Republic of Indonesia Number I/Missi/1959, which comprised religion, civilization, and education. This Special Region status was the solution to Aceh's overall problems.[34] The Prime Minister's Decree Number I/Missi/1959 serves as the legal foundation for all Aceh regulations, such as Law Number 22 of 1999 concerning Regional Government, which includes the role of the ulema in determining regional policies, and Law Number 11 of 2006 concerning the Aceh Government, which reaffirms the Aceh Regional Government's authority to

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[30] Dinas Syariat Islam, *Himpunan Undang-Undang, Keputusan Presiden, Keputusan Mahkamah Agung, Peraturan Daerah/Qanun, Peraturan Gubernur, Instruksi Gubernur* (Banda Aceh: DSI, 2021).

[31] Al Yasa` Abubakar, *Sekilas Syariat Islam Di Aceh* (Banda Aceh: Dinas Syariat Islam, 2007).

[32] Husni Mubarrak, Faisal Yahya, and Iskandar Iskandar, "Contestation on Religious Interpretation in Contemporary Aceh Sharīa: Public Caning in Prison as the Case of Study," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 2 (December 15, 2023): 213, https://doi.org/10.31958/juris.v22i2.10258.

[33] Syahrizal Abas and Rusjdi Ali Muhammad, *Landasan Filosofis Pelaksanaan Syariat Islam Di Aceh* (Banda Aceh: Dinas Syariat Islam Provinsi Aceh, 2018).

[34] Dinas Syariat Islam, *Himpunan Undang-Undang, Keputusan Presiden, Keputusan Mahkamah Agung, Peraturan Daerah/Qanun, Peraturan Gubernur, Instruksi Gubernur.*

implement Islamic Sharia. This law also gives the DPRA and DPRK one of the authorities to draft and form qanuns, putting them on the level with regional regulations in other provinces.

Mapping of Syar'iyah Court Decisions on Sexual Crime Offenses

Sexual offenses, including rape and harassment, have been governed in Qanun *Jinayat* of Aceh Province since 2014 and were previously regulated by other regulations, including the Criminal Code. Sexual crimes in this qanun are regulated in articles 46 to 56. Since the transfer of this absolute competence, sexual offenses that occurred in Aceh province are processed and tried at the Sharia Court. The majority of the Sharia Court's decisions on sexual offenses can be seen on the Supreme Court's website. Researchers explored the Supreme Court website for the last four years (2019-2022) to acquire information on Sharia Court decisions involving sexual offenses with permanent legal force (*inkrah*) in all Sharia courts in Aceh Province. The data were obtained at random in each court using the keywords sexual offenses, which led researchers to cases of sexual harassment and rape. After two months of analysis (October-November 2022), it is clear that every Sharia Court made a decision on sexual offenses. This indicates that there have been cases of sexual harassment and assault in every regency/city in Aceh Province that have ended up before the Sharia Court.

Data from the Sharia Court in all regencies/cities in Aceh Province reveal an increase in sexual offenses in the Aceh region from year to year. In addition, the age range of the perpetrators is expanding (younger and older). Due to the large number of Sharia Court rulings involving sexual offenses in Aceh Province, the researchers selected a random sample of cases from each Sharia court over the last four years. The Lhoksukon Sharia Court issued 13 decisions, Banda Aceh 9 decisions, Bireuen 5 decisions, Blangkejeren 10 decisions, Blangpidie 10 decisions, Calang 9 decisions, Idi 37 decisions, Jantho 41 decisions, Subulussalam 6 decisions, Kualasimpang16 decisions, Kutacane 9 decisions, Langsa 12 decisions, Lhokseumawe10 decisions, Meulaboh 22 decisions, Meureudu 5 decisions, Sabang 3 decisions, Sigli 10 decisions, Simpang Tiga Redelong 10 decisions, Sinabang 2 decisions, Singkil 9 decisions, Suka Makmue 8 decisions, Takengon 9 decisions, and Tapak Tuan 17 decisions. Decisions randomly selected throughout the Sharia Courts in Aceh Province in the last 4 years comprised 291 decisions both at the first level of the Sharia Court, appeal and cassation levels.

