# Criminalization of Child Victim of Rape in Qanun Jinayat (Study of the Lhoksukon Sharia Court Decision Number 10/JN/2020/MS-LSK)

Nursiti Nursiti[1], Roslaini Ramli[2], Anta Rini Utami[3]
{nursitish@unsyiah.ac.id[1], rosramli@unsyiah.ac.id[2], antariniutami@unsyiah.ac.id[3]}

Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia[123]

**Abstract.** Law enforcement against cases of sexual violence is often far from a sense of justice. That is due to the low perspective of gender justice in law enforcement officers. The reflection of the low gender justice perspective appears in court decisions related to criminal acts of sexual violence, one of which is the Lhoksukon Sharia Court decision Number 10/JN/2020/MS-LSK. This study uses a qualitative method with a normative juridical approach. The primary legal material used in this study is the Decision of the Sharia Court Number 10/JN/2020/MS.LSK and relevant legislation were used to analyze it. This paper aims to describe a court decision that is discriminatory and opens up opportunities for the criminalization of child victims of rape. The results of the analysis show that the problem began when Public Prosecutor decided to use the Aceh Qanun of Jinayat to resolve this case and ignore the Child Protection Act. The Public Prosecutor was considered not to be careful in preparing the indictment letter in an alternative form with the first indictment being rape of a child (Article 50), the second indictment being adultery with a child (Article 34), and the third indictment being sexual abuse of a child (Article 47). Mixing the qualifications of criminal acts in the perpetrator-victim relationship (rape and sexual harassment) with adultery which is classified as a criminal act committed voluntarily between the two parties is inappropriate. The next mistake is when the public prosecutor charged the defendant in the requisition with the crime of adultery with a child. This decision is very detrimental to the interests of the victim because, in the crime of adultery, the victim who is a child can also be positioned as the perpetrator, can be processed by law, and be subject to sanctions. The peak of the error was that the panel of judges did not use the perspective of child victims in their decision at all. The fact that the child victim and the defendant have a courtship relation cannot be used as a basis that the intercourse that occurred was adultery, not rape. Moreover, the juridical facts show that the child victims suffered abrasions and torn hymen. This case would be more appropriate if it was resolved using Article 76D in conjunction with Article 81 of Law Number 35 of 2014 as an act of forcing a child to have sex.

**Keywords:** Indictment letter, the Crime of Adultery with a Child, Rape of a Child, Sexual Abuse of a Child

## 1 Introduction

The Juvenile Criminal Justice System is regulated in Law Number 11 of 2012 which aims to provide guarantees so that children who conflict with the law receive an examination process that is following the stages of child development. Included as children in conflict with

ICGCS 2021, August 30-31, Padang, Indonesia
Copyright © 2022 EAI
DOI 10.4108/eai.30-8-2021.2316380

the law are children as perpetrators, children who become victims, and children as witnesses. In the Decision of the Lhoksukon Sharia Court Number 10/JN/2020/M. Lsk., the victim in this case is a 13-year-old girl. The child victim experienced a criminal act of rape/forced intercourse by someone she had only known for 7 (seven) days through her Facebook social media account, had an online romance, and was then invited to meet.

The position of the case is as follows:

Defendant (18 years old male) and the victim (13-year-old girl) got to know each other through their Facebook social media account on Wednesday, April 01, 2020. The defendant and the child victim then often exchanged messages using the messenger application. The defendant with his intimate words of seduction succeeded in establishing a love relationship with the victim. On Tuesday, April 7, 2020, at around 09.00 am, Defendant sent a message to the victim's Facebook and asked her to meet. The victim replied to the message and agreed to meet with Defendant.

The defendant invited his friend to meet with the victim at around 9:30 pm at the given home address in Sub-district Meurah Meuliah of North Aceh Regency. The defendant stopped at the side of the road 15 meters past the victim's house. The defendant then sent a message and asked the victim to come out to meet him. When Defendant met the Victim, they shook hands because Defendant and the Victim had only met for the first time. After chatting for a while, Defendant immediately touched the victim's cheek, then held the victim's breast with both hands and squeezed it.

