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Protection of Women and Children in the Perspective of Legal Pluralism: A Study in Aceh and West Nusa Tenggara

Muslim Zainuddin
Universitas Islam Negeri Ar-Raniry, Banda Aceh
Mukhsin Nyak Umar
Universitas Islam Negeri Ar-Raniry, Banda Aceh
Dedy Sumardi
Universitas Islam Negeri Ar-Raniry, Banda Aceh
Mansari
Universitas Iskandarmuda, Banda Aceh
Zakki Fuad Khalil
Universitas Islam Negeri Ar-Raniry, Banda Aceh
Email: muslim.zainuddin@ar-raniry.ac.id

Abstract: The coexistence of Islamic law, customary law, and the national legal system within empirical societies remains an ongoing phenomenon. The consequences of such legal pluralism have implications for the protection of women and children. This study aims to examine the dynamics of legal relationships, the determination of diverse laws among the people of Aceh and West Nusa Tenggara, and the factors influencing the contestation of legal choices that impact legal favoritism towards women and children. This study employed a juridical empirical legal research method with a legal pluralism approach. Data were obtained by means of in-depth interview and document study. The interviews were conducted with customary leaders, religious leaders, and academics, whilst document analysis included journal articles, laws, and relevant books. The study took place in two locations: Aceh and West Nusa Tenggara Provinces. The findings of the study reveal that the dynamics of the relationship between customary law, religious law, and state law run concurrently in the context of the application of family law and criminal law. Some members of the community follow customary law and religious law, while others follow state law. The determination of law among the people of Aceh and Lombok is based on the legal consciousness of the community concerned. The choice of law in societal reality has an impact on favoritism towards women and children. The choice of state law tends to guarantee legal certainty and can provide legal protection for women and children. Conversely, the choice of religious law and customary law may sometimes be detrimental to women and children.

Keywords: Women, Children, Legal Pluralism, Aceh, West Nusa Tenggara

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Abstrak: *Keberlakuan hukum Islam, hukum adat dan sistem hukum nasional dalam kenyataan empiris masyarakat menjadi fenomena yang terus berlangsung hingga saat ini. Konsekuensi dari pluralisme hukum tersebut memiliki pengaruh pada perlindungan perempuan dan anak. Kajian ini bertujuan mengkaji dinamika hubungan hukum, penentuan hukum yang beragam di kalangan masyarakat Aceh dan Nusa Tenggara Barat dan faktor yang mempenguhi kontestasi pilihan hukum yang berimplikasi pada keberpihak hukum bagi perempuan dan anak. Kajian ini menggunakan metode penelitian hukum yuridis empiris dengan pendekatan pluralisme hukum. Data diperoleh dengan cara wawancara mendalam dan studi dokumentasi, wawancara dengan tokoh adat, tokoh agama dan akademisi, sedangkan analisis dokumen yaitu artikel jurnal, undang-undang dan buku yang terkait. Lokasi penelitian dilakukan di dua tempat yaitu Provinsi Aceh dan Nusa Tenggara Barat. Hasil penelitian menunjukkan bahwa dinamika hubungan tradisi hukum adat, hukum agama dan hukum negara berjalan beriringan dalam konteks keberlakuan hukum keluarga dan hukum pidana. Sebagian masyarakat mengikuti tradisi hukum adat dan hukum agama, sebagian lainnya mengikuti hukum negara. Penentuan hukum di kalangan masyarakat Aceh dan Lombok didasari oleh kesadaran hukum masyarakat yang bersangkutan. Pilihan hukum dalam kenyataan masyarakat memiliki pengaruh keberpihakan pada perempuan dan anak. Pemilihan hukum negara lebih cenderung menjamin kepastian hukum serta dapat memberikan perlindungan hukum pada perempuan dan anak. Sebaliknya, pemilihan hukum agama dan hukum adat kadangkalanya merugikan bagi perempuan dan anak.*
Kata Kunci: *Perempuan, Anak, Pluralisme Hukum, Aceh, Nusa Tenggara Barat*

Introduction

Studies on legal pluralism or diversity in Indonesian law have resurfaced among legal experts in the postmodern era. Interest in studying legal pluralism is inseparable from Indonesia's geographical location, which is composed of diverse ethnic groups, races, religions, and cultures. This diversity has led to the emergence of legal complexities in determining the choice of law that favors the rights of children and women in societies based on religious (Islamic) law. The emergence of this agenda has become an important issue, capturing the attention of various parties, as it has given rise to many problems, especially in the field of law enforcement. Existing studies reinforce this assumption that legal diversity is a fact—always present—in the process of transforming value systems into the national legal system.[1] The fact of legal diversity is then made the object of study

[1]Haley Duschinski and Mona Bhan, "Introduction: Law Containing Violence: Critical Ethnographies of Occupation and Resistance," *Journal of Legal Pluralism and Unofficial Law* 49, no. 3 (2017), https://doi.org/10.1080/07329113.2017.1376266; Helen Dancer, "Harmony with Nature: Towards a New Deep Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 53, no. 1 (2021), https://doi.org/10.1080/07329113.2020.1845503; Dedy Sumardi, Ratno Lukito,

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in this current study, with its focus on the legality of legal traditions as official products of the state. The conceptual framework used to analyze the phenomenon of legal diversity is interlegality, a new way of viewing the phenomenon of legal pluralism. Interlegality is used as a reference framework to analyze the problems that arise around the ongoing process of interaction between various legal traditions, with a focus on cases involving children and women, thus contributing to efforts to form a new legal system that is adapted to the principle of openness to the diversity of values and social systems in society. Ideas about the awareness of legal diversity are built based on the diversity of legal cultures and value systems. The formation of legal culture is also influenced by theological understandings, which are always dependent on divine values.[2]

Attention to the diversity of legal traditions has existed and developed since before the colonial era through the process of cultural assimilation, being adopted from traditions based on religion and customs.[3] In the era of modernization, law is no longer understood as a system of norms that binds every citizen. At the implementation level, the law is controlled and monitored by the state through a number of formal regulations, which are created and compiled by members of the legislature as representatives of the state. Consequently, this leads to the emergence of a centralized nature of law, and in certain cases, the rights of children and women are often overlooked when confronted with the law.[4]

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and Moch Nur Ichwan, "Legal Pluralism within the Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia," *Samarah* 5, no. 1 (2021), p. 426–49; Bruce Baker, "Hybridity in Policing: The Case of Ethiopia," *Journal of Legal Pluralism and Unofficial Law* 45, no. 3 (2013); Rusjdi Ali Muhammad, "Reconciliation for the Settlement of Criminal Cases: Reactualization of Local Wisdom in Indonesian Criminal Law [Upaya Perdamaian Untuk Penyelesaian Perkara Pidana: Reaktualisasi Kearifan Lokal Dalam Hukum Pidana Indonesia]," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 10, no. 2 (November 19, 2021), p. 171.