Based on the age range of the perpetrators of rape and sexual harassment in the 291 decisions discussed above, it is obvious that the perpetrators' age range is widening. That is, the offenders are said to be both extremely young and very old. Of the 291 decisions, 22 cases were found for perpetrators of rape and harassment aged 13-17 years, 128 for perpetrators aged

18-39 years, 84 for perpetrators aged 40-59 years, 18 for perpetrators aged 60-69 years, 5 for perpetrators aged 70-78 years, and 34 for perpetrators whose age was concealed. According to the data and facts, the youngest perpetrator of rape and sexual harassment was 13 years old, and the oldest was 78 years old. This age span is widening, which causes great concern among policymakers who continue to strive to ensure that qanuns can overcome this devastating reality. On the side of rape victims, there were 121 decisions explaining that the victims were children under the age of 18, both boys and girls, despite the fact that they were dominated by girls and 140 decisions with children as sexual harassment victims. The more concerning data and facts were the 17 decisions that showed that the rape victim was a mahram (close relative/child/relative) of the perpetrator. There was one decision in which the child was identified as a victim of homosexuality/*liwath*.

The data also reveal that the punishment for the perpetrators of rape and sexual harassment in the province of Aceh is very diverse and represents every possible punishment. Of the 291 decisions at the court of first level (Sharia Court), it was found that there were 215 decisions with prison sentences, 7 decisions with prison sentences at LPKA, 11 decisions with punishments fostered at Special Penitentiary for Children (LPKA/LPKS) or *Dayah*/Islamic boarding schools, 52 decisions with flogging, 1 decision fined with gold, 3 decisions with flogging and imprisonment or fines, and 2 decisions where the perpetrators were returned to their parents. From this data, it is known that the trend of punishment for perpetrators of rape and sexual harassment at the Sharia Court of Aceh Province is imprisonment, namely 215 prison sentences compared to 52 flogging sentences. The longest prison sentence was 200 months (16.5 years) and the most lashes were 180. At the appeal court level, there was a dynamic of changing sentences from flogging to imprisonment or fines and vice versa. It was discovered that 6 decisions were made to change the sentence from flogging to imprisonment, 4 decisions were made to change the sentence from imprisonment to flogging, 2 decisions were made to acquit the offenders, 2 decisions were made to increase the length of imprisonment, 2 decisions were made to reduce the length of imprisonment, 2 decisions were made to increase the length of coaching, and 1 decision was made to change the punishment from coaching to coaching added with flogging. Those data demonstrate that the change in punishment from flogging to prison remained more prominent at the appeal court level. There are not many cassation decisions available on the Supreme Court's website for cases determined at the first and appeal levels for these 291 decisions. Perhaps, these cases have permanent legal force at the first level and the level of appeal. Nonetheless, two cassation decisions were discovered among the 291 first-level decisions mentioned above, each with a distinct decision. There was one case with an 80-month imprisonment term at the first level, reduced to 24 months at the appeal level, and the cassation decision affirmed the court's decision of the first

instance, namely an 80-month prison sentence. In one other instance, a prison term of 180 months at the Sharia Court was reduced to 180 lashes at the appeal level, and the cassation decision reinforced the sentence in the Sharia Court decision, namely imprisonment for 180 months.

The descriptions of the cases in the preceding decisions indicate that the major causes of rape and sexual harassment in the Aceh region include a variety of factors. One of them is owing to the unrestricted accessibility of information technology media. When the Covid-19 pandemic hit the world, including Indonesia, and required all activities to be carried out online at home, every student was expected to know, understand and have a set of technological tools to carry out learning at home, both cell phones and computers with internet data. Every parent must have limitations to supervise their children when using and browsing the internet, so they could freely browse any content that interests them. Moreover, both junior and senior high school students are still in the puberty stage, which is experiencing sexual growth and development. The internet network on their cell phones and computers provides an easy way for them to obtain all of the information they desire about sexuality without being supervised by their parents/guardians. Furthermore, numerous media present various types of sexual content without control or boundaries, exposing students to sexual content that they should not see. According to decision data, exposure to pornographic content through their gadgets causes children and teenagers to commit rape and sexual harassment. This is also true for older offenders. They are also exposed to pornographic content and no longer have a wife, so they channel their sexual urges to child victims who are easily convinced with a small amount of money.

