



The Criminal Act of Child Molestery on the Based on Mutual Consent in Qanun Jinayat is Reviewed with the Principle of Legal Preference (Decision No. 6/Jn/2019/Ms.Aceh)

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Article	Abstract
Keywords: Qanun Jinayat; Obligation to act committed against children	<i>Criminal acts in Aceh are regulated in Qanun Number 6 of 2014 concerning Jinayat, which is a regional regulation at the provincial level based on Islamic law. In the case of obscene acts committed against children based on mutual consent in Decision No. 6 / JN / 2019 / MS. Aceh acquitted the defendant based on Article 1 number 27 of Qanun Number 6 of 2014 concerning Jinayat. The purpose of this study is to examine obscene acts against children in Qanun No. 6 of 2014 concerning Jinayat using the principle of preference <i>lex superiori derogat legi inferiori</i> and <i>lex specialist derogat legi generali</i>. This study is normative and uses a case and statutory approach as a research methodology. The results obtained from this study are the existence of a judge's error in acquitting the defendant, based on Law No. 35 of 2014 concerning Child Protection and the Criminal Code, which is based on the principles of <i>lex superiori derogat legi inferiori</i> and <i>lex specialist derogat legi generali</i>, states that a child's consent cannot be used as a reason to excuse the crime of child molestation based on mutual consent.</i>

INTRODUCTION

Crime is one of the forms of phenomena or events that arise within the scope of the community environment. In criminology, crime is defined as an action that causes harm to the victim (Susanti & Rahardjo, 2018). This is in line with the definition of crime as formulated in the KBBI which defines crime as a form of behavior that clashes with the values and norms regulated in the 1915 Criminal Code. Criminal acts are closely related to criminal acts also called *strafbaar feit*. Moeljatno in the textbook on the principles of criminal law written by Dr. Lukman Hakim SH, MH states that "criminal or criminal acts only refer to patterns of behavior that are prohibited and carry consequences if violated."

The Indonesian state in implementing criminal law is based on the layers or legal basis of the 1915 Criminal Code which has now been revoked by Law No. 1 of 2023

which regulates the Criminal Code, and additional Criminal Laws that regulate specific crimes that apply nationally. Apart from these 2 (two) forms of criminal law, the Indonesian state also recognizes a Criminal Law that applies locally or in certain regions. In its meaning, national criminal law is a norm of criminal regulations established by the central government as a national sheet and its application on a national scale, namely for the entire territory of the Republic of Indonesia. Meanwhile, local criminal law or regional criminal law is a standard of regulations established by the regional government that is specific to that region only. (Rohman, 2023)

One of the regions that due to its special status can implement the Regional Criminal Law at the provincial level is the Special Region of Aceh Province. In exercising its special authority or powers, Aceh has formulated legislation based on sharia known as “Qanun”. Article 1 paragraph (2) of Law Number 11 of 2006 concerning the Government of Aceh defines Qanun as a legal regulation that can be classified as a type of provincial regulation regarding the implementation of Aceh regional government and the daily lives of the Acehnese people. To implement Aceh Province as a Special Region, especially in the law enforcement factor, the Special Region of Aceh has established the Sharia Court as the main jurisdiction in trying cases. The Special Region of Aceh Province in exercising the jurisdiction of the Sharia Court is based on Qanun No. 10 of 2002 concerning Islamic Sharia Courts. In Article 49 to Article 52 which regulates the authority and authority of the court, it is stated that: Article 49 regarding examining, deciding and resolving all problems at the initial to final level in the fields of ahwal al- syakhsiyah, muamalah and jinayat is the authority and responsibility of the Syar'iyah Court, and in Article 50 paragraphs 1 and 2 it states that in terms of examining or deciding cases whether at the first or final level it is the authority and responsibility of the Court. Sharia (QANUN 10 Tahun 2002 Tentang Peradilan Syariat Islam, 2002)

Referring to Law Number 11 of 2006 concerning the Government of Aceh in Article 1 paragraph (21), it briefly states that the Special Region of Aceh Province has special authority in adjudicating criminal cases based on the regional autonomy privileges granted to it. An example of a criminal act decided by the jurisdiction of the Syar'iyah Court is Decision No. 6 / JN / 2019 / Ms. Aceh. The case in Decision No. 6 / JN / 2019 / MS. Aceh began with the actions of the defendant and the child victim witness to commit immoral acts. On Sunday, February 3, 2019, in short, the defendant and the child victim witness found a quiet place and immediately engaged in the act of kissing on the lips. The defendant then extended his hand out of the victim's clothes and touched the child victim witness's genitals, the defendant felt a sanitary napkin on the child victim witness, from the child victim witness explaining that she was menstruating. That then the defendant opened one button of the shirt worn by the victim witness and inserted the defendant's hand to squeeze the child victim witness's breasts. Then the defendant ordered the child victim to suck the defendant's genitals

while the defendant took off his pants, then the child victim sucked the defendant's genitals once. Then the defendant kissed the victim again and touched the victim's breasts and hugged the child victim's body. At 23.30 WIB (half past twelve at night) the defendant suddenly saw many flashlights held by many residents pointing towards the defendant and the victim. And then the defendant ran away to avoid being caught by residents.