[2]Jessika Eichler and Fanny Verónica Mora Navarro, "Proceduralising Indigenous Peoples' Demands: Indigenous Environmental Rights and Legal Pluralism in Contemporary Jurisprudence," *Legal Pluralism and Critical Social Analysis* 55, no. 1 (2023), https://doi.org/10.1080/27706869.2023.2194846; Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable*, *Legal Pluralism in Indonesia: Bridging the Unbridgeable*, 2013.; Hoko Horii, "Pluralistic Legal System, Pluralistic Human Rights?: Teenage Pregnancy, Child Marriage and Legal Institutions in Bali," *Journal of Legal Pluralism and Unofficial Law*, 2019.

[3]Denys Lombard, *Le Sultanat d'Atjéh Au Temps d'Iskandar Muda, 1607-1636* (Paris : École française d'Extrême-Orient, 1967); Amirul Hadi, *Aceh: Sejarah, Budaya, Dan Tradisi* (Jakarta: Yayasan Obor Indonesia, 2010) ; Badruzzaman Ismail, *Ensiklopedia Budaya Adat Aceh* (Banda Aceh: Majelis Adat Aceh, 2018); Moehammad Hoesin, *Adat Aceh* (Banda Aceh: Departemen Pendidikan dan Kebudayaan Daerah Istimewa Aceh, 1970).

[4]Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law*, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law*, 2018, https://doi.org/10.4337/9781784716585; Ihsan Yilmaz, "The Emergence of Islamist Offical and Unofficial Laws in the Erdoganist Turkey: The Case of Child Marriages," *Religions* 12, no. 7 (2021), https://doi.org/10.3390/rel12070513; Jean Denis David and Megan Mitchell, "Contacts

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The focus of this study is to analyze the practice of legal pluralism occurring in the western and eastern regions of Indonesia, namely Aceh Province and the Sasak tribe on Lombok Island, West Nusa Tenggara. Both regions are known as societies that strictly adhere to both religious law and customary law. Both Aceh and Lombok practice religious law, customary law, and state law. The frequent issue that exists is how these two regions manage the complexity of the law and implement a law that can guarantee the protection of the basic rights of children and women when confronted with the law. Moreover, each legal tradition does not always favor the interests of children and women. For example, in the case of the rape of a minor that was resolved through state law (i.e., Qanun Jinayat of Aceh), initially, the perpetrator was sentenced based on the decision of the Sharia Court Panel of Judges in Jantho, Aceh Besar (first-level court); however, based on the decision of the Provincial Sharia Court Judge (appeals court), the perpetrator of child rape was declared not guilty.[5]

Legal complexities also occur in Sasak society, Lombok, where the rights of children and women are neglected. This is reflected in practices such as child marriage, carried out through the choice of customary law; polygamous marriages, which involve a man marrying two women simultaneously; and the tradition of elopement, as part of the marriage process.[6]

In light of the aforementioned phenomena, this study has an urgency to explore the complexities of law in three aspects. The first aspect is of the policies and regulations for the implementation of religious law, customary law, and state law that have been historically constructed. The second aspect is of the settlement of legal cases that favor children and women. The third aspect is of the contestation of the interests of children and women as both perpetrators and victims who directly face the diversity of legal choices in order to uphold their fundamental rights. Here, the study focuses on the aspect of the contestation of legal choices that provide legal protection for the rights of women and children in Aceh and West Nusa Tenggara.

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with the Police and the Over-Representation of Indigenous Peoples in the Canadian Criminal Justice System," *Canadian Journal of Criminology and Criminal Justice* 63, no. 2 (2021).

[5]https://regional.kompas.com/read/2021/06/09/141217278/pemerkosa-anak-divonis-bebas-aktivis-minta-qanun-jinayat-direvisi?page=all; https://www.cnnindonesia.com/nasional/20211008165057-12-705284/mahkamah-aceh-vonis-bebas-terdakwa-pemerkosa-anak-kandung.

[6]Rahmat Bin Mohamad and I Wayan Rideng, "The Legal Pluralism in Law Education in Indonesia," *Sociological Jurisprudence Journal* 4, no. 1 (2021), https://doi.org/10.22225/scj.4.1.2635.1-5; Arif Sugitanata, Siti Aminah, and Ahmad Muhasim, "Living Law And Women Empowerment: Weaving Skills as a Marriage Requirement in Sade, West Nusa Tenggara," *Al-Ahwal* 15, no. 1 (2022), https://doi.org/10.14421/ahwal.2022.15108; Trisno Raharjo, "Mediasi Pidana Dalam Ketentuan Hukum Pidana Adat," *Jurnal Hukum Ius Quia Iustum* 17, no. 3 (2010), p. 492–519, https://doi.org/10.20885/iustum.vol17.iss3.art8.

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The data in this study were obtained through observation, interview and document analysis, using a socio-legal approach. Data collection was carried out in cooperation between the State Islamic University of Ar-Raniry, Banda Aceh, Aceh and Qomarul Huda Institute, Central Lombok, as the research partner related to the Sasak tribe traditions in Lombok, West Nusa Tenggara. The respondents interviewed consisted of religious leaders in Aceh and Lombok, customary leaders in Aceh and Lombok, academics from Aceh and Lombok, legal practitioners (judges) in Aceh and Lombok, and Non-Governmental Organizations (NGOs) handling women and children in Aceh and Lombok. The research locations were Aceh Province, in which Banda Aceh, Subulussalam, and Central Aceh were chosen and West Nusa Tenggara Province, in which Central, West, and East Lombok were selected, as they are the domiciles of the Sasak people.

The field data were explored by directly observing various legal cases where the application of different legal systems was possible for the same case, and conducting in-depth interviews with parties actively involved in the legal case resolution process. The field data were then confirmed and combined by developing legal pluralism methods as a result of the collaboration/cross-linking of concepts and theories in law and social sciences. The aim was to obtain an overview of which legal systems were actively working in Aceh and Sasak, both of which adhere to legal traditions derived from religious, customary, and state law. The well-selected data were further read and analyzed using legal pluralism theories to capture the facts behind the legal phenomena at work in Aceh and Sasak societies. The combination of field data and document studies, linked throughout the data collection and analysis process, was presented as research results.

The Relationship between Customary Law, Religious Law, and State Law in Aceh and West Nusa Tenggara

Indonesia's legal system adopts the principle of a legal mix system. This can be seen in the application of law in the midst of society. Some use customary legal instruments, while others tend to use traditional Islamic law, which is accepted as a command that must be carried out. On the other hand, some tend to use positive law that applies nationally with all its legal consequences as accommodated in a number of laws and regulations.

However, the legal implications that occur as a result of legal pluralism in the midst of society have a negative impact on women and children. This can be seen in the following aspects:

1. Divorce Outside of Court

Empirical evidence show that the practice of divorce conducted outside of court still exists in society. This phenomenon is a consequence of legal pluralism

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in the field of marriage, as it is regulated not only in national law but also in Islamic law as discussed in *fiqh* (Islamic jurisprudence) books. The Marriage Law regulates divorce in Article 39 paragraph 1 which states that divorce can only be carried out in court after the relevant court has tried and failed to reconcile both parties. This provision indicates that divorce can only be carried out in court. A divorce conducted outside of court does not receive legal protection from the state.