The defendant was disturbed by the light from a passing vehicle because those acts were carried out on the side of the road. The defendant then pulled the victim's hand to enter the oil palm plantation by walking as far as 25 (twenty-five) meters. While walking, the victim's thigh hit a palm tree trunk, resulting in injuries and bleeding. After being inside the oil palm plantation, Defendant kissed the victim's lips, then his left hand groped the victim's vagina. The defendant pushed the victim to the ground in a sitting position. The victim tried to get up, but Defendant pinned her down and laid her down on her back. The defendant then kissed the victim's cheek and lips repeatedly. Then he unbuttoned the victim's shirt, lifted her bra, then sucked both of her breasts. The defendant then lowered the victim's panties to her knees and sucked the victim's vagina. The victim refused.

The defendant then took out his penis from behind the sarong and inserted it into the victim's vagina and shook it up and down until the defendant released sperm fluid on the victim's skirt. The defendant then reused his sarong and the victim put on her clothes which had been removed and opened and then walked back to the side of the road. The defendant and his friend then went home leaving the victim. The victim returned home and was asked by her parents why her condition was such a mess. The victim said that she had just met her friend. When her family found the sperm on the victim's skirt, the matter was reported to the police.

In the investigation process, the victim has also been medically examined, the results of which were then stated in the Visum et Repertum Letter Number 180/39/2020 dated April 09, 2020, which was signed by the examining doctor, dr. Teuku Yudhi Iqbal, Sp.OG., who concluded that on special examination there were abrasions on the Perineum, and visible lacerations on Hymen at directions of three o'clock, six o'clock, nine o'clock, and twelve o'clock and concluded that the hymen was not intact.

The defendant has been indicted alternatively by the Public Prosecutor as described in the Public Prosecutor's Indictment No. Reg. Case: PDM/Eku.2/Lsk/05/2020 dated 27 May 2020, which essentially states that the Defendant's actions are criminal acts as regulated and

punishable by crime in Article 50 in conjunction with Article 34 in conjunction with Article 47 of the Aceh Qanun Number 6 of 2014 concerning Jinayat (criminal) Law. The choice of settlement through the Qanun Jinayat is possible because this qanun also regulates the crime of sexual harassment, rape, and adultery.

In the case of child rape, it shows an example of the low position of women towards men's sexual interests, and the existence of women's sexual images that place women as male sexual objects. In their daily life, women always face violence, coercion, and torture both physically and psychologically. On that basis, rape is not only a reflection of the image of women as sex objects but as objects of male power.[1]

Rape is a form of crime, according to William Andreanus Bonger, defining crime "as an immoral act, contrary to decency, anti-social, annoying, and detrimental to society.[2] Violence (abuse) is not only defined physically but also mentally and even passively (ignorance). Violence can be interpreted as wrong treatment, cruel treatment. Terry E. Lawson said that "child abuse, ranging from neglect to rape and murder, which can be classified as emotional abuse, physical abuse, and sexual abuse (sexual violence)"[3]

This paper aims to describe the error in the Lhoksukon Sharia Court Decision which has decided this case as described above, as adultery with a child, which is regulated in Article 34 of the Qanun Jinayat. The decision causes the victim to be placed as a party responsible for the crime. This is because adultery is a criminal act which in the elements of the article places both parties as perpetrators. This criminal act of adultery is an act that is done voluntarily. The decision of the Sharia Court is considered to criminalize rape victims as perpetrators of adultery. Therefore, this decision is important to be analyzed and to be a concern for many parties, especially the Public Prosecutor and Judge, so that it never happens again.

## 2 Research Methods

The research uses a normative juridical research method with a case study approach. As normative research, the data source is secondary data obtained from library materials in the form of books, documents, and legal literature related to the issues raised from the Lhoksukon Sharia Court Decision Number 10/JN/2020/MS-Lsk regarding acts of adultery with children. Data collection was carried out through library research through a series of reading activities, citing, reviewing legislation relating to the object of research. While the research tool used is documents study which is a study of legal documents in the form of court decisions related to the case under study. The purpose and use of this literature study are basically to show the way to solve the problems under study. The type of data used in this study is secondary data which includes primary legal materials, secondary legal materials, and tertiary legal materials.

The analysis was conducted using a set of laws and regulations related to formal criminal law and material criminal law. The formal criminal law resources used are Law Number 8 of 1981 concerning the Criminal Procedure (KUHAP), Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, the Aceh Qanun Number 7 of 2013 concerning the Jinayat (criminal) Procedure Law, and the Aceh Qanun Number 9 of 2019 concerning the Implementation of Treatment for Violence Against Women and Children. The formal criminal law policies used to review this decision are Law Number 1 of 1946 concerning the Criminal Code (KUHP), Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, the Aceh Qanun Number 11 of 2008 concerning Child Protection and the Aceh Qanun Number 6 of 2014 concerning Jinayat (criminal) Law.