Referring to the rules regarding the chronology of the case above, regarding the obscene or lewd acts or actions carried out by the Defendant aimed at the Child Victim Witness, the Aceh Syar'iyah Court ruled the Defendant free on the basis that the Elements of Obscene Acts referred to in Article 1 Number 27 of the Rules concerning Jinayat Number 6 of 2014 were not fulfilled. This is because the obscene or lewd acts or behavior of the perpetrator of the crime were carried out in a quiet place and there was an element of consent or willingness given by the Child Victim Witness. In applying Article 1 number 27 of the Qanun which is used as the basis for acquitting the defendant for obscene or lewd acts committed against children on the basis of mutual consent or the consent or willingness given by the child, it is necessary to pay attention to the elements of criminal acts committed against children as regulated in Article 290 paragraph (2) and (3) of the Criminal Code and Article 76E of Law Number 35 of 2014 concerning Child Protection. Regarding this matter, if applying the Criminal Code and the Rules concerning Child Protection in Decision No. 6/JN/2019/Ms.Aceh, requires the principle of legal preference, which in this case is *lex superior* and *lex specialist* to find out how to apply legal regulations to a criminal case.

Formulation of the Problem

1. How is the regulation of the Criminal Act of Child Molestation in Qanun Number 6 of 2014 Jinayat, if it is based on mutual liking in decision No.6/Jn/2019/Ms.Aceh?
2. Can the legal preference principles of *Lex Superiori* and *Lex Specialis* be applied to decision Number 6/Jinayat/2019/Aceh Syar'iyah Court?

METHOD

This study utilizes research as an approach that is relevant to the research topic of the researcher who analyzes the "Criminal Act of Child Molestation Based on Mutual Consensus in Qanun Jinayat Reviewed by the Principle of Legal Preference (No. 6 / JN / 2019 / MS. Aceh)". The approach method used is the approach of the law approach using the rules in the 1915 Regulations concerning the Criminal Code, the 2014 Regulation Number 35 concerning Child Protection and the 2019 Regulation Number 16 concerning Marriage. While the case approach uses Decision No. 6 / JN / 2019 / Ms. Aceh which decides on the criminal act of vulgar acts in the form of

molestation or lewd acts committed against children with the reason of mutual consent.

The sources of legal materials consist of primary legal materials consisting of a collection of laws and regulations relevant to the problem, secondary legal materials consisting of books, journals, theses, as well as news and articles obtained from trusted media sources and non-legal legal materials consisting of the Big Indonesian Dictionary (KBBI) and foreign language dictionaries and legal dictionaries. The technique of collecting legal materials uses literature studies and documents, by reviewing and analyzing various legal information used as literature materials that have relevant relationships and ties to the Crime of Child Molestation Based on Mutual Consensus reviewed from the 1915 Regulations concerning the Criminal Code, the 2014 Regulation Number 35 concerning Child Protection and the 2019 Regulation Number 16 concerning Marriage, as well as the 2014 Qanun Regulation Number 6 concerning Jinayat.

RESULTS AND DISCUSSION

A. Regulation of the Criminal Act of Child Molestation in Qanun Number 6 of 2014 Jinayat, if it is based on mutual liking in decision No.6/Jn/2019/Ms.Aceh.

Qanun 2014 Number 6 Jinayat is a provincial regulation that regulates criminal acts or regulations regarding the prohibition of committing crimes based on Islamic law that is enforced in the Special Region of Aceh Province. As a provincial criminal regulation based on Islamic law that applies in the Special Region of Aceh Province, this regulation also regulates obscene acts or lewd acts or immoral acts or immoral acts. In its role as a criminal regulation based on Islamic law at the provincial level, this law is often used as a legal basis in deciding cases of criminal acts of immoral acts or immoral acts or obscene acts or immoral acts.

Jinayat, a criminal code based on Islamic law and enforced in Aceh, regulates various forms of criminal acts or crimes based on Islamic law. One form of criminal act or crime regulated in Qanun Number 6 of 2014 concerning Jinayat is an act or crime that violates norms of decency and etiquette, one of which is the crime of indecent acts.

In Qanun Number 6 of 2014 concerning Jinayat, indecent acts are essentially inseparable and have a close relationship or connection with sexual harassment. In the Qanun on Jinayat, sexual harassment is defined as an immoral act or indecent act that the perpetrator consciously commits in public against the victim of the crime without the victim's consent. The criminal penalties are then regulated in Articles 46 and 47, which briefly state the prohibition of committing indecent acts against adults and children.

