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Criticizing the Verdict of 18/JN/2016/MS.MBO of Mahkamah Syar'iyah Meulaboh Aceh on Sexual Abuse against Children from the Perspective of Restorative Justice

Muhammad Siddiq Armia

*Universitas Islam Negeri Ar-Raniry, Banda Aceh,
Jl. Syekh Abdul Rauf, Kopelma Darussalam, Banda Aceh, Indonesia
email: msiddiq@ar-raniry.ac.id*

Zahlul Pasha Karim

*Universitas Islam Negeri Ar-Raniry, Banda Aceh,
Jl. Syekh Abdul Rauf, Kopelma Darussalam, Banda Aceh, Indonesia
Corresponding Author's
email: zahlul.pasha@ar-raniry.ac.id*

3

A. Hamid Sarong

*Universitas Islam Negeri Ar-Raniry, Banda Aceh,
Jl. Syekh Abdul Rauf, Kopelma Darussalam, Banda Aceh, Indonesia
email: hamidsarong@ar-raniry.ac.id*

3

Muhammad Zuhlilmi

*Universitas Islam Negeri Ar-Raniry, Banda Aceh,
Jl. Syekh Abdul Rauf, Kopelma Darussalam, Banda Aceh, Indonesia
email: em.zuhlilmi@ar-raniry.ac.id*

3

Muhammad Syauqi Bin-Armia

*Universitas Islam Negeri Ar-Raniry, Banda Aceh,
Jl. Syekh Abdul Rauf, Kopelma Darussalam, Banda Aceh, Indonesia
email: msyauqibinarmia@ar-raniry.ac.id*

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Author correspondence email: msiddiq@ar-raniry.ac.id

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Abstract:

This article is based on a critical review of the judgment in the Indonesian Islamic Court, known publicly as *Mahkamah Syar'iyah*, case number 18/JN/2016/MS.MBO. The tribunal process in the Indonesian legal system should present clear evidence that convinces all involved parties, including for sexual abuse cases. Unfortunately, during the tribunal process of the case, the judges had neither asked the prosecutor to show the evidence nor asked how the case had happened. After asking a few simple questions, judges have made consideration and finally a judgment. Two main research questions will be answered in this article; how is restorative justice applied for law-breaking cases in Acehnese view? Why has the punishment been imposed by the Mahkamah Syar'iyah in its legal considerations for the case? This article has used the black-letter law method and interview. The research results have indicated that the case seems weird and does not provide the due process of law principle. The tribunal procedure has not provided any sufficient evidence before the verdict had been decided. The connection between both evidence and judicial facts, in this case, is very blurred. The witness was simply based on the victim's evidence.

Keywords:

Sexual Abuse; Mahkamah Syar'iyah; Province of Aceh;
Restorative Justice

Abstrak:

Penelitian ini berawal dari tinjauan kritis terhadap putusan Pengadilan Agama Indonesia—yang secara luas dikenal sebagai *Mahkamah Syar'iyah*—untuk kasus nomor 18/JN/2016/MS.MBO. Proses peradilan dalam sistem hukum Indonesia seharusnya menghadirkan bukti-bukti yang jelas untuk meyakinkan semua pihak yang terlibat, termasuk dalam kasus pelecehan seksual. Namun, dalam proses persidangan kasus ini, hakim tidak meminta jaksa untuk menunjukkan bukti atau menanyakan bagaimana kasus tersebut bisa terjadi. Setelah mengajukan beberapa pertanyaan sederhana, hakim membuat pertimbangan dan akhirnya memberikan putusan hukum. Ada dua permasalahan utama yang akan dijawab dalam artikel penelitian ini: Dalam pandangan masyarakat

Aceh, cara-cara seperti apa yang sebaiknya ditempuh agar keadilan restoratif dapat diwujudkan pada kasus pelanggaran hukum? Apa pertimbangan hukum di balik keputusan Mahkamah Syar'iyah menjatuhkan hukuman terhadap pelaku kasus tersebut? Artikel ini menggunakan metode black-letter law dan wawancara. Hasil penelitian ini menunjukkan bahwa kasus tersebut tidak wajar dan tidak sesuai dengan asas due process of law. Pengadilan tiba-tiba memberikan putusan hukum padahal bukti yang disajikan belum cukup. Kaitan antara bukti dan fakta peradilan dalam kasus ini juga sangat kabur karena hanya mengandalkan kesaksian korban.

Kata Kunci:

Pelecehan seksual; Mahkamah Syar'iyah; Provinsi Aceh;
Keadilan Restoratif

Introduction

This article criticizes the tribunal process of sexual abuse against a child judged by the Indonesian Islamic Court in Meulaboh-Aceh, Indonesia.¹ The case occurred in Nagan Raya District. The victim was a ten-year-old girl named Anggi who has been sexually abused by Indra Sadewa. She is a close friend of Indra Sadewa's daughter and used to visit Sadewa's house. Thus, the victim's parents did not worry about his daughter's habit to play with Sadewa's daughter in his house.