Data analysis is the most important thing in a study, namely, to provide answers to the problems studied. Analysis of the data used is qualitative data analysis using analytical methods (the content of analysis), namely selecting, comparing, combining, sorting various meanings. Furthermore, all the data is analyzed to answer the problems in this case study.

## 3 Findings and Discussions

Aceh is a province that has asymmetrical autonomy as regulated in Law Number 11 of 2006 concerning the Government of Aceh. This causes Aceh to have a different authority compared to other provinces in Indonesia. One of these differences is the application of Islamic Criminal Law (*Jinayat*). The provisions regarding *Jinayat* are regulated in the Aceh *Qanun* Number 6 of 2014 concerning *Jinayat* Law (hereinafter referred to as *Qanun Jinayat*). There are ten *jarimah* (acts of crimes) regulated in the *Qanun*, namely *Khamar* (alcoholic drinks), *Maisir* (gambling/chances games), *Khalwat* (seclusion with *non-mahram*), *Ikhtilat* (making out with *non-mahram*), *Zina* (adultery), *Liwath* (male same-sex sexual relations), *Musahaqah* (female same-sex sexual relations), *Qazaf* (accusing people of adultery), Sexual Harassment and Rape.

Qanun Jinayat defines adultery in Article 1 Number 26 as "intercourse between a man or more and a woman or more without marital ties with the willingness of both parties". This definition is different from the definition of adultery that has been formulated by Islamic scholars. For example, Al-Qurtubi argues that adultery is:

إيالج فرج بفرج أي قبل أنثى محرم لعينه خال عن الشبهة مشتهى

It means; Entering *farji* (penis) into another *farji*, namely female genitalia which is forbidden without any doubt.

Ibn Qasim al-'Ashimi quoted Ibn Rushd as saying:

الزنا هو فعل الفاحشة، قال ابن رشد هو كل وطء وقع على غير نكاح صحيح وال شبهة نكاح وال ملك يمين

Some scholars define adultery as sexual intercourse between a man and a woman outside the frame of marriage or *syubhatunnikah*.

The definition of adultery from the two scholars' opinions above is different from the definition that has been formulated by the *qanun*. First, the *qanun* mentions the element "there is willingness between the two adulterers" where this element is not included in the definition made by the scholars. The existence of the element of "willingness of both parties" contained in the definition of adultery in the *qanun* is intended to distinguish between sexual intercourse which is called adultery and intercourse which is categorized as rape. The definition set out in the *qanun* also does not provide a limit on the age of the adulterer. In Islamic religious provisions, adultery can only be held accountable to someone who is an adult (*mukallaf*). The punishment that can be imposed for an adulterer is 100 lashes.[4]

In the Qanun Jinayat, the provisions concerning the prohibition of adultery are regulated in Article 33 which reads:

a. Everyone who intentionally commits *Jarimah Zina* (adultery), is threatened with *'Uqubat Hudud* by being lashed 100 (one hundred) times.
b. Anyone who repeats the act as referred to in Paragraph (1) is threatened with *'Uqubat Hudud* by being lashed 100 (one hundred) times and can be added with *'Uqubat Ta'zir* in the form of a maximum fine of 120 (one hundred and twenty) grams of pure gold or *'Uqubat Ta'zir* in the form of imprisonment for a maximum of 12 (twelve) months.

c. Any Person and/or Business Entity who intentionally provides facilities or promotes *Jarimah Zina* shall be threatened with *'Uqubat Ta'zir* by being lashed at a maximum of 100 (one hundred) times and/or a fine of a maximum of 1000 (one thousand) grams of pure gold and /or imprisonment for a maximum of 100 (one hundred) months.

The provisions for adultery as regulated in Article 33 consist of several elements of action. In Paragraph (1) the element of the article that must be proven is the act of sexual intercourse between two adults who do not have a *mahram* relationship and is carried out outside the marriage bond voluntarily. In the provisions of paragraph (1), both are perpetrators and if proven, they will be punished with 100 lashes. The regulation of the crime of adultery in the *Qanun Jinayat* is different from the regulation in Article 284 of the Criminal Code which requires that the crime of adultery is a complaint offense and at least one of the spouses who commit adultery is still bound by marriage. In the *Qanun Jinayat*, adultery is not a complaint offense and an adulterous couple can occur between people who are not yet bound by marriage (single).