The Causes of '*Uqubat* Disparity

1. The Urge of the Women's Group of Qanun *Jinayat* Observers

The implementation of the Qanun Aceh Number 6 of 2014 concerning *Jinayat* Law after the ratification has aroused dynamics and various responses from the public, particularly the people of Aceh who the qanun has imposed on them. Despite the fact that the planning, discussion, and ratification of the qanun had raised pro and contra from the beginning, the qanun was still ratified in 2014. Those pros and cons continue to this day when this research was conducted. The pros and cons are particularly focused more on the articles on sexual offenses, both the articles on accusations of adultery, rape, and sexual harassment, starting from Article 46 to Article 56. Basically, these articles involve perpetrators and victims. This dynamic can also be seen in the data and facts of the 291 decisions of the Sharia Court throughout Aceh in the last four years. It is alleged that the pressures and demands of observer groups, especially women's observers, have contributed to the trend in the determination of prison sentences for perpetrators of sexual offenses. Based on the data from the 291

decisions mentioned above, women and children, including girls and boys, are the most common victims of sexual offenses in Aceh. The implementation of these provisions on sexual offenses is considered by qanun observers, particularly women observers, as discriminatory and preventing them from receiving fair treatment. They are members of Balai Syura Ureung Inong Aceh.[35] This group of observers has numerous reasons to criticize the qanun and its implementation after its ratification.

They take action in response to indications of discriminatory articles and gender prejudice in the qanun by making particular attempts to have this qanun revised. So far, the Balai Syura team has been active in providing input, including in the form of a DIM (Problem Entry List) for qanuns that are regarded as potentially discriminatory for women based on an in-depth investigation. Input or DIM is submitted to the Aceh Government (legislative and executive) and they seek discussion to convey this input in order to achieve a common understanding. According to an academic at UIN Ar-Raniry, the Sharia Court continues to carry out and initiate such discussions.[36] The Balai Syura has not attempted to undertake a Judicial Review thus far, but they are continuing to make efforts to encourage this process to be carried out. For example, when the Aceh and Jakarta Women's Solidarity conducted a Judicial Review of Qanun Aceh Number 6 of 2014 concerning the *Jinayat* Law in 2016-2017, Balai Syura provided support by participating in a substance study, despite the fact that they did not submit their ID Cards as local residents who objected to the qanun due to personal and family safety concerns living in Aceh. However, the Judicial Review was denied for reasons that are difficult to accept. Balai Syura is currently advocating with the women's movement and other civil movements for the improvement of the qanun so that it may genuinely give grace to everyone, including the development of a concept paper, DIM, which will be presented to the Aceh Regional Government. Among the parts of the qanun which contain weaknesses are articles 3 paragraph 2 letters f and g and articles 51 to 55.

Balai Syura emphasized that there are problems that can be solved with qanuns, but there are also other problems that can be solved differently and more appropriately so that some societal problems can be solved with qanuns and their sanctions, while others can only be solved with *reusam* (custom rules), and there are also issues that can be done by improving the quality of education (not only formal but also informal through alternative education). This means that certain cases necessitate the involvement of government officials, while others involve traditional leaders who are wiser and have a gender perspective. These alternate paths can be pursued by deciding on gender-responsive customs

[35] Balai Syura, LSM Pemerhati Qanun, September 24, 2022.
[36] Jabbar Sabil, Akademisi, Agustus 2022.

and culture in accordance with women's conditions as a form of local wisdom in the Acehnese community. Another factor to evaluate is the relevance of these diverse arrangements to critical concerns in Aceh that must be resolved immediately. So far, in the evaluation of Balai Syura, causal aspects are frequently inconsistent, based on assumptions from a gender-biased perspective, and are not based on measurable data.