During the tribunal process, it has been revealed that on the day of the incident, Anggi played hide and seek with Sadewa's daughter. Unfortunately, Anggi stepped over Sadewa whilst he slept on the floor. Feeling furious, Sadewa then grabbed Anggi's hands and shut her mouth while sexually abusing her by fingering her female genital. After having *visum et repertum*, the medical team proved that Anggi's female genital had been sexually abused by Sadewa so the judges have proved him guilty. Unfortunately, Anggi has not been treated like a victim who deserves to receive restorative justice including trauma healing.

¹Judgement of Mahkamah Syar'iyah Meulaboh Nomor 18/JN/2016/MS_Mbo

Islamic law should, in theory, be able to address a variety of views of punishment and sanctions in diverse legal theories, including certain cases that involve children.² The punishment stipulated in those Islamic bylaws is supposed to be more humanistic and respectful of human rights so that it can become a lesson for the perpetrators, victims, and community. It is also supposed to provide an opportunity for repentance. More specifically, the main aim of punishing on the perpetrator of a crime against children is to protect for children as the asset of the future. As such, the legal consideration of the judges should lead to enhanced protection for children.

In fact, Aceh has been implementing bylaws called the *Qanun Aceh* Number 7 of 2013 on the *Hukum Acara Jinayat* (Islamic Procedural Criminal Law) and *Qanun Aceh* No. 6 the year 2014 on the *Hukum Jinayat* (Islamic Criminal Law). However, Islamic law, on the other hand, is considered unable to answer a variety of cases occurring in the Islamic Court, including those that happen in Aceh. Moreover, those Aceh's Islamic law has often been unfamiliar to Moslem itself. This condition has disabled Moslem to provide clear answers on the new type of cases, including sexual abuse against children.

Relating to children, Acehnese people of the past and nowadays have shown the notion of unpleasant treatments in different ways. For example, the traditional community of Aceh has perceptions that forcing children to learn the Al Qur'an in an early age is an absolute responsibility and the rights of parents. Although this perception recently has been classified as family violence, parents' perspective in fulfilling children's rights is still attached to that of community culture. In fact, protecting children is a natural and human process that every parent is obliged for.

In the context of law cases on children, the concept of restorative justice has now become a trend and popular term, especially among academics, law enforcers, and law practitioners. It is seen as a paradigm or approach to handling crime or criminal actions committed by both children and adults. As a paradigm or approach, restorative justice is expected to serve as one of the alternative ways of

² Nasimah Hussin, "An Islamic Perspective on Preventing Sexual Abuse Against Children," *IIUM Law Journal* 29, no. 1 (2021): 153–76.

dealing with crime or criminal cases. The priority is to restore the harmony of relationships between perpetrators and victims or their families. In some ways, it seems relevant to use for the crime against children.

Several previous researches had discussed the topics above. As for *Mahkamah Syari'iyah* (known as Islamic Court), Rosmawardani, for instance, had conducted significant research questioning the jurisdiction of the district court and *Mahkamah Syari'iyah*. Her finding shows that the jurisdictions of the district court and *Mahkamah Syar'iyah* have still overlapped, including in the case for a child sexual abuse. This issue furthermore creates legal ambiguity in the implementation of Islamic criminal law in Aceh.³

Butt, furthermore, has also insisted on a battle of three Indonesian courts, consisting of the Constitutional Court, District Court, and Supreme Court, on the case of adultery and same-sex intercourse. Butt has strongly disagreed with the Supreme Court that was considered not annulling the *Qanun Jinayat* established in Aceh.⁴ Additionally, using the historical approach, Mawardi explained how imperialism has influenced the establishment of Islamic law in Indonesia and Malaysia. He stated that the Dutch had inclined to develop a legal system in Indonesia, including Islamic law. Similarly, British imperialism has also obstructed the law system of Malaysia using the common law system. However, day by day, as law scholars have arisen from both Indonesia and Malaysia, the colonial laws have slightly been annulled and replaced by new laws, such as the enactment of the law of Marriage no. 1/1974, the law of the Religious Judiciary no. 7/1989, and *Kompilasi Hukum Islam di Indonesia* (Compilation of Islamic Law in Indonesia) among others.⁵

³ Rosmawardani Muhammad, "Analysis Of Absolute Competence Of District Courts And Syari'ah Courts," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (2020): 145–49.

⁴ Simon Butt, "Religious Conservatism, Islamic Criminal Law And The Judiciary In Indonesia: A Tale of Three Courts," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018): 402–34.

⁵ Imam Mawardi, "Islamic Law and Imperialism: Tracing on The Development of Islamic Law in Indonesia and Malaysia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1–24.