The provisions in Paragraph (2) are intended for anyone who repeats the criminal act of adultery as regulated in Paragraph (1). The provision in Paragraph (2) is not a repetition of a criminal act as referred to in the Criminal Code. The repetition of a crime (recidivism) in the Legal Dictionary is defined as the repetition of a crime, the event that someone who has been convicted of a crime commits another crime. The provision in Paragraph (2) does not require that the first act has been processed by law and has undergone a sentence. The repetition of adultery as referred to in Paragraph (2) Article 33 of the *Qanun Jinayat* is often only based on the perpetrator's confession of how many times the adultery has been committed. Based on this confession or other evidence at trial, the defendant can be sentenced to a heavier *uqubat*, namely 100 lashes which can be added to the imposition of a maximum fine of 120 grams of pure gold or 120 months in prison.

Article 33 Paragraph (3) is aimed at a person or business entity providing facilities or promoting adultery. With this provision, hotel management, owners of boarding houses, or any facilities that can be used to commit adultery, can be subject to *'uqubat*. The number of sanctions stipulated in the *Qanun Jinayat* is a maximum of 100 lashes or a fine of 1000 grams of pure gold or 100 months in prison.

Further provisions in Article 34 reads "Every adult who commits adultery with a child, in addition to being threatened with *'Uqubat Hudud* as referred to in Article 33 Paragraph (1) can be added with *'Uqubat Ta'zir* with a maximum of 100 lashes or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum imprisonment of 100 (one hundred) months.

Based on the provisions in Article 34, adult perpetrators who commit adultery with children will be given additional punishment. In addition to the *uqubat hudud* of 100 lashes, it can be added with *Uqubat Ta'zir* lashes of a maximum of 100 (one hundred) times or a fine of a maximum of 1,000 (one thousand) grams of pure gold or imprisonment for a maximum of 100 (one hundred) months. The problem in Article 34 lies in the child who is the "adultery partner" of the adult. Referring to the notion of adultery as an act of sexual intercourse that is carried out voluntarily outside of marriage, the child will also be positioned as an offender who can be legally processed and sentenced.

Referring to Article 67 of *Qanun Jinayat* in Paragraph (1) it is stated that: "If a child who has reached the age of 12 (twelve) years but has not yet reached the age of 18 (eighteen) years or has not married commits adultery, then the child can be charged with *'Uqubat* at most 1/3 (one third) of the *'Uqubat* that has been determined for adults and/or returned to their parents/guardians or placed in a place provided by the Aceh Government or the Regency/City Government".

The stipulation in Article 34 of *Qanun Jinayat* is contrary to the principles contained in the Child Protection Act, particularly regarding the principle of the Best Interest of the Child. In the Child Protection Act, there is no known crime of adultery with children. A child is someone who is not yet 18 (eighteen) years old and includes children who are still in the womb. Children are judged not to be able to determine the good and bad of an action. Therefore, when there is an adult who has intercourse with a child, it is not included in the form of adultery (which contains a voluntary element in it). The consent of the child does not eliminate the element of the crime.

An adult's sexual relationship with a child will be considered adultery if it occurs completely without persuasion, without lure, without threats, or the like. A child will not want to commit adultery on his/her initiative; therefore it should be suspected that he was persuaded, deceived, or threatened. If the act was carried out inadvertently on his/her initiative, then the act would be considered rape. Children will be encouraged to do so when stimulated to do so, for example through flattery, persuasion, lure, deception, and others similar to that which are included in the sense of being threatened (threats).[5]

The problems that arise from the arrangements in Article 34 of the *Qanun Jinayat* can be resolved by Article 76D of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Article 76D states: Everyone is prohibited from committing violence or threats of violence to force children to have intercourse with him or with other people. The provisions of this Article 76D criminal sanctions are regulated in Article 81 which reads:

a. Anyone who violates the provisions as referred to in Article 76D shall be sentenced to a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).
b. The criminal provisions as referred to in paragraph (1) shall also apply to any person who intentionally commits a trick, a series of lies, or persuades a child to have intercourse with him or with another person.
c. If the criminal act as referred to in paragraph (1) is committed by a parent, guardian, child caretaker, educator, or educational staff, the penalty shall be increased by 1/3 (one third) of the sentence as referred to in paragraph (1).