Divorce conducted outside of court has a negative impact on the legal protection of women and children. This is because there is no legal protection from the state, as the state has no authority to intervene in divorces that are not conducted in court.[7] This means that if a husband and wife want to file for divorce in a Sharia Court, there is a high chance of obtaining legal protection from the state. For example, a wife can claim *'iddah* (a temporary maintenance for a specified period after the divorce) allowance, *mut'ah* (a one-time payment given to the wife upon divorce) allowance, *kiswah* (clothing and other necessities) allowance, joint assets, and child support after the divorce. If these various rights are claimed and the court decides that they must be fulfilled, then the husband is obligated to carry them out.[8]

The head of the Regional Technical Implementation Unit for the Protection of Women and Children (UPTD PPA) in North Lombok, TNF described that people in North Lombok often pronounce *talaq* (divorce) outside of court. This practice is a very common phenomenon among the community. This happens because of the community's belief that *talaq* is a right of the husband who can simply pronounce it.[9] There was even a case of divorce where the husband pronounced *talaq* through a WhatsApp message.[10]

A frequent consequence of divorces outside of court is the dispute over child custody. Each party feels entitled to the child born from the marriage and tries to claim custody. According to Iwan Setiawan, as an implication of legal pluralism between Islamic law found in *fiqh* books and state law that requires divorce in court, it is difficult to resolve child custody cases. He argued that child custody is relevant to married couples after the dissolution of the marriage, as each couple feels entitled to the child born from the marriage. The absence of a final and binding court decision due to divorce outside of court is a very strong basis for each party to claim custody of the child.[11]

Child custody dispute is one phenomenon that still frequently occurs in West Nusa Tenggara. The data obtained from the West Nusa Tenggara Child Protection Agency show the following cases:

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[7] Interview with Junaedi, Chair of the Sharia Court of Subulussalam, April 3, 2023.
[8] Interview with Junaedi, Chair of Sharia Court of Subulussalam, April 3, 2023.
[9] Interview with Tri Nuril Fitri, Head of UPTD. PPA North Lombok, June 15, 2023.
[10] Interview with Bagiarti, Chair of LPA NTB, June 15, 2023.
[11] Interview with IS, Member of LPA NTB, June 16, 2023.

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Table 1
Child Rights Cases in the Mataram Religious Court

Child Protection Agency West Nusa Tenggara			Mataram Religious Court		
No	**Year**	**Number of Cases**	**No**	**Year**	**Number of Cases**
1	2020	12 cases	1	2020	4 cases
2	2021	6 cases	2	2021	4 cases
3	2022	7 cases	3	2022	6 cases

Source: LPA NTB and PA Mataram, 2023

The difference in the number of cases between the LPA and the Mataram Religious Court is influenced by the methods of dispute resolution practiced. Child custody cases reported to the LPA NTB are handled through non-litigation means, involving bringing the parties together to find a common ground for resolution. If no amicable settlement is reached, it is then brought to litigation, in this case to the Mataram Religious Court.[12]

Another negative impact of divorce outside of court is the lack of legal certainty and the neglect of the rights of women and children after the divorce. The rights that should be obtained after the divorce include the rights to *'iddah, mut'ah,* and *kiswah* allowances, as well as child support.[13] Women often experience the neglect and under-provision of these rights.[14] According to Muniroh, a common problem is that women do not get their rights because of the lack of active participation of the defendant (husband) during the proceedings. Often, the husband never attends the court hearings, and the case is decided by *verstek* judgment or a judgment made in the absence of the defendant.[15]

Nevertheless, the husband's absence from the court proceedings is not a reason for the judge to dismiss the case. The panel of judges is still allowed to

[12]Interview with Sukran, Secretary General of the West Nusa Tenggara Child Protection Agency, June 15, 2023.

[13]Interview with Muniroh, Judge of the Mataram Religious Court, June 16, 2023.

[14]Mansari Mansari and Moriyanti Moriyanti, "Sensitivitas Hakim Terhadap Perlindungan Nafkah Isteri Pasca Perceraian," *Gender Equality: International Journal of Child and Gender Studies* 5, no. 1 (2019), p. 43–58; Hassan Maajeeny, "Effects of Family Disintegration on Children Later Depression," *International Journal of Advanced and Applied Sciences* 9, no. 3 (2022); Ubong E. Eyo, "Divorce: Causes and Effects on Children," *Asian Journal of Humanities and Social Studies* 6, no. 5 (2018), https://doi.org/10.24203/ajhss.v6i5.5315; Mark Cammack and Tim Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effect of Political Change," *Asian Journal of Social Science* 39, no. 6 (2011).

[15]Interview with Ernawati, Judge of the Mataram Religious Court, June 16, 2023.

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hear and decide the case without the presence of the defendant, which is known as a *verstek* judgment. Junaedi stated that legally it is permissible for the judge to issue a *verstek* judgment.

In divorce cases, particularly, in order to uphold justice and fairness for women, the panel of judges often delays the implementation of the pronouncement of *talaq* until the *'iddah* and *mut'ah* allowances have been paid. The pronouncement of *talaq* will not be granted until women's rights are fulfilled. Consequently, the marriage between the parties continues, and the husband cannot marry another woman. In fact, if the pronouncement of *talaq* is not carried out for up to six months, it is considered null and void, and the marriage between the parties is still considered valid.[16]

2. Marriage Registration

Marriage registration is an administrative requirement that must be carried out by Indonesian citizens who wish to get married. This is stipulated in Article 2 paragraph 2 of the Marriage Law which states that every marriage must be registered according to applicable laws and regulations. Marriage registration as an administrative requirement for marriage is one form of legal pluralism in Indonesia, as unregistered marriages are also valid in Indonesia according to Islamic law found in *fiqh* books which are the guidelines for *kyai* (Muslim scholars) and unauthorized marriage officiants. As a result, it is also possible for people who want to have a *sirri* (secret) marriage, or a marriage without registration from the authorized official, despite the potential negative implications for the parties involved in the marriage. The direct negative impact is generally experienced by women and children, as they do not receive legal protection from the state.

Ernawati, a judge at the Mataram Religious Court, mentioned that unregistered marriage often ends up in court as couples file for marriage *itsbat* (validation). Marriage *itsbat* is a solution offered by the government for married couples who have not registered their marriage. However, not all marriage *itsbat* requests filed to the Religious Court are granted by the panel of judges. Some marriage *itsbat* cannot be granted if the marriage was performed without following the pillars and conditions for a valid marriage as stipulated in Islamic teachings.

Another issue arising from the lack of marriage registration, according to Muniroh, is the absence of legal protection from the state. As a result, between the husband and wife, they do not inherit from each other, do not receive joint property, and the wife is not entitled to alimony from the husband.[17]

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[16]Interview with Ernawati, Judge of the Mataram Religious Court, June 16, 2023.
[17]Interview with Muniroh, Judge of the Mataram Religious Court, June 16, 2023.

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Budiarti stated that marriage registration must be undergone by prospective spouses. Marriage without registration is closely related to harm, especially for the parties involved in the marriage. Budiarti added that *sirri* marriages also have a detrimental impact on women, as there have been cases of women becoming second wives, whilst the man who married them is still bound to his first wife.[18] Thus, it can be understood that the practice of *sirri* marriages, in addition to having a negative impact on the first wife, may also cause harm to the second wife.