All of the conditions described above are no longer relevant to the changing current circumstances that require more mobilization of women. Ideally, the policies released include qanuns, addressing concerns in the appropriate context, so it does not create new societal problems that could result in accidents/victims, or new burdens on groups of people that cannot be addressed. Concerning the application of articles on sexual harassment and rape, Balai Syura stated that there is no oath procedure in Islam for rape cases. The oath mechanism is only applied to cases of adultery. As a result, Balai Syura has been calling for the elimination of this oath mechanism from the Qanun *Jinayat*. Victims must be seen as victims (believing what they say), because Balai Syura believes that in cases of rape, no woman will be willing to make a false confession because the social impact she will face as a rape victim is far more severe, not only on herself but also on her family. In some cases, a woman who claims to have been raped has an impact on the community so the victim/victim's family may be subject to sanctions of expulsion, paying fines, and others. This provision benefits the perpetrator by allowing him to go free and burdens the victim by requiring the victim to submit evidence, while in fact, the evidence must be provided by the investigator. It is the investigator's responsibility to seek evidence that can be used to convict the perpetrator, not the victim. This also violates the provisions of Criminal Procedure Code Article 1 point 2 on the determination of suspects who must go through an investigation process. Oath evidence should not be used as evidence in this rape case because it will reinforce impunity and allow the criminal to go free. Furthermore, the verse concerning *li'an/mula'anah* is revealed in the Qur'an for the subject of husband and wife relations. The same thing is not appropriate when utilized to solve rape cases.

In bringing up this contentious article, the Balai Syura not only criticized but also proposed alternatives. They recommended that the Aceh Regional Government do a substantive study, policy harmonization, and policy application projections. The goal is to be able to prepare compelling and well-supported arguments. The results of the study are presented in a variety of products, including infographics, DIM, or position papers that are tailored to the interested parties that can affect the discussion of the qanun revision text. Furthermore, it maps the influential parties, both from the Aceh Regional Government and the National Government, as well as other circles such as ulemas, community leaders, political parties, academics, and others. The

government and the DPRA must revise and improve the provisions, particularly those dealing with rape and sexual harassment, and then refer to the state's Law on Sexual Violence. Balai Syura also conducts advocacy and hearings for the Legal Bureau and other parties, as well as providing suggestions for the rape and sexual harassment settlement procedure. Ideally, these matters are settled under Law Number 12 of 2022 on Crimes of Sexual Violence.

Concerning sexual offenses in Aceh, the Balai Syura expressed its opinions on the framework of cooperation agreements including several government and customary institutions in Aceh to implement Restorative Justice in cases of sexual violence. This has become one of the Balai Syura's studies in providing input to the government because the Balai Syura believes that cases of sexual violence, particularly rape, must be encouraged to be resolved through legal mechanisms (legal delict) by ensuring the fulfilment of the victims' rights both during case handling and also on post-traumatic resilience and empowerment. This is founded on the view that sexual violence is a crime that should not be resolved under customary law.

Women observers from Kontras Aceh conveyed similar views. According to Husna,[37] there are ten *jarimah* in the Qanun *Jinayat*, and some of them discuss sexual crimes such as rape, charges of adultery, and sexual harassment. There is an ambiguous meaning of rape in these articles. There is also an oath in the articles that can be used as evidence. If the victim confesses under oath that she is the victim raped by the perpetrator, and the perpetrator also swears under oath that he did not do so in the name of Allah, both the perpetrator and victim are in the same position. So that the perpetrator might be free of the consequences of his acts. Meanwhile, the definition of sexual harassment proposed in the Qanun *Jinayat* appears to be superficial. Sexual harassment, for example, can occur only in domestic environments or in closed spaces. In fact, sexual harassment can take place in public spaces. The same is true of the sanctions imposed. There are also anomalies in the articles of adultery and adultery accusations. The existence of power relations is one of the causes of adultery, and an imbalance of power relations can motivate one party to impose his sexual will on the victim, however, these situations are not deemed coercion, let alone happen to adults.

Women observers in Aceh are also concerned about the articles outlining punishments. The types of punishments stipulated in the qanun are flogging, imprisonment, or fines. Flogging is at the top of the list and is frequently selected as a punishment for perpetrators by judges. If the judge prioritizes and decides only the flogging punishment for the perpetrator, it appears that the punishment will not necessarily solve the problem because there is a possibility that the perpetrator will repeat the action when he has

[37] Azharul Husna, LSM Kontras Pemerhati Qanun, Agustus 2022.