Regarding restorative justice, there are earlier researches that can be considered relevant to this article. Marshall, for example, stated that restorative justice has been defined as one of the most important novelties in the administration of criminal justice to have ascended in the contemporary era. From small-scale tentative early stages in the early 1970s, restorative justice had since grown up into a worldwide social program for change, embracing a variety of broad and peace-making practices in a varied range of situations. Although the story behind the emergence of the modern restorative justice programs is still questioned, there is a good purpose not to reduce the involvement of religious faith in the origin, theory, and exercise of restorative justice. In fact, Marshall also insisted that without the effect of core Christian principles and beliefs, the central doctrines of restorative justice might not arise with such simplicity and conviction.⁶ In Aceh with Moslem as the majority, the values of Islam take into account in applying restorative justice.

Gude and Papic also insisted that restorative justice as a national policy is sometimes diminished by literature considering legal culture is an essential process in law enforcement. They identified restorative justice backgrounds that are deemed as representative of civil and common law legal systems respectively and equivalence with a case study belonging to the previous system. They furthermore argued that restorative justice practices are formed by the legal traditions, political practices, and criminal justice character of the system where they grow. Also, they proposed a method to transfer restorative justice practices based on comparative criminology, restorative justice traditions, and legal culture. Those are believed to create a theoretical role in the field as well as have practical consequences at the level of public policy design.⁷

However, Gang criticized restorative justice while stating that restorative justice as an answer to sexual violence remains to be subject to important criticism. To measure the evidence, they sought to evaluate and synthesize evaluations of restorative justice programs

⁶ Christopher D. Marshall, "Restorative Justice," in *Religion Matters* (Springer, 2020).

⁷ Alejandra Díaz Gude and Iván Navarro Papic, "Restorative Justice And Legal Culture," *Criminology & Criminal Justice* 20, no. 1 (2020): 57-75.

for sexual and family violence crimes by conducting a methodical review of peer-reviewed literature. This shortage of evidence leaves them powerless to classify how best to achieve the goals for which programs were recognized and poses difficulties for policymakers. Additionally, they decide whether it is appropriate to publicize restorative justice objectives for sexual and domestic abuse. At last, they recommended that evaluations of restorative justice programs that admit sexual and family violence cases be shown as a substance of urgency.⁸

Based on the above explanation and previous research, we claim this article to possess a clear novelty and originality as indicated by the main research problems that had not been discussed previously. Been conducted a case study research from the *Mahkamah Syar'iyah* Meulaboh Aceh, there found no previous research discussing sexual abuse cases in this court. Meanwhile, two main questions that this article aims to discuss are; firstly, how is restorative justice for law-breaking cases in Acehnese view? Secondly, why has the punishment imposed by the *Mahkamah Syar'iyah* in its legal considerations for the case?

Method

This article has used the black-letter law method. In this method, the authors focused on Aceh's Islamic law verdict from *Mahkamah Syar'iyah* Meulaboh Nomor 18/JN/2016/MS_Mbo using a socio-legal approach in the Aceh context. The reason for using the black-letter law method is because the main object of research is the judgment itself contrasted to other government official letters. The verdict here serves as the primary data to analyze and to know how well the judges understand the procedural law on criminal cases against children. However, to get supporting data, the authors also conducted interview with prominent persons having knowledge background of this case, such as judges of Islamic courts.

⁸Daye Gang, et al. "A Call For Evaluation Of Restorative Justice Programs," *Trauma, Violence, & Abuse* 22, no. 1 (2021): 186-90.

Discussion and Result

Restorative Justice for Law Violation Case in Acehnese View

Restorative justice in Acehnese culture has been established since long time ago even before the Dutch colonialization.⁹ Acehnese culture has its terminologies regarding to restorative justice consisting of *dhiet*, *sayam*, and *suloh*. The word *dhiet* has been used for murder cases when a murderer replaces a damaged soul or body with treasure. Meanwhile, the word *sayam* has been used for mistreatment, the form of compensation in the form of assets given to the victim or his family, and the word *suloh* has been used for reconciliation among those who has conflict.¹⁰ From the perspective of the living law of local wisdom, the Aceh community finds it a shock to the social system whenever the law is violated or a crime takes place.¹¹ Therefore, whenever the social system encounters a community shock caused by a *jinayat* case, the *adat* (customary) ruler takes intervention to maintain the stability of society.¹² One of the ways is by organizing

⁹ Syahrizal Abbas, *Mediasi dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional* (Jakarta: Kencana, 2011); Muhammad Sahlan et al., "The Roles of Ulama in the Process of Post-Conflict Reconciliation in Aceh," *Society* 7, no. 2 (2019): 251-67. See also Goss and Andrew, "Mobile Warriors and Cosmopolitan Intellectuals: The Legacy of the Dutch Counterinsurgency in Colonial Aceh," 2011.