The provision in Article 81 Paragraph (2) is a common phenomenon in rape cases that occur in unequal relationships. Perpetrators do not have to use violence or threats of violence to force the victim to comply. In a courtship relationship, as in the case of the sharia court ruling that is analysed, the perpetrator will use deception, a series of lies, or persuasion so that the child victim wants to have sex with him.

If Article 50 of the *Qanun Jinayat* is used for cases of rape against children, then the difficulty is in the limitation of rape which only requires that it be carried out with violence or coercion, or threats of violence. The definition of rape is regulated in Article 1 Number 30, namely: "Rape is sexual intercourse with the *faraj* (vagina) or rectum of another person as a victim with the perpetrator's penis or other objects used by the perpetrator or against the victim's *faraj* or penis with the perpetrator's mouth or against the victim's mouth with the perpetrator's penis, by force or coercion or threats against the victim."

The definition of rape regulated in *Qanun Jinayat* is broader than the definition of rape regulated in Article 285 of the Criminal Code which only recognizes rape only if there is the penetration of the male genitalia into the female genitalia and the female victim must be someone who is not the wife of the perpetrator. If referring to the provisions of Article 1 Number 30 of *Qanun Jinayat*, the definition of rape can be in the form of the following acts:

a. Sexual intercourse with the perpetrator's penis to the victim's vagina.
b. Sexual intercourse with the perpetrator's penis to the victim's rectum.
c. Sexual intercourse in which the perpetrator uses other objects to the victim's vagina.
d. Sexual intercourse in which the perpetrator uses other objects to the victim's rectum.
e. Sexual intercourse to the victim's vagina with the perpetrator's mouth.
f. Sexual intercourse with the mouth of the perpetrator to the victim's penis.
g. Sexual intercourse to the victim's mouth with the perpetrator's penis.

The description of the forms of acts that fall within the scope of rape shows that the *Qanun Jinayat* classifies anal sex, oral sex, and the use of objects into the vagina and anus as part of the act of rape as is the act of penetrating the male genitalia into the female genitalia. The formulation of the definition of rape in the *Qanun Jinayat* also opens a wider subject where the victim does not have to be a woman who is not his wife as stated in the Criminal Code. The victim can also be male as the sixth form of action is sexual intercourse with the perpetrator's mouth to the victim's penis. In this case, it means that the female perpetrator performs oral sex on the male victim.

The expansion of these forms of rape is unfortunately limited to how it is done which must be by force or coercion or threats. *Qanun Jinayat* did not provide further details on violence, coercion, and threats. Therefore, investigators and public prosecutors refer to the definition stated in the Criminal Code which explains that "violence is the illegal use of force or physical strength. For example, hitting with the hands or with all kinds of weapons, kicking, and so on. In the Criminal Code, what is meant by violence is to make people faint or helpless.[6]

According to Alyasa' the notion of violence in *Qanun Jinayat* can be interpreted as "Violence is (can be understood as) a sadistic act (physical activity), namely causing excessive pain (due to violence or improper ways of relating) or physical damage to the victim. Thus, a sexual relationship that was originally an act of adultery, *liwath*, or *musahaqah* can turn into rape if one party commits violence to injure his/her partner (sadistically). While the notion of coercion is "the use of energy, authority, influence, and or power (verbal), so that people who become victims feel helpless (powerless), cannot refuse (lost authority, influence), do not dare to fight (lost power), depressed in such a way that they feel compelled to follow the wishes of the perpetrator out of fear.

Especially for coercion of children not only by threats or pressure but also persuasion, lure, which makes children affected. Definition of Threats, basically a part of coercion, but in a more persuasive way (gentle, polite), can be referred to as coercion in a lighter way; so that the scope becomes wider than coercion; In the threat can be included deception, persuasion, seduction, or lure. A trick, persuasion, seduction, or lure is considered a threat if there are bad consequences to the victim if the victim is resisted or rejected, for example, humiliation. Seduction against children, according to Alyasa' must be understood as a threat.