In the Qanun on Jinayat or Child Protection, a child is categorized as someone who has not reached the age of 18, including fetuses in the womb of their parents. In the Special Region of Aceh Province, children have basically received legal protection granted to them, namely Qanun number 11 of 2008 concerning Child Protection. The protection received by children in this Qanun covers all aspects of protection received by children, including protection from violence based on Article 28 letter c. This article states that legal entities or adults are prohibited from committing acts of violence against children in the form of sexual violence.

Sexual violence is generally defined as an act that demeans, harasses, or attacks a person's body parts or reproductive functions. Aceh's Qanun does not explicitly regulate the crime of sexual violence, but rather regulates sexual harassment and rape. Sexual harassment is regulated in Qanun Number 6 of 2014 concerning Jinayat. The crimes of sexual violence regulated in this Qanun are sexual harassment and rape.

The definition of Sexual Harassment in the Qanun Jinayat is regulated in Article 1 number 27 which states that sexual harassment is an immoral or obscene act that the perpetrator consciously commits in public against the victim without the victim's permission or consent. The criminal elements related to sexual harassment are regulated in Articles 47 and 48 which state the prohibition of committing obscene acts against a person in general and obscene acts against a child.

In Articles 47 and 48 of Qanun Number 6 of 2014 concerning Jinayat, it can be seen that the focus of these two articles is on the indecent act itself, without considering the need for permission from the victim or the child. This is based on the words "a person" is "prohibited" from "performing indecent acts." These three words, in legal interpretation, are said to be sufficient evidence in court. However, this is completely at odds with Article 1 number 27, which makes the victim's permission the main point in proving that an act can be considered indecent or sexual harassment.

Article 1 number 27 of Qanun Number 6 of 2014 states that sexual harassment is an act that violates the principles of decency and manners or an obscene act that is intentionally committed in public against the victim without the victim's consent. When referring to the principle of legality, there are two elements that must be proven in court before the act can be said to be an act of sexual harassment. These two things are "intentionally committed in public" and "without the victim's consent". There is a legal loophole in Article 1 number 27, namely if the immoral or obscene act or sexual harassment is committed in a public place and there is consent given by the victim, then referring to the principle of legality, the act cannot be said to be sexual harassment or an act that violates the principles of decency and manners or an obscene act.

The provisions of Article 1, number 27, are also considered applicable to acts of sexual harassment committed against children. This is because the Qanun Jinayat (Islamic Law) does not distinguish between sexual harassment against a person in general and a child. Therefore, when confronted with a case of sexual harassment, the concept of consent granted by the child is a key issue that must be proven in court.

B. The Principle of Legal Preference *lex superiori derogat legi inferiori* and *lex specialist derogat legi generali* Applied to the Decision of the Sharia Court Number 6 / Jinayat / 2019 / Aceh Sharia Court.

a. The principle of *Lex Superiori Derogat Legi Inferiori*.

The principle of *lex superiori derogat legi inferiori*, if interpreted word for word, will find the word *superiori* which means higher, and *inferiori* which means lower. So if interpreted as a whole, the meaning of the principle of *lex superiori derogat legi inferiori* is that norms or rules of a higher strata will override lower norms or rules (Erizka Permatasari S.H, n.d.). Referring to this, then if it is applied to the *a quo* case Case No: 6/JN/2019/Ms.Aceh regarding the criminal act of lewd or obscene acts committed against child victims on the basis of mutual consent. The laws and regulations that hierarchically can override Qanun 2014 Number 6 which regulates Jinayat are Article 289, 290 paragraph (2) and paragraph (3) of Law 1915 concerning the Criminal Code. Article 289 states the prohibition with violence or threats of violence to commit or allow vulgar and indecent acts in the form of lewd or obscene or obscene acts. Article 290 paragraph (2) and paragraph (3) states that it is prohibited for anyone to carry out vulgar and indecent acts in the form of molestation or lewdness and/or offerings to children who they know or should suspect are not yet 15 (fifteen) years old or not yet ready to marry.

Referring to the description above, vulgar and indecent acts in the form of criminal acts of obscene or lewd acts committed against children as regulated in Article 289 Juncto Article 290 paragraph (2) of the 1915 Law on the Criminal Code which states the prohibition for anyone to commit obscene or lewd acts, to a person who is known to be a child or is reasonably suspected to be a child or is reasonably suspected to be under 15 years of age. Therefore, it can be said that the concept of giving consent by a child to commit obscene or lewd acts against him is not linked either to Article 290 paragraph (2) of the 1915 Criminal Code or to What is emphasized in the Criminal Code article is "the act of persuading a child victim to be willing to commit obscene or lewd acts committed against the child victim" so that the reason or alibi for someone committing obscene acts against a child on the basis of mutual consent with the child's willingness cannot be used as a justification.

b. The principle of *Lex Specialis Derogat Legi Generali*.