¹⁰Muhammad Natsir, "Perlindungan Hukum Terhadap Korban Penganiayaan Melalui Diyat Dan Sayam Pada Peradilan Adat Aceh," *Arena Hukum* 12, no. 1 (2019): 91-112; Herlambang P. Wiratraman, et al. "Taking Policy Seriously: What Should Indonesian Government Do To Strengthen Aceh Truth And Reconciliation Commission?," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 1 (2020): 14-30.

¹¹T. Nazaruddin, et al. "Legal Political of Aceh Sustainable Spatial Reconstruction Based on Local Wisdom of Mukim Customary Legal Community," *JL Pol'y & Globalization* 56 (2016): 69..

¹²Arfriani Maifizar, et al. "A Study of Cultural Understanding of the Peusijek Rituals among Acehnese," *Journal of Talent Development and Excellence* 12, no. 3 (2020): 2999-3008; Bustamam Ali and Wahyu Wiyani I. Made Weni, "The Peusijuek Tradition as a Social Communication Media in the People of Aceh, Indonesia," *International Journal of Advances in Scientific Research and Engineering* 6, no. 6 (2020): 7-19; Ito Takeshi, *The World Of The Adat Aceh: A Historical Study Of The Sultanate Of Aceh*, 1984.

a *kenduri* (congregational feasting).¹³ This practice of feeding others and eating together intends to restore social harmony from a disturbance.

The pattern of settlement of various criminal cases within Acehese society still reflects the process and practice that have been undertaken and experienced by people in the past. Since a long time ago, the most influential aspect of Aceh's societal system has been inspired by Islamic values and this has become the basic principle that serves as the ideological foundation and then develops the religious life order of the majority of Aceh people. Thus, it is natural that the basic principle of dispute resolution in Aceh always puts forward Islamic values.¹⁴

The principle of respecting, rehabilitating, and compensating the victims is regulated by Islamic tenets and this has become the customary practice of the Acehese people. The emergence of the concept of restorative justice is apparently not novel. It has indeed almost been foreign to the present-time society regardless of its past-time victory.¹⁵

However, Aceh's restorative justice values seem to not have been well implemented in the tribunal process in the case of sexual abuses at *Mahkamah Syar'iyah* Meulaboh No. 18/JN/2016/MS_Mbo. The judges should have decided the case using Aceh's restorative justice to protect the rights of the child as the victim. However, the judges only focused to punish the perpetrator without considering the psychological and physical impact suffered by the victim. In fact, Aceh's restorative justice should have also been implemented in both private and criminal law cases as an Acehese society does not distinguish between criminal and private law domains. Both are

¹³Nina Suryana, Sufandi Iswanto, and Heri Fajri, "The Development of Audio-Visual Learning Media Based on Kenduri Laot Tradition for Students at SMA Plus Athiyah Banda Aceh City to Increase Character Values," *Briliant: Jurnal Riset Dan Konseptual* 6, no. 2 (2021): 261–76.

¹⁴Shane Joshua Barter, "Ulama, The State, & War: Community Islamic Leaders In The Aceh Conflict," *Contemporary Islam* 5, no. 1 (2011): 19–36..

¹⁵Takeshi, *The World Of The Adat Aceh: A Historical Study Of The Sultanate Of Aceh*.

supposed to be processed by Aceh's restorative justice involving multi parties.

However, involving multi parties in modern legal system cases is deemed to possibly create a serious problem so it has not provided any mechanism of handling criminal law cases through implementing multi parties approach.¹⁶ Meanwhile, in the restorative justice of Acehese society, the goal of seeking mediation between parties is to humanize the justice system while creating justice that can respond to the demand of victims, perpetrators, and the community. Although there found no legal basis concerning a special formulation of regulations governing restorative justice, according to the theory of legal discovery, law enforcers' duties also include finding the living law within the society.

In this case, when the existing law (retributive justice) is considered unable to resolve the problems that inflict the victim, the study of social legal studies requires the apparatus not to remain silent or do nothing. Instead, they are required to try to find a way how to change the law and reinterpret it in order to create justice. It is important, therefore, to also put a restorative justice perspective ahead in handling the cases of child crime as well as a crime against children such as sexual abuse. Restorative justice can be offered as the main approach to seek the resolution towards the fulfillment of a prosecution-oriented demand to achieve a resolution beneficial to all parties.

Practically, there emerge many cases of sexual harassment crimes against children. Victims who are sexually abused can experience very serious losses both physically and psychologically.¹⁷ It could be the damage to genital organs such as tearing of the hymen,

¹⁶ Tody Sasmita Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 269-89; Simon Butt, "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts," *Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018): 402-34.