A second wife, for whatever reason, cannot file a lawsuit to validate (*itsbat*) her *sirri* marriage, since it is not legally permissible to marry a man who is already married to another woman, except with the permission of the first wife. SEMA Number 3 of 2018 concerning the Implementation of the Minutes of the Plenary Session of the Supreme Court in 2018 as a Guideline for the Implementation of Duties for Courts states that a request for validation of a polygamous marriage based on a secret marriage, even with the reason for the interests of the child, must be declared inadmissible. To guarantee the interests of the child, a request for the child's origin can be filed.[19]

Based on this provision, it can be understood that the *itsbat* of a polygamous marriage cannot be justified. Judges may not legalize a marriage if it is known that the husband of that marriage is still bound to his first wife. Even with the reason of providing protection for the child, judges are also not permitted to recognize a marriage with a second wife. This underscores the risks involved in *sirri* marriages, especially for women and children.

The *itsbat* of a marriage as a solution to legalize a marriage is only for certain reasons as stipulated in Article 7 paragraph 3 of the KHI, which states that marriage *itsbat* that can be filed with the Religious Court is limited to matters concerning:

1) A marriage as a solution to a divorce;
2) Loss of the marriage certificate;
3) Doubt about the validity of one of the marriage requirements;
4) A marriage that occurred before the enactment of Law No. 1 of 1974; and
5) A marriage performed by those who have no legal impediment to marriage according to Law No. 1 of 1974.

The data obtained from the Mataram Religious Court show that there are still people who file for marriage *itsbat*. This can be seen in the following table.

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[18]Interview with Muniroh, Judge of the Mataram Religious Court, June 16, 2023.

[19]Salman Abdul Muthalib, "Pengesahan Isbat Nikah Perkawinan Poligami Kajian Putusan Nomor 130/Pdt.G/2020/Ms.Bna," *El-Usrah* 5, no. 2 (2022): 31; Ahmad Arif Masdar Hilmy and Faby Toriqirrama, "Isbat Nikah Terpadu Perspektif Maqāṣid Al-Syarī'ah," *Al-Ahwal* 13, no. 1 (2020).

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Table 2
Cases of Marriage *Itsbat* in the Mataram Religious Court

No.	Year	Number of Cases
1	2020	450 cases
2	2021	639 cases
3	2022	542 cases
4	2023	233 cases

3. Marriageable Age of a Child

Another issue as a consequence of legal pluralism is related to the age of a child. In *fiqh* books, a child can be considered an adult when they experience wet dreams for boys and menstruation for girls. Once these two happen, both boys and girls can be considered to have reached puberty and are thus obligated to follow religious laws. A person who is obligated to follow religious laws must obey all religious commands and avoid all prohibitions. Failure to comply with these religious obligations is considered haram (forbidden) and sinful.

The age in positive law is certainly different from the concept built by Islamic jurisprudence. The provisions in Indonesian positive law limit the age to nineteen years for both boys and girls. This age is regulated in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Before the amendment of the Marriage Law, the age of marriage was 19 years for boys and 16 years for girls. According to Munirah, after the change in the marriage age to 19 years for both boys and girls, the number of marriages at the Mataram Religious Court can be seen in the following table.

Table 3
Marriage Dispensation in the Mataram Religious Court

No.	Year	Applications for Marriage Dispensation
1	2020	8
2	2021	12
3	2022	3
4	2023	2
Total		25 cases

Source: Mataram Religious Court, 2023

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There are many factors that underlie parents' applications for dispensation for their children. The first factor is cultural influence. Culture has an influence on child marriage. The assumption that arises if their child is not married is that parents worry that no one will propose to their daughters.[20] In addition, another culture that influences child marriage is a custom practiced by the people of Lombok, where if a girl is brought out at night, she will be married off by the local community.[21] The second factor is economic issues. A common problem that drives children to marry is due to the economic conditions of the parents. This was also expressed by Rusyda, the head of the Office of Religious Affairs (KUA) in Simpang Kiri, Subulussalam. Financial constraints often lead families to pressure their children into early marriage.

4. The Age of a Child in the Qanun Jinayat

The age of a child in the Qanun Jinayat poses a problem in the context of its application in the Sharia Court. This was conveyed by Dangas Siregar, who argued that the existence of the age of a child in the Qanun Jinayat creates problems and injustice, especially in the context of the crime of *zina* (fornication) committed by an adult with a child. For adults, they are punished with *hudud* (fixed) punishment because they are legally and convincingly proven to have committed *zina*, while for children, *hudud* punishment is often not imposed. Children are more often returned to their parents or placed in rehabilitation institutions. According to DS,

> "*Sometimes the child comes, and many times the child comes, not just two or three times. Although the child also comes, the adult man is punished. Sometimes it is not fair, but on the other hand, if we turn it around, if the child is punished, it will definitely be protested internationally. Even though the children wanted it, and the children seduced [the adults], they were still not being punished. In our opinion, the judges also felt unfair. Sometimes those children have already been corrupted first by other men*."

5. Children Involved in Zina Cases

The *jarimah* (criminal act) of *zina* is one of the provisions regulated in Aceh Qanun Number 6 of 2014 concerning Jinayat (Criminal) Law. The issue of *zina* is specifically regulated in Article 1 number 26 which states that *zina* is sexual intercourse between one or more men with one or more women without the bond of marriage with the consent of both parties. This provision indicates that the *jarimah* of *zina* occurs due to the involvement of two people, consisting of a man and a woman. The problem that later arises is related to the practice of

[20]Interview with Ernawati, Judge of the Mataram Religious Court, West Nusa Tenggara
[21]Interview with Nuril Fitri, UPTD. PPA North Lombok, West Nusa Tenggara

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the *jarimah* of *zina* that occurs between an adult man and a child who has not yet reached the age of 18.

6. Underutilized Restitution towards Women and Children

Restitution is a right of rape victims that is recognized in the Qanun of Jinayat Law. This is stated in Article 51 paragraph 1 of the Qanun of Jinayat Law which states that ,"In the event of a request from the victim, every person who is imposed with *'uqubat* (punishment) as referred to in Article 48 and Article 49 may be imposed with *'uqubat* restitution of at most 750 (seven hundred and fifty) grams of pure gold." Dangas Siregar said that to date there has never been imposition of a restitution penalty, as the relevant authorities are not proactive in asking the panel of judges to propose restitution costs, which should be included in the indictment so that restitution costs are included in the indictment.[22] Another problem is that sometimes the perpetrator is the victim's biological father or stepfather, who is constrained by finances. This will be a separate difficulty in realizing restitution costs to the child victim of rape.[23]

Restitution has also never been practiced by judges of the Subulussalam Sharia Court. According to Junaedi, the Chief Judge of the Subulussalam Sharia Court, the non-implementation of restitution in rape cases is due to no request from the family. The restitution provision regulated in the Qanun is only granted if there is a request from the victims or their family.[24] This is stated in Article 51 paragraph 1 of the Qanun of Jinayat Law, which states that in the event of a request from the victim, every person who is imposed with *'uqubat* as referred to in Article 48 and Article 49 may be imposed with *'uqubat* restitution of at most 750 (seven hundred and fifty) grams of pure gold.