Children tend not to be able to think logically and, do not have careful consideration, so they are easily influenced. Threats to children are not necessarily the same as threats to adults. Statements that they will be left as girlfriends, or previous *ikhtilath* acts that have been carried out will be published on social media, or indecent photos will be disseminated or the like, are already fall under threat. Seduction and lure such as being married, given money, have also entered as part of the threat to children.[5]

The explanation as given by Alyasa above has not become a common understanding among law enforcement officers. Most law enforcement officers still understand that violence is the use of great physical force, which is marked by resistance from the victim. Therefore, in cases of sexual violence where the relationship is courtship, law enforcement officials tend to categorize it into consensual acts (adultery). This will certainly cause injustice for child

victims who have not been able to decide what is right and wrong and are unable to think about the consequences of their actions.

Another crime charged by the Public Prosecutor in the Decision of the Lhoksukon Sharia Court Number 10/JN/2020/MS-Lsk., is Sexual Harassment. According to Article 1 Number 27 of *Qanun Jinayat*, the definition of sexual harassment is "an immoral act or obscene act that is intentionally carried out by someone in public or against another person as a victim, both male and female, without the victim's consent." Based on this definition, sexual harassment can be divided into immoral or obscene acts. The use of the word "or" between the two activities makes it an act that is considered the same. The meaning of immoral or obscene acts is not explained in the *Qanun Jinayat*. Therefore, the Investigator and Public Prosecutor used the explanation given by R. Soesilo, namely "what is meant by obscene acts are all acts that violate decency (courtesy) or vile acts, all of which are in the environment of sexual lust, for example kissing, groping touch the genitals, touch the breasts, and so on.[6]

These activities can be divided into two forms. The first is immoral or obscene acts committed against oneself and carried out in public. The victims in this activity are people who are in a public place who feel disturbed or harassed by the actions committed by the perpetrator. Another activity is immoral or obscene acts committed to the victim, who can be male or female, whether committed in public or not. In this case, the victim is not willing or does not accept the immoral or obscene act committed against him/her.

Regarding perpetrators, sexual harassment can be carried out by men and/or women. The age of the perpetrator in the sexual harassment case was not determined. In the provisions of Islamic teachings that can be held criminally responsible as perpetrators should only be adults. However, because in the formulation of this *Qanun Jinayat* there is no age limit, then a child can also be prosecuted as a perpetrator of sexual harassment, only that the punishment that can be imposed on child perpetrators will refer to Article 67 of the *Qanun Jinayat* as previously discussed.

Victims in this sexual harassment crime can be divided into victims in the general group who object to the perpetrator's actions in public and direct victims who are the targets of the perpetrators to be harassed or molested. When it comes to gender, the victims can be male or female. If it is related to the age of the victim, then this sexual harassment is divided into two groups, namely adult victims as regulated in Article 46 of the *Qanun Jinayat* which reads: "Everyone who intentionally commits *jarimah* sexual harassment, is threatened with *'Uqubat Ta'zir* with a maximum of 45 (forty-five) lashes or a maximum fine of 450 (four hundred and fifty) grams of pure gold or imprisonment for a maximum of 45 (forty-five) months, and the group of victims at the age of children as regulated in Article 47 of *Qanun Jinayat* which reads "Everyone who intentionally commits sexual harassment as referred to in Article 46 against children, is threatened with *'Uqubat Ta'zir* by lashes at most 90 (ninety) times or a maximum fine of 900 (nine hundred) grams of pure gold or a maximum imprisonment of 90 (ninety) months."

Sexual harassment is often included in every indictment of the public prosecutor in cases of sexual violence. This *jarimah* is equivalent to the criminal act of obscenity regulated in Article 289 of the Criminal Code. While the equivalent for sexual abuse of children can use a stronger provision in Article 76E in conjunction with Article 82 of the Child Protection Act, which reads: Everyone is prohibited from committing violence or threats of violence, coercion, trickery, committing a series of lies, or persuade the Child to commit or allow obscene acts to be carried out." The sanctions against the prohibition in Article 76E are regulated in Article 82 of the Child Protection Law which reads as follows:

a. Anyone who violates the provisions as referred to in Article 76E shall be sentenced to a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).
b. If the criminal act as referred to in paragraph (1) is committed by a parent, guardian, child caretaker, educator, or educational staff, the penalty shall be increased by 1/3 (one third) of the penalty as referred to in paragraph (1).

The provisions of criminal sanctions regulated in the Child Protection Act for this obscene act are much heavier than the sanctions in the *qanun jinayat*. Sanctions for obscene acts are the same as sanctions for criminal acts of rape or coercion to have sex with a child. Meanwhile, the criminal sanctions in the *Qanun Jinayat* for sexual abuse of children are only regulated with a maximum provision of 90 lashes or a fine of 900 grams of pure gold or 90 months in prison. The absence of minimum sanctions for this crime creates a high disparity in criminal sanctions.