¹⁷ Dawn Crosswhite and Johnny S. Kim, "Child Sexual Abuse," in *Solution-Focused Brief Therapy with Clients Managing Trauma*, 2018, 177-88, <https://doi.org/10.1093/oso/9780190678784.003.0011>.

fainting, or even death. They are also likely infected by any sexually transmitted diseases and endure unwanted pregnancies as well as severe traumatism. It is also possible for them to experience post-incident psychological shocks followed by some physical reactions.¹⁸ Unfortunately, these legal considerations had never been disentangled in the verdict of the *Mahkamah Syar'iyah Meulaboh* Number 18/JN/ 2016/MS_Mbo.

Furthermore, the healing process for traumatism requires support from various parties. Multi-dimensional supports are needed mainly to raise the spirit of the victims and to help them able to accept what has happened. In fact, the criminal law has formulated the provisions for sexual harassment crime. Local legal policies about children have also existed in the community for a long time ago. The community also plays important role in children's surveillance outside homes, while parents supervise their children at home. The children's conduct receives proper observation both from the community and respective parents either at home or away from home.

Therefore, in the tribunal process, although judges find some obstacles in carrying out their duties and authority in dealing with sexual criminal action against children or other indecency cases, they are still required to examine the rights of the victimized child in formulating their decision. At least, they should consider other additional legal instruments, including restorative justice. Moreover, the Indonesian Supreme Court 2011 had produced some the landmark decisions that were subsequently transformed into the jurisprudence of the Supreme Court. One of them is Decision Number 1600 K/Pid/2009 containing the restorative justice considerations. This is also reinforced and highlighted in the decision of the Supreme Court of the Republic of Indonesia Number 096/KMA/ SK/VII/ 2011 on the Jurisprudence Release Team of the Supreme Court of the Republic of Indonesia regarding the Norms of Legal Formulation into Landmark Decision on July 1st, 2011. The decision turned out to be

¹⁸Faradilla Fadlia and Ismar Ramadani, "The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia," *Journal of Southeast Asian Human Rights* 2, no. 2 (December 2018): 448, <https://doi.org/10.19184/jseahr.v2i2.8358>.

interesting because the judges have applied the concept of restorative justice to their verdicts before the provisions were formulated in the legislation and law. Therefore, the provision has certainly laid down the groundwork for the judges to use restorative justice.

However, again, the verdict of the *Mahkamah Syar'iyah Meulaboh* Number 18/JN/2016/MS_Mbo has not led to seeking a settlement through restorative justice even though its provisions have already existed since the issuance of legislation on Judicial Power. *Mahkamah Syar'iyah Meulaboh* handled the case as usual and treated it as common case without searching the real background and detailed information regarding the case. They simply took the testimony of the victim and the witnesses—who unfortunately did not personally see or hear the incident --into their consideration. Seemingly, the judges were reluctant to apply Aceh's restorative justice because they are not accustomed to using it.

In fact, a judge with a case with unexisted or less obvious provisions and sanctioning has a way of exploring them through legal discovery.¹⁹ Such notion is also provided in Article 5 paragraph (1) of Law Number 48 the year 2009 regarding Judicial Power which reads: "Judges and Constitutional Court Judges are obliged to explore, follow and understand the values of law and the sense of justice living in the society." Thus, the judges can provide fair justice by digging into the case in detail, including seeking the resolution through restorative justice.

The opportunity to impose punishment through restorative justice is actually widely open. Moreover, restorative justice is well known in the traditional law system of Aceh so all criminal cases – let alone private cases—were usually settled through reconciliation and justice. Another way to reconcile the relationship between the perpetrator, victim, and family of both is through various peace-building ceremonials.²⁰ This ranges from putting an obligation on the perpetrator (the perpetrator's family) to doing something specific such

¹⁹Mukti Arto, *Pembaharuan Hukum Islam Melalui Putusan Hakim* (Yogyakarta: Pustaka Pelajar, 2015).

²⁰ M. Ridha, *Peumat Jaroe: Proses Mediasi Menuju Harmoni Dalam Masyarakat Aceh* (Banda Aceh: Lhee Sagoe Press and CV. Meuseuraya, 2017).

as stating a plea of guilt, saying an apology, paying compensation or submitting a particular object, and financing a trauma healing.

Punishment Imposed by the Mahkamah Syar'iyah and its Legal Considerations

The Mahkamah Syar'iyah Meulaboh decided on the first-level sentence of 30 (thirty) months imprisonment for the perpetrator according to Article 47, Aceh's *Qanun* Number 6 of 2014 on the *Jinayat* Law. The judges' legal considerations have come to a decision through the verdict of the Mahkamah Syar'iyah Meulaboh Number 18 JN/2016/MS-Mbo on October 18, 2016. The verdict, unfortunately, has not considered any rehabilitation and restitution for the victim, including trauma healing as a part of restorative justice.²¹ The imprisonment has only repeated the pattern of punishment introduced by the Dutch colonial in Indonesia. In pre-colonial times, Muslim throughout the archipelagic regions did not recognize the sort of imprisonment sentence.²² These archipelagicians understood religious teaching as a religiously-inspired common sense living in the community of that time. All crimes and law violations were prosecuted and legally handled through reconciliation. This shows how religion and tradition had been an integral part of society's behavior.²³