This provision links the request for restitution to the request of the family, and thus, when the family does not request the panel of judges, it implies that restitution is not obtained as compensation for the victim. As a result, even though the perpetrator becomes a victim in a rape case, they cannot be given restitution due to the absence of a request from the victim or the family.

Dangas Siregar once decided to add a sentence for perpetrators who committed *zina* against children. *Zina* was punishable by *hudud* of 100 lashes and supplemented with *ta'zir* (discretionary) punishment for the perpetrator. Thus, in addition to being flogged, the perpetrator also received a prison sentence. The combination of punishments was decided to protect children from meeting the perpetrator, because when the perpetrator was serving his sentence, he could no longer meet the child. The combination of punishments for perpetrators of *zina* with children is still permitted by the Qanun of Jinayat Law. This is stated in

[22] Interview with Dangas Siregar, Judge of the Sharia Court of Takengon, Aceh
[23] Interview with Dangas Siregar, Judge of the Sharia Court of Takengon, Aceh
[24] Interview with Junaedi, Judge of the Subulussalam Sharia Court, Aceh

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Article 34 of the Qanun of Jinayat Law which states that, "Every adult who commits *zina* with a child, in addition to being sentenced with *'uqubat hudud* as referred to in Article 33 paragraph (1), it can be added with *'uqubat ta'zir* of flogging at most 100 (one hundred) times or a fine of at most 1,000 (one thousand) grams of pure gold or imprisonment for a maximum of 100 (one hundred) months."[25]

The aforementioned findings suggest that for cases of *zina* with children, in addition to being punished with flogging, the perpetrator can also be punished with *ta'zir*. The *ta'zir* that can be added is a maximum of 100 lashes, 1000 grams of pure gold, or 100 months imprisonment.

On the other hand, the judges of the Meureudu Sharia Court have applied restitution in some rape cases. Decision Number 2/JN/2022/MS.Mrd has sentenced the perpetrator of the crime of rape to 200 months imprisonment and sentenced the defendant Yusri bin Su'ud to pay restitution for victims A, B, C, D, F, and G by paying for the psychological recovery of the child victims until the child victims are declared to have returned to normal life by a psychologist.

The implementation of restitution from the three Sharia Courts above presents a fascinating subject for analysis from the perspective of the legal system theory developed by Lawrence M. Friedman. Friedman states that a new legal system is effectively applied when three important elements of law run in parallel, including the substance of law (legal rules), the structure of law (law enforcement), and the culture of law (culture of law). These three aspects must be synergistic so that the law can be fully implemented. In terms of the provision of restitution for victims of rape, especially children, the legal rules are still not in favor of women and children. The rules require the victims and their family to request the judges to grant restitution, and without a request, a judge is not entitled to determine restitution for the victims.

Further, one issue arising from the requirement to request restitution from the family is the culture of shame in Aceh society. Victims and their families often feel ashamed to ask compensation from the perpetrator who has ruined their future. Research conducted by Rizkal found several factors impeding the full realization of victim restitution, which included insufficient public understanding of restitution, the diminution of the female victim's dignity and honor, and the perpetrator's limited financial capacity.[26] In a similar vein, Dangas Siregar also

[25]Interview with Dangas Siregar, Judge of the Sharia Court of Takengon, Aceh

[26]Bhabani Sonowal and Dipa Dube, "Reparative Approach towards Victims of Armed Conflict: Global Experiences and Lessons for India," *BRICS Law Journal*, 2019. ; Muhammad Nur, Muhammad Salda, and Hamdani Hamdani, "The Politics of Criminal Law on The Protection of Rape Victims Based on the Qanun of Jinayah in Aceh," *Kanun Jurnal Ilmu Hukum* 23, no. 2 (2021), https://doi.org/10.24815/kanun.v23i2.20311; Rizkal Rizkal and Mansari Mansari, "Pemenuhan Ganti Kerugian Anak Sebagai Korban Pemerkosaan Dalam Kasus Jinayat Aceh," *Gender Equality: International Journal Of Child And Gender Studies* 5, No. 2 (2019), p. 45.

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expressed that the economic limitations of the perpetrator impact the determination of restitution by the Sharia Court judges.[27]

The Supreme Court has institutionally endeavored to resolve the problems faced by women and children. This can be seen in the issuance of the Supreme Court Circular Letters (SEMA) as follows:

a. SEMA Number 10 of 2020

SEMA Number 2 of 2020, issued by the Supreme Court, has a very direct impact on children. The provisions of the Circular describe that if a child is a victim in cases of sexual harassment and rape in criminal cases, the punishment is imprisonment for the perpetrator. This regulation does not provide other alternatives to opt between flogging and fines, whereas the Qanun Jinayat regulates alternative punishments for perpetrators of sexual harassment and rape between flogging, fines, and imprisonment. Initially, judges were given the option to impose one of these three forms of punishment; however, after the enactment of SEMA Number 2 of 2020, it is specifically stated in cases of sexual harassment and rape against child victims that the punishment of flogging must be imposed.

The regulation in SEMA has guaranteed legal protection for children. Prior to the existence of SEMA, the punishments imposed by judges on perpetrators of sexual harassment and rape were diverse: some imposed imprisonment while others imposed flogging. This is because the punishment stipulated in Article 47 of Aceh Qanun Number 6 of 2014 is alternative in nature. Article 47 of the Qanun of Jinayat Law states that "Every person who intentionally commits the crime of sexual harassment as indicated in Article 46 against a child, is punishable with *'uqubat ta'zir* of flogging at most 90 (ninety) times or a fine of at most 900 (nine hundred) grams of pure gold or imprisonment for a maximum of 90 (ninety) months."

Furthermore, Article 50 of the Qanun of Jinayat Law, on the crime of rape against a child, states that "Every person who intentionally commits the crime of rape as indicated in Article 48 against a child is punishable with *'uqubat ta'zir* of flogging at least 150 (one hundred and fifty) times, at most 200 (two hundred) times or a fine of at least 1,500 (one thousand and five hundred) grams of pure gold, at most 2,000 (two thousand) grams of pure gold or imprisonment for a minimum of 150 (one hundred and fifty) months, a maximum of 200 (two hundred) months."

Based on these two regulations, it can be understood that both sexual harassment and rape have alternative punishments between flogging, fines, and imprisonment. The panel of judges is given the option to impose one of these three forms of punishment. In addition, the judge may even impose a punishment that is different from the demand of the public prosecutor. For example, if the public

[27]Interview with Dangas Siregar, Judge of the Sharia Court of Takengon, Aceh

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prosecutor demands a flogging sentence, the panel of judges may still impose a prison sentence or a fine, and vice versa, and even if the public prosecutor demands a prison sentence, the panel of judges may impose a flogging sentence based on their independence. Article 178 paragraph 7 of the Qanun of Jinayat Procedure Law states that the panel of judges may impose a different type of punishment from that requested by the public prosecutor if the punishment for the crime is alternative. In other words, the judge is not bound by the demands made by the public prosecutor in cases of sexual harassment and rape, whether the demand is for flogging, fines, or imprisonment.