The Public Prosecutor should not settle this case through the *Qanun Jinayat*, because the act of crimes regulated therein has limitations. The most appropriate legal basis used to resolve this case is to use the Child Protection Act which will be examined and decided in the General Court. This choice is based on at least three considerations, namely first: The Child Protection Act is a special law that makes children the subject of its regulation so that the policies regulated in it become more comprehensive. Second: the sanctions regulated in the Child Protection Act are much more severe than the *Qanun Jinayat*. Third: the use of the Child Protection Law will be under the authority of the General Court. The Juvenile Justice System applied in the District Court is much better than the application in the Sharia Court. The number of judges with child certification is still very limited in the Sharia Court. Work facilities to support the implementation of child trials following the juvenile criminal justice system are also not yet available. Based on these considerations, the Public Prosecutor should not use the *Qanun Jinayat* to resolve child cases, especially those related to sexual violence.

The Public Prosecutor, in the decision being analyzed, compiled his indictment letter using an alternative form of indictment. The term indictment is a word introduced from the provisions of Article 140 Paragraph (1) of the Criminal Procedure Law. From all the articles of the provisions of the Criminal Procedure Law and other laws, there is no definition of an indictment letter. In general, the indictment is interpreted by legal experts in the form of a deed that contains the formulation and conclusions from the results of the investigator's examination which are then linked to the article of the crime that was violated and charged to the defendant. The indictment is the basis for the examination of the judge in the trial court.[7]

The requirements or contents of the indictment as stated in Article 143 paragraph (2): "The public prosecutor shall make an indictment which is dated and signed and contains: Full name, place, and date of birth, age or date of birth, gender, nationality, place of residence, religion, and occupation of the suspect, as well as a detailed, clear and complete description of the criminal act charged with mentioning the time and place where the crime was committed.

In addition to functioning as a basis for examination by judges in trials, the indictment serves as the basis for the Public Prosecutor in filing criminal charges against the defendant, as well as the basis for the defendant to defend himself and as the basis for the judge to consider and make a decision.

From the types and patterns of criminal acts that occurred, several forms of the indictment were identified, namely single charges, alternative charges, cumulative charges, subsidiary charges, and combined charges. The Alternative Charge or Preferred Indictment is chosen if the facts resulting from the investigation only meet the elements of one crime, but the public prosecutor is doubtful because the facts that support the elements of the crime can also support

other criminal acts. So, it could be that what will be proven is another crime. This happens when the indictment of one criminal offense with another criminal offense is mutually exclusive. Because only one criminal act will be proven, the conjunction "OR" is given between one indictment and another. How this alternative indictment is examined in court is that all charges are examined at once. From the results of the examination, the public prosecutor and the judge each choose one criminal act which is considered proven. While charges that are not proven need not be considered further.[8]

In the Decision of the Lhoksukon Sharia Court Number 10/JN/2020/MS-Lsk., the alternative indictment prepared by the Public Prosecutor was judged to be inaccurate because it combines a crime that contains elements of violence and there are victims (rape and sexual harassment) with adultery committed voluntarily by both parties. The inclusion of adultery in the indictment shows that the public prosecutor has doubts about the crime that occurred, especially regarding the child victims who experienced violence, coercion, or threats. Based on the case prepared by the public prosecutor in his indictment, it places great emphasis on the existence of a courtship relation between the perpetrator and the victim, describing how sexual intercourse was carried out without threats or violence.

The Public Prosecutor should find facts about the existence of acts of persuasion and lure committed by the perpetrator to the Child Victim which can be categorized as a threat. The charge (*requisit*ion) proposed by the public prosecutor is Article 34 of the *Qanun Jinayat* regarding adultery with children, indicating that the public prosecutor did not consider the best interests of the child. That the child victim who is only 13 (thirteen) years old girl does not have enough knowledge about sexual relations and the consequences it causes. The Public Prosecutor should have the courage to call that the criminal act committed by the perpetrator is the rape of a child.

The culmination of the error in the Decision of the Sharia Court Number 10/JN/2020/MS-Lsk is when the panel of judges in their consideration is more focused on the defendant's confession and the defense of the defendant's legal counsel, that sexual relations that occurred because of love, consensual because of the perpetrator and victims in courtship relationships. There is no threat or coercion let alone violence.