The Aceh *Qanun* Number 6 the year 2014 on *Qanun* of *Jinayat*, meanwhile, is a law produced by the Government of Aceh as a special province of Indonesia.²⁴ Thus, it can be said that Aceh has involved

²¹ Zulfa Hanum, "Pengawasan Pelaksanaan 'Uqubah Cambuk Di Kota Banda Aceh (Analisis Pasal 262 Ayat (2) Qanun Hukum Acara Jinayat Tentang Pelaksanaan 'Uqubah Cambuk Tidak Boleh Dihadiri Oleh Anak-Anak Di Bawah Umur 18 Tahun)" (UIN Ar-Raniry Banda Aceh, 2017).

²² Boma Wira Gumilar, Gunarto Gunarto, and Akhmad Khisni, "Reconstruction of Life Imprisonment in Prison System in Indonesia," *Jurnal Daulat Hukum* 2, no. 4 (2020): 499; Christina Maya Indah Susilowati, "Sentencing of Minor Offences in Indonesia: Policy, Practice, and Reform," *International Journal of Criminology and Sociology* 10 (2021): 778–83.

²³ A Hamid Sarong, *Mahkamah Syar'iyah Aceh: Lintasan Sejarah Dan Eksistensinya* (Banda Aceh: Global Institute, 2012).

²⁴ Amsori Amsori and Jailani Jailani, "Legislasi Qanun Jinayat Aceh Dalam Sistem Hukum Nasional," *Ar Raniry: International Journal of Islamic*

the state as the guardian in providing protection to its people through upholding the law of *fiqh* (Islamic jurisprudence).²⁵ It also means that *fiqh* law-directly or indirectly-has become a legal material in Indonesia. The mission to increase the number of Islamic legal content to be incorporated into the national law lies at the hands of the *fiqh* expert. With their serious efforts and relevant competencies, they have a wide chance to identify concepts of Islamic jurisprudence compatible with the legal basis to be incorporated into Indonesia's legal system.²⁶

Cammack and Feener have stated that Aceh people have agreed to the imposition of caning punishment is a falsification to Islamic law that had been implemented since 2003.²⁷ So far, the punishment prescribed by national law is considered unable to reduce the rate of crime in society.²⁸ Therefore, to grant the judge some ease, the *Qanun* Aceh Number 6 of 2014 provides three forms of punishment; (1) caning; (2), imprisonment; (3), compensation or fine. All these three forms of punishment can be imposed on the judges' choice, chiefly compensation or fine for cases relating to restorative justice. Article 46 of the *Qanun* reads "Whomsoever intentionally

Studies 4, no. 2 (2018): 221; Al Yasa' Abubakar M. Daud Yoesoef, "Qanun Sebagai Peraturan Pelaksanaan Otonomi Khusus Di Provinsi Nanggroe Aceh Darussalam," *Jurnal Legislasi Indonesia* 1, no. 3 (2004): 15-30.

²⁵Afridawati, "History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?," *Al-Risalah* 21, no. 1 (2021): 33-47; Abdul Syatar, "Transformation Of Fiqh In The Forms Of Hajj And Zakat Legislation,"; Zahlul Pasha Karim, "Relasi FPI Dengan Dayah Dalam Penegakan Syari'at Islam Di Aceh," *Jurnal Sosiologi Agama Indonesia* 1, no. 3 (2020): 228-37.

²⁶ Nyak Fadhlullah, "Metode Perumusan Qanun Jinayah Aceh : Kajian Terhadap Pasal 33 Tentang Zina," *In Right (Jurnal Agama Dan Hak Azazi Manusia)* 7, no. 1 (2017): 16-40.

²⁷ Cammack, M. E. and R. M Feener, "The Islamic Legal System in Indonesia," *Pacific Rim Law & Policy Journal* 21, no. 13 (2012); Nurrohman Syarif and Marzuki Wahid, "Politik Formalisasi Syari'at Islam Dan Fundamentalisme: Kasus Nanggroe Aceh Darussalam," *ISTIQRA: Jurnal Penelitian Direktorat Perguruan Tinggi Agama Islam* 01, no. 01 (2018): 45-74.

²⁸ Dinas Syariat Islam Aceh, *Kajian Syariat Islam Terhadap Tingkat Kriminalitas Pasca Penerapan Qanun Jinayat* (Banda Aceh: Dinas Syariat Islam Aceh, 2017).

performs a *jarimah* (forbidden activities) of sexual harassment is sanctionable with a maximum *uqubat ta'zir* (a punishment for those who break the law which is not mentioned in Al Qur'an/Hadits) of 45 (forty-five) times whipping or a maximum fine of 450 (four hundred and fifty) grams of pure gold, or a maximum imprisonment of 45 months. Meanwhile, Article 47 stipulates that "whomsoever deliberately performs a sexual harassment as meant in Article 46 against a child is threatened with a maximum *ta'zir* of 90 (ninety) times of caning or a maximum fine of 900 (nine hundred) grams of pure gold or maximum imprisonment of 90 (ninety) months. It is understandable, therefore, to find the punishment doubled when the victim comes from children.