Referring to Law Number 35 of 2014 concerning Child Protection in Article 1 number 1, defines a child as a person who has not reached the age of eighteen years, as well as a child who is in his mother's womb. RA Kosnan formulates the definition of a child as a human being who has not yet reached adulthood both in terms of age that is not yet mature or adult and in terms of the soul that needs a lot of direction, advice or guidance, because the ability to think in him has not yet developed which causes him to be easily influenced in his behavior (Perpustakaan fakultas hukum universitas Pattipura, n.d.). Because the ability to think in him has not yet developed, this is why children are often seen as someone who is not yet capable and needs guidance from someone older in deciding something. Children's rights on the legal side are also based on Article 28B of the 1945 Constitution which states that every child has the right to a happy life to grow and develop, and to be protected from prejudice and violence (UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA, 1945), including protection from obscene or lewd acts committed or directed at the child.

Law of 2014 Number 35 which regulates Child Protection in Article 76E emphasizes that there is a prohibition for anyone who is involved or allows others to be involved in indecent and vulgar acts in indecent acts or lewd acts by means of threats of violence or violence, by means of coercion, or through deception arranged with a series of lies to persuade child victims. The aspect of consent given by the Child is then also regulated in Law of 1974 Number 1 which regulates Marriage which has been amended by Law of 2019 Number 16 concerning Marriage. Article 47 paragraph (2) of the law regulating marriage states that as guardians, parents act on behalf of their children in all legal actions both inside and outside the court (Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan, 1974).

So it can be concluded that, good lewd acts are obscene acts committed against child victims with the element of consent given by the child when analyzed with the principle of *lex specialist derogat legi generali* Article of Law of 2014 Number 35 concerning Child Protection Article 76E of Law of 1974 Number 1 which regulates Marriage which has been amended by Law of 2019 Number 16 concerning Marriage Article 47 paragraph (2) of the law regulating marriage. In sequence, it states that obscene acts committed against children are seen as acts of a series of lies or manipulation to persuade children to commit obscene acts against them. And the reason that children give consent to commit obscene acts against children on the basis of mutual consent cannot be used as a reason or an exonerating element because it cannot be said to be a legal act.

CONCLUSION

Decision No. 6/JN/2019/Ms.Aceh is a case involving indecent behavior in the form of obscene or lewd acts committed against children under the guise of mutual liking. The judge in the *a quo* case in making the decision based on Article 47 and Article 1 number 27 of Qanun of 2014 Number 6 concerning Jinayat. The judge in the *a quo* case is of the opinion that the actions committed by the defendant against the child victim witness are indeed obscene acts, however there are elements of obscene acts that must be fulfilled as regulated in Article 1 number 27. Stating that sexual harassment is defined as immoral and indecent acts in the form of obscene acts or lewd acts committed in public places and contrary to the wishes of the victim, both male and female. Referring to this case, because the legal element of obscene acts referred to in Article 1 number 27 is not fulfilled, because the defendant committed this obscene act in a quiet place and there is willingness from the child victim witness, then the actions committed by the defendant cannot be said to be obscene acts committed against children.

Indecent acts committed against children on the basis of mutual consent based on the principle of preference are also regulated in the Criminal Code. Based on the principle of *lex superiori derogat legi inferiori*, indecent acts committed against children are regulated in Article 290 paragraph (2) and (3) of the Law on the Criminal Code of 1915 which states that there is a prohibition on indecent acts committed against someone who is suspected or should be suspected of being a child who is under 15 years of age. This criminal act of indecent acts is then regulated again in the Child Protection Law and the Marriage Law based on the principle of *lex specialist derogat legi generali*. Article 76E of Law Number 35 of 2014 concerning Child Protection views indecent acts committed against children as acts with a series or manipulation to persuade the child to commit indecent acts against him. The element of consent given by children on the basis of mutual consent is regulated in Law Number 16 of 2019 concerning Amendments to Law Number 1974 concerning Marriage which states that parents represent children in all legal acts both outside and inside the court, so that legal acts given by children cannot be said to be legal acts if they do not get representation by their parents' guardians. So it is concluded that based on the principle of preference, the principle of *lex superiori derogat legi inferiori* and the principle of *lex specilais derogat legi generali* states the prohibition of obscene acts committed against children, where obscene acts against children are seen as acts with a series of lies or manipulations to persuade children to want to commit obscene acts against them. This also applies even if the child gives consent or willingness to have obscene acts committed against them, because children without the representation of their parents' guardians cannot carry out legal acts.

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