This paradigm has shifted after the enactment of SEMA Number 10 of 2020, which explicitly stated in the provisions of point 3 letter b of the Chamber of Religion's Formulation that in cases of rape/sexual harassment crimes where the victim is a child, to guarantee the protection of the child, the defendant must be sentenced to *ta'zir* punishment in the form of imprisonment, while if the perpetrator of the crime is a child, then the punishment follows the provisions of Article 67 paragraph 1 of Aceh Qanun Number 6 of 2014 concerning Jinayat Law and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

The existence of these provisions has indeed changed somewhat from the previous practice where flogging could be imposed. Currently, it is mandatory to impose a prison sentence. However, in reality, it is still seen in the Sharia Court that flogging is imposed even though the victim is a child. This can be seen in the Judge's Decision Number 6/JN/2023/MS.Lsk. The Public Prosecutor demanded that the perpetrator be declared legally and convincingly guilty of the crime of sexual harassment and sentenced to 25 lashes. The panel of judges disagreed with the public prosecutor's demands and imposed a sentence of 35 lashes.

b. SEMA Number 3 of 2018

According to Dangas Siregar, the Supreme Court has made a legal breakthrough in the context of women's protection. The breakthrough made by the Supreme Court has allowed for the wife *'iddah* alimony as long as the wife is not *nusyuz* (disobedience) even though it is the wife who files for divorce.[28] This is stated in SEMA Number 2 of 2018 which states that by accommodating Perma Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Facing the Law, wives in divorce cases can be given *mut'ah* and *'iddah* alimony as long as they are not proven to be *nusyuz*.[29]

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[28]Interview with Dangas Siregar, Judge of the Takengon Sharia Court, Aceh

[29]Hanik Harianti, Mansari Mansari, and Rizkal Rizkal, "Sensitivitas Hakim Terhadap Perlindungan Hak Isteri Dalam Kasus Cerai Gugat (Analisis Putusan Mahkamah Syar'iyah Banda Aceh Nomor 157/Pdt.G/2020/Ms.Bna)," *Jurnal Mediasas : Media Ilmu Syari'ah Dan Ahwal Al-Syakhsiyyah* 4, no. 1 (2021), p. 49.

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c. SEMA Number 1 of 2022

SEMA, which is one of the bases for judges in adjudicating cases brought before them, has undergone very rapid changes, especially in the regulations governing the protection of women and children. The changes regulated in SEMA Number 1 of 2022 relate to joint property in marriage. The SEMA stipulates that if the joint property obtained during the marriage is only a house, then the division is postponed until the child born of the marriage becomes an adult.

This SEMA clearly provides protection for children if their parents divorce. The house, which is joint property, is not immediately divided because if it is divided, it will have implications for the child's place of residence. This paradigm shift emerges because before the existence of this SEMA, married couples have always wanted to divide the house obtained from the marriage so that it could be shared together as joint property. The Compilation of Islamic Law (KHI) clearly states in Article 97 that a divorced widow or widower is each entitled to half of the joint property as long as it is not otherwise stipulated in the marriage agreement. This means that property obtained while still bound by marriage is divided in half for the widow and half for the widower as long as it is not otherwise stipulated in that marriage.

d. SEJA Number 2 of 2019

The paradigm of imposing prison sentences is also regulated in the Attorney General Circular Letter (SEJA) Number SE-2/E/EJP/11/2020 which stipulates that perpetrators of sexual crimes (rape and/or sexual harassment) must be prosecuted with imprisonment. Based on the two provisions above, it can be understood that specifically for sexual harassment and rape crimes, imprisonment must be imposed. This means that the Public Prosecutor in prosecuting cases of sexual harassment and rape must impose a prison sentence on the perpetrator if the victim in the case is a child.

e. SEMA Number 3 of 2017

According to Junaedi, the Supreme Court currently pays great attention to the rights of women and children. The rights of women, such as the rights to *'iddah, mut'ah*, and *kiswah*, should indeed be included in the lawsuit. The aim is to provide protection for women and to have a legal basis for the panel of judges to issue a verdict that is oriented towards the interests of women and children. Likewise, the rights of children after a divorce also receive attention among the judges. This is because the phenomenon that often exists is that the issue of child support after a divorce is often neglected.[30]

At the Subulussalam Sharia Court, there is an independent lawsuit with pre-prepared legal forms, outlining, for example, the rights obtained and the child

[30] Interview with Junaedi, Judge of the Subulussalam Sharia Court, Aceh

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custody arrangements. This innovation is designed to support individuals who lack legal knowledge and understanding of their rights.[31] One of these innovations was created by a newly appointed civil servant.[32]

Determining the Choice of Law with a Dimension of Protecting Women's and Children's Rights

Indonesian society recognizes a choice of law that can be used as a basis for resolving cases among the community. Various legal systems are still applicable, consisting of customary law, religious law, and state law, giving people the opportunity to choose. The determination of the choice of law in resolving cases depends very much on the community itself. The pattern of resolving cases using state apparatus refers to the applicable legal rules which are more formal. In contrast, in the case of a customary law approach, due to its unwritten nature, the settlement pattern used is more towards family and deliberation.

For divorce cases, as is usually practiced by the Keuchik of Gampong Simpang Kiri, it is more towards a customary settlement in the village. The parties involved, consisting of husband and wife, ask for recommendations from the Keuchik Gampong. The Keuchik Gampong would usually make it difficult for divorces to occur in their community. The general pattern used is by not directly giving recommendations, but the steps taken include giving advice and finding the right solution to the problems faced by the community. Keuchik Salman explained that:

> "*Before giving a recommendation, the keuchik will first consider the impacts of the marriage on the wife and children. Although it may seem harsh sometimes, the goal is for the good of the divorcing parties. We usually make it difficult for divorces to occur in the village. Sometimes, their family relationships would eventually improve. Two weeks later, the persons had already felt better. They would also thank the keuchik.*".

The approach used by the *keuchik* shows that the available legal options in the community can help restore strained marital relationships. The choice of law can facilitate the maintenance of long-standing family bonds, with the primary objective of protecting women and children, thereby mitigating the risk of divorce, which has a very direct impact on children's mental health. If a case is immediately settled in the Sharia Court, whose main orientation is formal legality, the existence of the dispute in the family will be proven, and the panel of judges will grant the divorce petition filed. Provided that marital discord is duly

[31] Interview with Junaedi, Judge of the Subulussalam Sharia Court, Aceh
[32] Interview with Junaedi, Judge of the Subulussalam Sharia Court, Aceh

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proven, separation of spouses may be decreed by the court following established legal protocols.

Legal Protection for Women and Children in Aceh and NTB

The pluralism of laws applicable in community life is correlated with the handling of women's and children's issues. Some communities resolve them using customary law approaches, some use positive law approaches, and others, based on the special autonomy granted to regions like Aceh, apply the Qanun Jinayat. This has become an unavoidable phenomenon in regions that have been given authority by the central government to organize special autonomy.

In terms of the practice of handling sexual harassment cases involving children, some regions still adhere to customary law and cases are not brought to litigation. One of the officers at the UPTD PPPA of Aceh Province, PB explained that:

> "*Sometimes people, for example, in District X, do not differentiate between cases. There are cases of sexual harassment that actually cannot be mediated, but are mediated. If it's mediation, then it is more towards custom. But people would often prevent to make a big deal out of it, as it was a shame*.[33]

Based on the information provided by PB, shame has often become the reason that cases are not escalated to the police. Consequently, women remain susceptible to harm, and perpetrators continue to operate with impunity within the community, potentially leading to prolonged psychological trauma on victims.