The judges' judicial consideration regarding the criteria of *jinayat* action became the primary basis for seeking punishment formula. The following criteria must be fulfilled, namely: *First*, subjective, i.e. person (someone) who can be accountable for legal action (bearer of rights and responsibilities). This means that the person can be held criminally liable. The identity has also been matched and clarified against the witnesses. *Second*, intentional. This element is actually a criterion recognized in crime/delict in general. *Third*, the element of the case or sexual harassment in this context; contains the defendant's confession in whatsoever wordings he/she expresses. The defendant, for instance, must acknowledge that he hit the victim on the breast and genital organs. *Fourth*, target, namely against an under-aged person/victim. Islam teaches that a mere confession is not enough. Confession must be proven with other evidence and followed by an explanation about the perpetrator's knowledge regarding the legal offense he/she has committed. Diagram 1 below shows the restorative justice framework

Subjective Substance: 1. someone who commits the action and is the subject of Law Intention

Objective Substance: 1. *Jarimah* of Indecency Action in public
With an objection

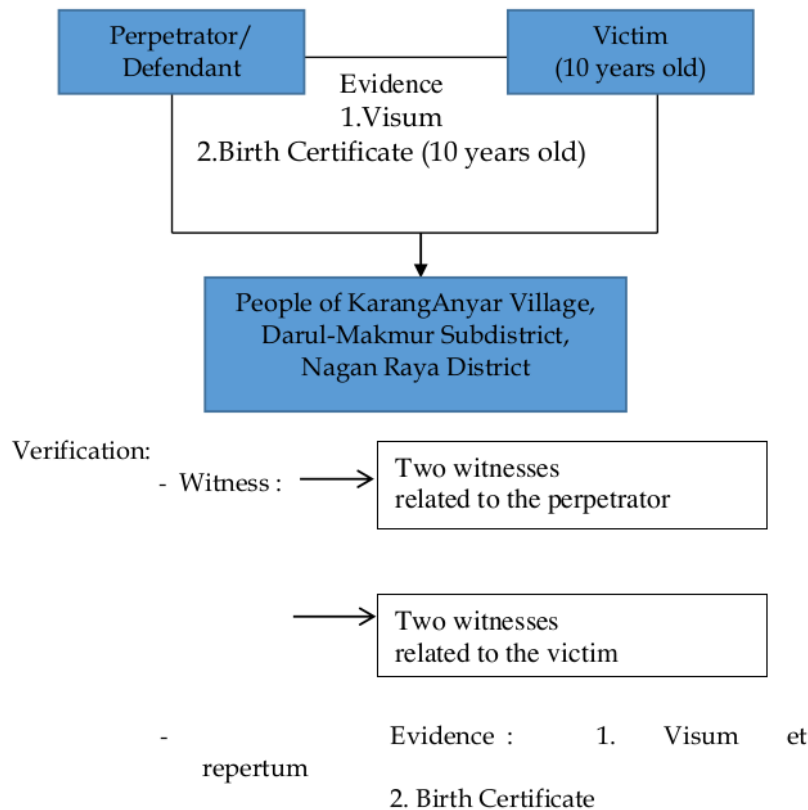


Diagram 1. Restorative Justice Framework

The 24-page verdict issued by the ² *Mahkamah Syar'iyah Meulaboh* Number 18/JN/2016 MS Mbo dated on October 18, 2016, mentions the term of sexual harassment 33 times.²⁹ On the

²⁹ Mahkamah Syar'iyah Aceh, "Putusan Mahkamah Syar'iyah Aceh No: 11/JN/2016/MS-ACEH,"

consideration page, the verdict also mentions Law No. 11/2006 on the Governing of Aceh as one of its referred legal standings. This indicates that the *Mahkamah Syar'iyah* Meulaboh has the authority to persecute the crime with the authority granted by the government of the Republic of Indonesia instead of the Aceh's *Qanun* not showing the value of justices. The punishment on the basis of Aceh's *Qanun* (bylaw) should also be proven to respect humanity.³⁰ Islam greatly respects human rights and therefore, both Indonesian law and the spirit of Islam should have been reflected in the verdict because Islam provides neat and humane guidance in all matters including in the law of war, let alone in the matters of punishment.