finished serving his sentence and returns to his place of residence because the time between arrest, trial, and execution of the sentence is not long. This case demonstrates that flogging alone does not and has not been able to create a deterrent effect on perpetrators, despite the fact that it can have a societal effect, namely the feeling of shame on perpetrators to prevent repeat offenses. These situations are one of the reasons for this qanun to be reviewed in those controversial sections, particularly under articles 47-50, which govern rape and sexual abuse of children. Sexual violence and rape against children are frequent in Aceh, with statistics showing an increase year after year. According to data from the Office of Women's Empowerment and Child Protection (DPPPA) of Aceh, there were 27 rapes against children and 20 other sexual offenses in 2022. In the same year, there were 117 cases of sexual harassment, 8 cases of incest, 6 cases of sodomy, and 102 rapes against women and children. Banda Aceh has the largest number of sexual offenses against children, followed by North Aceh Regency.

Women observers from Kontras Aceh (2022) stated that several perpetrators were acquitted in these cases, both at the first level (Sharia Court) and at the appeal level, such as in the decision of the Lhoksukon Sharia Court Number 5/JN/2019/MS.Lsk that released the perpetrator who was sentenced to 25 lashes in a first-level decision, and also there was a release of the defendant in the Tapaktuan Sharia Court decision Number 5/JN/2019/MS.Lsk, who was sentenced to 18 months imprisonment in the first level. Referring to data on cases of violence against women and children, they are not and have not been protected by qanuns. Meanwhile, there are other regulations governing child protection, such as Law Number 35 of 2014. Other than that, the Qanun *Jinayat* does not specify sanctions for perpetrators who sexually manipulate, persuade, seduce, or groom children sexually. These perspectives provided a reference for women from Kontras Aceh who advocated for these ambiguous articles to be revised or improved to ensure women's justice. The revisions are probably made to increase the amount of flogging for perpetrators in order to give them a deterrent effect. On the other hand, the existence of Qanun *Jinayat*, in addition to stricter legislation governing child protection and sexual offenses, demonstrates that qanuns still have possibilities for improvement in their pursuit of perfection, and this situation should not be used as a material to negate qanuns. The article on sexual violence against children, for example, is more extensively and comprehensively regulated under the Child Protection Law and the Sexual Violence Crime Act. These regulations are higher in the hierarchy than qanuns. Therefore, when a qanun governs the same issues but is not as comprehensive as the laws above it, the use of a qanun is deemed to set aside other higher legal rules, which becomes counterproductive for the Qanun *Jinayat* itself.

Other qanun observers contended that if a jarimah of sexual harassment and rape is proven guilty, the proper punishment will be imprisonment. It is because there is a rehabilitation process for perpetrators during the imprisonment process, even if the perpetrator who is imprisoned does not necessarily repent for his conduct because he may later commit sexual crimes after leaving prison. Nonetheless, his time in prison can prevent him from committing the same offense while in prison, as opposed to the flogging punishment. The perpetrators are free the next day after flogging and have the opportunity to repeat their crimes. There is less possibility of repentance, especially when the judge imposes a fine because money can buy many things, including justice for women.[38] The views of these observers continue to be conveyed to the government, both to executive, legislative, and judiciary through various media, so these views have become one of the primary considerations for the judges of the Sharia Court in the distribution of decisions to prefer imprisonment over flogging. The tendency of imprisonment is increasing year after year. As a result, textually, flogging is the first choice of law, but in fact, in the Sharia Court, flogging is the second choice of punishment.

2. Choice of Punishment, Why Imprisonment and Not Flogging?

Sexual offenses are among the crimes for which perpetrators face severe penalties. These crimes disproportionately target women and children due to their physical and psychological limitations in defending themselves against the perpetrators' physical dominance. In theory, researchers have widely exposed the reasons for sexual offenses. According to Amri and Tulab,[39] one of the causes of sexual crimes is the collapse and breakdown of the joints and the order of family life. Ninawati et al., mentioned that the reason for sexual crimes, particularly among children, is a lack of sexual education provided by parents and teachers from an early age.[40] Anggraini & Maulidya said that the majority of sexual crimes are committed against children because they have been exposed to pornographic content from an early age.[41] Minin suggested that the causes of sexual violence include the level of education, poverty, broken families, and lack of understanding of religion.[42] According to Syailendra, the reason for rape against children and close relatives is the dominance of one

[38] Aulianda Wafisa, Advocate and head of field at LBH Banda Aceh, 2022.