In addition, the information from PB shows a form of using the wrong choice of law. The law clearly regulates that there are cases that can be settled customarily, and some that must use national law. A number of cases in Aceh are given the authority to be settled at the village level. Aceh Qanun Number 9 of 2008 concerning the Development of Customary Life regulates 18 cases that are settled customarily, as stipulated in Article 13 paragraph (1) which states that customary disputes and customs include:

a) Domestic disputes;
b) Disputes between families related to *faraidh* (Islamic inheritance);
c) Disputes between villagers;
d) *Khalwat* (close proximity between opposite sexes);
e) Disputes over ownership;
f) Petty theft within the family;
g) Disputes over shared property;
h) Petty theft;

[33]Interview with PB, UPTD PPA, June 22, 2023.

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i) Theft of livestock;
j) Violations of customs regarding livestock, agriculture, and forests;
k) Maritime disputes;
l) Market disputes;
m) Minor assault;
n) Arson (on a small scale that harms the *adat*/indigenous community);
o) Harassment, slander, incitement, and defamation;
p) Environmental pollution (on a small scale);
q) Threats (depending on the type of threat); and
r) Other disputes that violate customs and traditions.

The cases presented above demonstrate the inadequacy of customary justice mechanisms in resolving sexual harassment. As previously discussed, customary courts are authorized to handle only cases involving minor offenses. Sexual harassment and other forms of sexual violence are crimes that require special handling by state institutions authorized to carry out such tasks, including the Police, Prosecutor's Office, and Judges, using the criminal justice system.

In Lombok, there is a similarity with the local wisdom found in Aceh, where some cases classified as minor criminal offenses are resolved customarily or through what is known as the *Majelis Kerame Desa* (MKD).[34] A number of cases can be resolved by the MKD as stipulated in Article 18 of West Lombok Regent Regulation Number 21A of 2019 concerning the *Majelis Kerame Desa*, which states that the scope of disputes that can be submitted for handling to the MKD includes:

a. Minor criminal offenses that are also private prosecution offenses;
b. Civil cases;
c. Customary disputes;
d. Minor criminal offenses that do not have a broad impact; or
e. Criminal offenses for children and those over 70 years old.

In principle, the provisions stipulated in Qanun Aceh Number 9 of 2008 and the West Lombok Regent Regulation have similarities because the substantive part of both regulations is minor criminal offenses. The difference lies only in the direct mention of the type of case in the Qanun Aceh, while the West Lombok Regent Regulation regulates it in general terms, namely cases of minor

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[34]*Majelis Kerame Desa* consists of 3 (three) syllables, namely "*majelis*" which means an assembly, council, or meeting place, "*krama*" which means etiquette, manners, or customs, and "*desa*" which means a village. Therefore, *Majelis Krama Desa* is a council or assembly within a village that is responsible for upholding the village's customs, traditions, and social norms. Suci Ramadhani Putri, Implementasi Peraturan Bupati Nomor 20 Tahun 2017 tentang Pedoman Majelis Krama Desa Terhadap Pencegahan Pernikahan Dini (Studi di Kabupaten Lombok Utara), Program Studi Hukum Keluarga Islam Pascasarjana Universitas Islam Negeri (UIN) Mataram 2022, p. 58.

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criminal offenses, civil cases, customary disputes, and criminal offenses for children and people over 70 years old. The West Lombok Regent Regulation on child criminal offenses is unique in its approach, prioritizing child protection over punitive measures. Children who are perpetrators in a criminal act can be resolved through customary law applicable in West Lombok. On the other hand, the Aceh Qanun does not specifically mention it for children who commit criminal acts. Another similarity is that both emphasize deliberation and consensus to find the right solution to end conflicts and disputes that occur in the community.

The contestation between national law and customary law in relation to the handling of sexual violence cases can occur due to a lack of public understanding of the applicable laws. Insufficient public awareness and a deficient gender perspective impede efforts to protect women and children. Legal culture is one aspect that influences law enforcement as expressed by Lawrence M. Friedman. Additional factors impacting law optimal functioning are the substance of law and the structure of law.[35] A flawed legal culture can result in substantial losses to victims. In fact, according to PB, sexual harassment cases are strictly prohibited from being mediated within the family. Sexual harassment has inflicted significant damage upon the victims, jeopardizing their future prospects and depriving them of their possessions.[36]

Such cases, both experienced by men and women, must be resolved using a customary justice approach at both the *gampong* (village) and *mukim* (township) levels. Law enforcement officers, in this case the police, are obliged to return the cases to the *gampong* to be resolved. If no peace agreement is reached at the *gampong* level, the next step is to refer the cases to the *mukim* level as a *mukim*-level customary court. Judicial proceedings are only filed after the cases cannot be resolved at the *mukim* level.

Within the framework of criminal justice in Aceh, there are legal ramifications for prioritizing women's rights. This is a direct consequence of the substantive legal provisions outlined in the Qanun Jinayat and the Child Protection Law. The legal provisions in the Qanun, such as sexual harassment and rape, is also regulated in the Child Protection Law. Consequently, this has implications for the legal protection afforded to children. The legal provisions outlined in the Qanun must be enforced, notwithstanding the concurrent application of national law.

Article 72 of Aceh Qanun Number 6 of 2014 concerning Jinayat Law affirms the obligation to implement the Qanun, regardless of the concurrent national law. Article 72 states that, "In the event of a *jarimah* act as regulated in

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[35]Lawrence M. Friedman, *The Legal System of Social Science Perspective* (New York: Russel Sage Foundation, 1975); Ratno Lukito, "Islamic Law and Adat Encounter: The Experience of Indonesia," *ProQuest Dissertations and Theses* (1997); David Grinlinton, "The Intersection of Property Rights and Environmental Law#," *Environmental Law Review* 25, no. 3 (2023).

[36]Interview with PB, UPTD PPA, June 22, 2023.

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this Qanun and also regulated in the Criminal Code (KUHP) or criminal provisions outside the KUHP, the applicable rule is the *jarimah* rule in this Qanun." This provision provides guidance to law enforcement officers to apply the legal material contained in the Qanun even if it has been regulated in the Criminal Code or other criminal law regulations. The Qanun Jinayat takes precedence over the Child Protection Law, rendering the latter ineffective in areas of overlap. Given the specific provisions of the Qanun Jinayat, the standard legal framework for rape and sexual harassment is not applicable to cases involving child victims.

Before the promulgation of SEJA Number SE-2/E/EJP/11/2020, the imposition of penalties under the Qanun Jinayat for perpetrators of child sexual abuse was subject to considerable judicial discretion. Judicial decisions varied, with some judges imposing caning, while others opted for imprisonment. The imposition of such punishments, however, fail to adequately safeguard the best interests of the child, as it does not prevent future interactions between the perpetrator and the victim. The psychological impact on a child of encountering a familiar perpetrator can be profound, thereby leading to severe and long-lasting consequences.