Additionally, the verdict of the *Mahkamah Syar'iyah* Meulaboh does not mention Islamic shari'ah as a living law in Aceh's society. In fact, it is not sufficient for sharia law to merely rely on the *qanuns*. The *qanun* comes to exist under the support of the community's aspirations. Aspirations of the society are a part of living law leading to the laws that society wishes to manifest. The verdict which serves as the object of this study also mentions the wish of the defendant to prefer the punishment of caning instead of imprisonment. If the caning is categorized as a violation of human rights, why had the defendant preferred to choose to can? It can certainly be understood that in this context, caning is better or more acceptable than imprisonment.

Another thing is about the judges who did not consider the fact that the victim was a child who happened to be playing and then stepped over the perpetrator at the time of the incident. This ponders a question on whether the action can be categorized as delinquency.³¹ Alignments will degrade the quality of the decision. Although the judges have absolute power to impose the judgment as they wish since they serve as the authorized agents to produce a fair decision, they still should provide clear and transparent considerations. For example, the judges could have named the victim as a part of a

³⁰ Mohd. Hisyam Mohd. Kamal, "Human Rights Perspectives On Issues In The Implementation Of Islamic Criminal Law In Malaysia," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* Volume 4, no. Nomor 1 (2019).

³¹ Wagianti Soetodjo, *Hukum Pidana Anak* (Bandung: Refika Aditama, 2006).

vulnerable group. When she was playing too joyfully, she could possibly be unaware of whether or not others were disturbed. This is actually an important point to consider in the decision.

Out of legal considerations, there are five items taken by the judges from the prosecutors' attention. The five items are considered very important: (1) the prosecutor proposed 30 months imprisonment minus the period of detention. On the contrary, the defendant did not request for imprisonment reduction. Instead, he requested for being whipped or caned. (2) The panel of judges mentioned in their legal considerations that the defendant was not accompanied by a lawyer. This shows his acceptance of whatsoever judgment to be imposed on him and that he did not have a will to defend himself excessively. (3) The panel of judges indicated that the defendant had violated Article 47 of the *Qanun* Number 6 of 2014 regarding *Jinayat* Law. (4) The defendant accepted the contents of the indictment which shows that he had understood it and did not file any objection. (5) The panel of judges showed the evidence submitted by the Public Prosecutor (*Jaksa Penuntut Umum*) to the audience.

The judge must also have set the verdict as clear and transparent as possible because clarity and transparency are the hallmarks of Islamic law. Another judge's legal consideration that needs highlighting is the mentioning of the word 'child'. In their legal consideration, the judges repeat the word 39 times. This indicates that the Panel of Judges put the child as a high priority.³² It shows how the judges paid very much attention to the need of child to gain multiple protections. However, the verdict did not mention or direct any legal attention to what the child must obtain as a victim, including restorative justice. If the law had been directed towards restorative justice, there would have been a signal to encourage legal thinking for seeking compensation against a crime experienced by the victim.

In fact, such an arrangement is not new to the legal community in Indonesia and the restorative justice law has been recognized in the customary law system. Therefore, restorative justice should be considered a legal obligation amongst judges so that they can explore

³² Indonesia's Supreme Court Regulation Number 3 Year 2017 Regarding the Guidelines on Prosecuting Women Cases before the Law.

the laws living in the society. Responding to this case, the head of *Mahkamah Syar'iyah* Aceh has stated as follows:

In the name of justice, the judges should rely on the verdict not only on the text of bylaws but also on the victim's side. The victim is a child who must be strongly protected as an affected victim of sexual crime and needs trauma healing for her future life. Punishing the perpetrator without giving rehabilitation to the child is a serious injustice.³³

It can be inferred that the judges in that time only considered sentencing the punishment to the perpetrator without considering the victim's rights and needs to fulfill. This tribunal fact seemingly happened because the mindset of judges had concentrated only on the text of bylaws instead of the context of a case that should protect a child with a vulnerable position as a sexual abuse victim.

Conclusion

The Verdict of 18/JN/2016/MS.MBO decided by *Mahkamah Syar'iyah* Meulaboh Aceh on sexual abuse against children has not indicated a value of justice, chiefly from the perspective of restorative justice. The panel of judges has only pursued the target of imposing punishment on perpetrator without considering the values of justice for the victims such as rehabilitation and trauma healing. In showing evidence, the judge's verification was carried out with a lack of judicial evidence as shown by persecutors. The *visum et repertum* report used for core evidence has not even been shown from the beginning until the end of the tribunal process. The distinctive opinion of the head judge and chairman should have been examined more deeply an appealing level. The case has also seemed a weird occasion because the displayed evidence during the tribunal process are inadequate for deciding a proper verdict as a final judgment. Judges have only relied on the evidence the testimony of the perpetrator's neighbor, who was not in the location whilst the case

³³ Interviewed with Rosmawardhani, Head Mahkamah Syar'iyah Aceh (2021).

happened. The poor evidence in the tribunal process has indicated that a judgment has justice abused.

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