[39] M. Saeful Amri and Tali Tulab, "Tauhid: Prinsip Keluarga Dalam Islam (Problem Keluarga Di Barat)," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 1, no. 2 (May 5, 2018): 95, https://doi.org/10.30659/jua.v1i2.2444.

[40] Mimin Ninawati and Nur Wahyuni, "Using Book Of Sex Education Animated Cartoons To Increase The Understanding Of Basic School Sex Students" 07, no. 02 (2020).

[41] Trinita Anggraini and Erine Nur Maulidya, "Dampak Paparan Pornografi Pada Anak Usia Dini," *Al-Athfaal: Jurnal Ilmiah Pendidikan Anak Usia Dini* 3, no. 1 (June 27, 2020): 45–55, https://doi.org/10.24042/ajipaud.v3i1.6546.

[42] Darwinsyah Minin, "Strategi Penanganan Trafficking di Indonesia," no. 54 (2011).

family member over another.[43] Sexual violence against women is also caused by a patriarchal culture that views women as second-class citizens,[44] whereas Supriyadi stated that sexual crimes arise as a result of the loss or absence of state protection for women and children.[45] The reasons for the aforementioned sexual offenses can also be found in 291 decisions issued by the Sharia Court for the Aceh region in the last four years. As a result, the judge's decision is influenced by the causes of these crimes and their relationship to the perpetrators of abuse and rape.

There are 10 types of jinayat regulated in article 3 point (2) of this qanun, namely *khamar*, *maisir, khalwat, ikhtilath*, adultery, sexual harassment, rape, *qadzaf*, *liwath* and *musahaqah*. Seven out of ten *jarimah* only include perpetrators, while the other three, namely sexual harassment, rape, and *qadzaf*, involve both perpetrators and victims. Articles 46 to 56 of this Qanun *Jinayat* govern the *jarimah* of sexual harassment and rape. The minimum penalty for harassment is 45 lashes, and the maximum penalty is 200 lashes for rape with a child or *mahram* victim. One lash is equal to one month in prison or 450 grams of pure gold. The application of punishment to perpetrators of sexual harassment and rape is alternative (optional), with the option of flogging, fines, or imprisonment. The judge can select one of the three sentences or combine them for perpetrators who have been shown to have committed crimes of sexual harassment and rape. In this case, qanun observers are no longer concerned with qanun punishments for the perpetrators of the seven *jarimah* mentioned above, but instead, criticize the material of the qanun and its application in the *jarimah* part that involves perpetrators and victims. In the section on sexual harassment and rape, the perpetrators are mostly men and the victims include women and children, who are the most vulnerable to these two crimes. Based on the data and facts above, the most common punishment imposed by judges is imprisonment. When the judge sentences the perpetrator to a flogging sentence, another dilemma arises after the punishment. Flogging can be completed in one day, after which the perpetrator is free or returns to his residence, where the victim also resides. Zuhra expressed a similar concern, claiming that because this circumstance is inversely related to the victim's

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[43] Achmad Prasetya Syailendra, "Legal Protection of Incest Victims Who Have an Abortion," *Jurnal Hukum Novelty* 10, no. 2 (November 14, 2019): 140, https://doi.org/10.26555/novelty.v10i2.a12497.

[44] Muhammad Faisal Al Faraby, "Creativity of Protection of Rape Victims in Victimological Perspective," *Journal of Creativity Student* 4, no. 2 (July 30, 2019): 143–56, https://doi.org/10.15294/jcs.v4i2.36046.

[45] Slamet Supriyadi, "International Refugees in The Protection of Human Rights: A Discourse of International Humanitarian Law and Human Rights Law," *International Law Discourse in Southeast Asia* 1, no. 1 (January 31, 2022): 43–64, https://doi.org/10.15294/ildisea.v1i1.56872.

psychological state and vulnerability to repeated *jarimah* against her, ensuring a sense of security and protection will be difficult.[46]