The promulgation of SEJA SE-2/E/EJP/11/2020 has shifted the paradigm of punishment, mandating that public prosecutors seek imprisonment for perpetrators of sexual harassment and rape against children. Initially, the Qanun Jinayat prescribed alternative punishments for sexual harassment and rape. The legal consequence of this is the judge can choose between imposing a caning sentence, imprisonment, and a fine. Therefore, it is unsurprising that in practice in the Sharia Court, some impose caning and others impose imprisonment. The imposition of such punishments has a strong legal basis as it is regulated in the Qanun of Jinayat Procedure Law as stated in Article 178 paragraph 7, which states that the panel of judges may impose a different type of punishment from that requested by the public prosecutor if the *'uqubat jarimah* is alternative.

This provision empowers judicial panels to tailor sentencing decisions to the specific circumstances of each case, drawing from a range of potential punishments outlined in the Qanun Jinayat. This includes cases of sexual harassment and rape, the potential punishments of which are alternative between caning, fines, and imprisonment. The alternative of punishments for sexual harassment and rape opens up space for judges to impose any punishment. Similarly, the provisions of Article 176 paragraph 6 of the Qanun of Jinayat Procedure Law state that the *'uqubat* to be imposed may be less or more than the amount proposed by the public prosecutor in the demand for *'uqubat*. This provision also reinforces where in the imposition of the verdict, the judge may give a higher or lower punishment than the amount of punishment demanded by the public prosecutor.

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The legal pluralism encompassing customary law, Islamic law, and national law can lead to unfair treatment and neglect of the children's rights. In the context of child protection, for example, the Qanun Jinayat regulates simple punishments and forms of crimes compared to the legal rules regulated in national law, i.e., Child Protection Law. As a comparison, the following discussion elaborates on the differences between the rules that have been stipulated in the Qanun Jinayat and the Child Protection Law.

In the case of sexual harassment of children, Article 47 of the Qanun Jinayat Law describes that anyone who intentionally commits the crime of sexual harassment as referred to in Article 46 against a child shall face *ta'zir* punishment of caning of up to 90 lashes, a fine of up to 900 grams of pure gold, or imprisonment of up to 90 months. The Child Protection Law addresses sexual harassment in Article 76E, which states that everyone is prohibited from committing violence, or threats of violence, coercion, deception, a series of lies, or from inducing a child to commit or allow obscene acts to be committed.

Based on a comparative analysis of the two provisions, the following key differences can be identified. First, the Qanun imposes less severe punishments for child sexual abuse than the Child Protection Law. The Qanun stipulates a maximum of 90 lashes, a maximum of 90 months imprisonment, or a maximum of 900 grams of pure gold, whereas the Child Protection Law stipulates a minimum of five years, and a maximum of fifteen years. Therefore, in terms of punishment, the Qanun's punitive measures are less severe than those outlined in the Child Protection Law.

Second, unlike the Child Protection Law, the Qanun Jinayat does not explicitly link the perpetrator of sexual harassment to a specific object or act. Article 81 paragraph 3 of the Child Protection Law states that, "In the event that the criminal act as referred to in paragraph (1) is committed by parents, guardians, people who have a family relationship, child caregivers, educators, education personnel, officials who handle child protection, or is committed by more than one person jointly, the penalty shall be increased by 1/3 (one third) of the threat of criminal punishment as referred to in paragraph (1)." The Child Protection Law significantly increases the penalty for perpetrators with specific roles, such as family members, caregivers, educators, or officials involved in child protection, or for those acting in groups, thereby offering greater protection to child victims. By introducing a one-third increase in penalties for certain types of offenders, the Child Protection Law offers a more robust deterrent and provides greater protection for child victims, surpassing the provisions of the Qanun. This heightened penalty is warranted, as it recognizes the betrayal of trust inherent in such acts, where individuals who are supposed to safeguard children instead exploit and harm them.

Third, the Qanun Jinayat prescribes caning as a potential punishment which the judges may impose upon the perpetrator. Upon completion of the

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sentence, the perpetrator may return to the community. This, however, may have detrimental effects on the child's psychological state. A child who re-encounters a perpetrator of abuse may experience severe psychological distress. Conversely, the Child Protection Law imposes imprisonment, thereby ensuring the perpetrator's isolation from the child. By separating the perpetrator from the child, imprisonment minimizes the risk of further trauma and allows the child to begin the healing process without the constant fear of re-encountering the abuser.

The aforementioned weaknesses highlight how legal pluralism can have detrimental impact on child protection. Junaedi mentioned that in response to the concern regarding caning for child sexual abuse, SEJA Number 10 of 2020 stipulates that the judge must sentence the perpetrator of such crimes to imprisonment.[37] The primary goal of imprisonment, as stipulated in SEJA, is to prevent the perpetrator from re-encountering the victim.[38] As noted by Dangas Siregar, SEJA has provided a positive impact on child protection by reducing inconsistencies in judicial decisions in Sharia Court. Although caning has been applied in certain instances, imprisonment has emerged as a more prevalent punishment. SEJA has contributed to a narrowing of the gap between caning and imprisonment as forms of punishment.

Empirical data from the Supreme Court indicates that some judges persist in imposing caning sentences for sexual harassment, even after the enactment of SEJA. This is evident, for example, in Decision Number 6/JN/2023/MS.Lsk. In this case, the Public Prosecutor demanded that the perpetrator be declared legally and convincingly guilty of the crime of sexual harassment and be sentenced to 25 lashes. The panel of judges disagreed with the prosecutor's demands and imposed a sentence of 35 lashes.

The findings of this study highlight the paradox between the legal policy framework, which outlines the desired legal outcomes, and the actual practices of judges, who may deviate from these guidelines, leading to inconsistencies and potential injustices. While the law mandates imprisonment as a deterrent and to protect child victims, judicial decisions still prioritize caning,[39] undermining the purpose of the law.

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[37]Interview with Junaedi, Judge of the Sharia Court of Subulussalam

[38]Interview with Junaedi, Judge of the Sharia Court of Subulussalam

[39]Muslim Zainuddin, "Penjatuhan Hukuman Cambuk Terhadap Pelaku Pelecehan Seksual Terhadap Anak," *Legalite : Jurnal Perundang Undangan Dan Hukum Pidana Islam* 8, no. 1 (2023), p. 58–74; Muhammad Amin Suma, Ridwan Nurdin, and Irfan Khairul Umam, "The Implementation of Shari'a in Aceh: Between the Ideal and Factual Achievements," *AHKAM : Jurnal Ilmu Syariah* 20, no. 1 (2020), p. 19–48; Muhammad Yusuf, *Impementasi Hukum Jinayat Di Aceh: Keasadaran, Kepatuhan Dan Efektivitas*, ed. Ali Abubakar and Firdaus M. Yunus (Banda Aceh: Bandar Publishing, 2022).

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Conclusion

Legal pluralism offers a novel perspective on how law can shape legal culture of Aceh and West Nusa Tenggara. Legal practices concerning with the protection of children and women often extend beyond state law. Customary law and religious (Islamic) law contribute to the legal protection of women and children in Aceh and West Nusa Tenggara. Nevertheless, national legal instruments provide a more reliable mechanism for protecting the rights of women and children, adhering to the provisions of applicable laws and regulations and guaranteeing legal certainty.

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