The judge's consideration is considered to have absolutely no perspective on the interests of the child. The judge should have considered that the victim and the perpetrator had only been acquainted for 7 (seven) days, had never met except on the night of the incident and that the perpetrator deliberately did not meet at the victim's house, but on the side of the road 15 (fifteen) meters from the victim's house. The panel of judges should understand that the child victim was willing to meet the perpetrator on the side of the road, being willing to be pulled by the perpetrator's hand into the oil palm plantation does not mean that the victim is willing to be invited to have sex (adultery) by the perpetrator.

In the terminology of the crime of rape, the category of seductive rape is known, namely a rape that occurs in stimulating situations created by both parties. At first, the victim decided that personal intimacy should be limited not to the extent of sexual intercourse. Perpetrators generally have the belief that the victim needs coercion, therefore the perpetrator has no guilt regarding sex.[9] Rape that occurs in a courtship relationship is generally included in the category of seductive rape. Although the victim is considered to have had a role in the occurrence of sexual relations because of not giving a firm resistance or rejection, the case can still be categorized as a criminal act of rape.

In the case of rape, judges and prosecutors should also pay attention to the motive so that they are not wrong in placing the prosecution article and the sentencing decision. In this case, the perpetrator's motive was to ask the victim, whom he had just met through social media, to

meet outside her house, to invite her and by holding her hand then dragging her into the oil palm plantation.

The action of the public prosecutor and the panel of judges in deciding the qualifications of the crime that occurred was adultery with a child, causing the criminalization of the victim. Criminalization is a change in value that causes several actions that were previously blameless and not criminally prosecuted to turn into acts that are considered despicable and need to be punished. In this decision, what happens is a change in the value of a child as a victim of rape who deserves protection and reparation, to being an adulteress who can be lashed 100 times. The decision with the imposition of adultery also causes the child victim to lose the right to be able to file claims for restitution as regulated in Article 51 of the *Qanun Jinayat*.

## 4 Conclusion

In cases of sexual violence, usually, women or girls are often considered as the trigger for the act, especially in sexual violence in a dating relationship. As a result, the decisions taken are often detrimental to the victim, especially if the prosecutor and the panel of judges are biased in understanding the articles of legislation used so that the victim often gets injustice, and there is a patriarchal attitude that tends to take side with men so that in every case of sexual violence woman often victimized many times.

Analysis of the Lhoksukon Sharia Court Decision Number 10/JN/2020/MS-LSk shows that the child victim of rape is criminalized when the crime she has experienced is qualified as adultery against a child. This decision resulted in the child victim being considered voluntarily having sexual relations with the perpetrator. The victim has the opportunity to be prosecuted and sentenced. The imposition of a decision on adultery with a child also causes the child to lose his right to apply for restitution. Qanun Jinayat stipulates that victims of rape can apply for restitution which must be paid by the convict. It is recommended that the Public Prosecutor be more careful in compiling his indictment and prioritize the best interests and protection of children by using the Child Protection Act.

## References


[1] A. N. N. Juwita, “Child Victims of Sexual Violence Due to Gender Inequality,” vol. 16, 2019.

[2] B. W A, *Introduction to Criminology*. Jakarta: Pembangunan, 1962.

[3] M. Gultom, *Legal Protection for Children and Women*. Bandung: Refika Aditama, 2014.

[4] R. Fakharurazi, “Adultery And Rape In Qanun Jinayat Aceh: Formulation Analysis Of Istinbath Method,” vol. 1, 2020.

[5] A. Alyasa, “Principles, Definitions, and Proof of Criminal Acts in Qanun Jinayat,” Banda Aceh, 2021.

[6] R. Soesilo, *The Criminal Code (KUHP) And Its Comments Complete Article By Article*. Bogor: Politeia, 1994.

[7] T. P. M. B. D. K. R.I, *The Development Team for the Education and Training Board of the Indonesian Attorney General’s Office Module, the Indictment Letter Module, the Education and Training Agency for the Attorney General’s Office of the Republic of Indonesia*. 2019.

[8] M. H. Harun, *The Indictment, Techniques for Compilation, Functions, and Problems*. Jakarta: Rineka Cipta, 1994.

[9] I. M. Wahid Abdul, *Protection for Victims of Sexual Violence*. Bandung: Refika Aditama, 2001.