On the one hand, the phenomenon of imprisonment for perpetrators of sexual offenses in the 291 decisions above is justified by Qanun *Jinayat* because this punishment is optional.[47] Statistics show that out of 300,000 people in Aceh there are only 51 criminal cases that have occurred and entered the Sharia Court. In 2022, there were only 7 cases until August. According to him, this could be one of the proofs of the Qanun *Jinayat's* effect in deterring individuals from carrying out jarimah in Aceh. Yusri added that this qanun is remarkable in terms of legal formality.[48] It is merely that the government's commitment is less apparent and is not implemented in accordance with the rules of the law, affecting the enforcement of the flogging sentence following the Sharia Court's ruling. Implementation of flogging requires funds from the government because it is carried out in public places. As a result, the offender must remain in custody until funds from the government are available to carry out the flogging. Detention during the waiting period for flogging execution also has an impact on the number of floggings. In cases of sexual harassment and rape, almost all perpetrators are imprisoned because of the trauma experienced by victims of sexual harassment and rape. As a result, extended prison sentences appear to have a deterrent effect on perpetrators and serve as a lesson for other communities.

As an academic, Yahya considered that the punishment under the Qanun Jinayat is an option between flogging, imprisonment, and fines. In the meantime, there is only one judge's decision, and they prefer imprisonment to flogging.[49] The distribution of the 291 decisions above demonstrates this pattern. This does not/has not provided some people with a sense of justice. In contrast to the Child Protection Act, there is chemical castration for perpetrators of several sexual offenses. The punishment is thought to bring more justice to the victim, but it can also provide a loophole for the perpetrator, preventing the victim from receiving justice. This worldly punishment cannot provide a complete sense of justice and satisfaction, but the Qanun Jinayat can come close to providing a sense of justice for victims. No matter how severe the punishment is given to the perpetrators, it still will not give a sense of justice

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[46] Nadia Maulida Zuhra, "Penerapan Hukuman Cambuk Bagi Pelaku Pelecehan Seksual Dalam Perkara Jinayat Dihubungkan Dengan Jaminan Akan Hak Asasi Manusia Atas Rasa Aman Dan Perlindungan Bagi Korban," *DiH: Jurnal Ilmu Hukum* 16, no. 2 (July 14, 2020): 259–70, https://doi.org/10.30996/dih.v16i2.3668.

[47] Muslim Bakhtiar, Judge (with special authority to handle jinayat cases) of the Syar'iyah Court in Banda Aceh, 2022, Banda Aceh.

[48] Yusri, Judge (with special authority to handle jinayat cases) of the Syar'iyah Court in Banda Aceh, 2022, Banda aceh.

[49] Faisal Yahya, Academician and qanun observer from UIN Ar-Raniry Banda Aceh, 2022, Banda Aceh.

and satisfaction. Many people can feel an abused woman's pain, but nothing will rectify the injustice that has been done to her. Therefore, Indonesia regulates castration punishment because this act of sexual harassment is extremely harmful. The punishment given may not always be fair for the victims, especially considering the trauma and the continuation of their future.

Conclusion

Based on the preceding discussion, it can be concluded that the pattern of punishments handed down by Sharia Court judges to perpetrators of sexual offenses, both rape and sexual harassment, is imprisonment. As a manifestation of Sharia regulations, it appears that the courts believe that imprisonment is more necessary than flogging, although their application has not adequately protected women and children. Rape, sexual harassment, and accusations of adultery are examples of similar cases with a wide range of punishments. More prison sentences are imposed by Sharia Court judges in these cases than flogging and fines. On the one hand, this situation is understandable because the Indonesian state has historically used imprisonment to enforce laws and regulations for a long time. When flogging is used in conjunction with a prison sentence, it takes longer for society to accept and adapt to this punishment. The primary cause of this disparity in decisions is the choice of punishments in the qanun, which is colored by the judges' perspective in assessing Sharia-based qanun rules. Another reason for this disparity in rulings is the community's insistence that perpetrators of rape and sexual harassment be imprisoned because the qanun does not yet regulate how ex-convicts of sexual crimes should live in society, particularly near victims and their families. Some people argue that flogging does not deter perpetrators since the punishment can be completed in a short period and the perpetrators can instantly return to society, where they can repeat their activities while the victim is still in a traumatic state. On this side, qanuns lack separate laws to govern and limit the distance between perpetrators and victims, as well as their families, to prevent repeat offenses.

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