

Social construction of law enforcement for sexual violence against women in Aceh Utara

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ABSTRACT

Today, the level and types of sexual violence crimes in Indonesia are increasing and worrying the public. Law enforcement efforts to overcome criminal acts of sexual violence are increasingly being implemented. This study aims to examine the social construction of law enforcement against the crime of sexual violence against women in Aceh Utara. Respondents in the study amounted to 21 people who were selected with accidental sampling. The types of data in the form of primary data and secondary data were analyzed descriptively qualitatively. The results of the study explain that the legal basis used in the law enforcement process of sexual violence against women in Aceh Utara is Aceh Qanun Number 6 of 2014 concerning Jinayat Law. Criminal charges for perpetrators of sexual violence in Aceh are whipping, fines, and imprisonment. It was found that the criminal sanctions contained in the qanun jinayat were lighter than the national law. For this reason, it is necessary to revise the qanun to provide a more severe deterrent effect on perpetrators, protect witnesses and victims with adopting developments in national laws related to sexual violence while still referring to the Aceh's Islamic characteristics.

Article History:

Submitted : 16-08-2022

Revised : 19-08-2022

Accepted : 19-09-2022

Keywords:

Aceh law; social construction; woman violence



Cite in APA 7th:

Zulkifli, Z., Rahman, A., Martina, M., Mumtiza, R., & Risma, M. (2022). Social construction of law enforcement for sexual violence against women in Aceh Utara. *Jurnal Civics: Media Kajian Kewarganegaraan*, 19(2), 224–234. <https://doi.org/10.21831/JC.V19I2.52631>

Introduction

Law enforcement of sexual violence has become a vital spotlight throughout human history because sexual violence is the cruelest act of human rights violations against women and children (Das & Singh, 2020). Some ancient texts, such as the Code of Hammurabi written in 1754 BC, stipulate the death penalty for perpetrators of sexual crimes. In addition, other sources are contained in the books of the world's major religions, such as Islam, Christianity, and Judaism, concerning sexual violence. In the modern era, acts of sexual violence are classified by the United Nations as crimes against humanity. Article 7 Paragraph (1) of the Rome Statute of The International Criminal Court, sexual violence is a crime against humanity (crimes against humanity) which is included in the category of the most severe crime (Gaggioli, 2015). The characteristics of the most serious crime in international law include: the crime committed is a heinous and cruel act, shakes the conscience of humanity, there is an element of intentional, organized, systematic, and widespread to cause death or other dire consequences. The consequences of this crime are ominous for the state or the wider community (Bradley, 2020).

Thus, the reason for including sexual violence as a crime against humanity or a severe crime is based on the impact it causes. Many studies show the tremendous impact of this sexual violence crime, such as memory impairment and trauma (Forest & Blanchette, 2018; Sigurdardottir & Halldorsdottir, 2021), economic effects such as work and economic well-being of victims, including rest periods, decreased performance, health, job loss, and inability to work (Loya, 2015; Martin et al., 2011). Based on these studies, the impact of sexual violence, including physical and non-physical has implications for victims. Non-physical consequences due to sexual violence include betrayal or loss of trust in children towards adults (betrayal); trauma sexually (traumatic sexualization); feeling helpless (powerlessness); and stigma (Chynoweth et al., 2022; Darves-Bornoz, 2021; Draucker, 1999; Lippus et al., 2020). Physical impacts include injuries during pregnancy (Lukasse et al., 2012)

Even though it is considered a severe crime, the reality shows that violence is increasing. Research results of Komisi Nasional Perempuan (National Commission on Violence against Women), show an increase in sexual violence by 19 percent in 2020 (Komnas Perempuan, 2022). Most of the rise in sexual violence occurred in the personal sphere at 10 percent and the public sphere at 8 percent. During 2021 cases of violence, especially against women, will increase by two times compared to 2020. Meanwhile, at the Aceh Province level, as noted by Aceh Government Services to Women and Children, there were 697 cases of sexual violence against women from January to September 2021 (Komnas Perempuan, 2022)

Theoretical model showing that sexual harassment is the most obvious example of many workplace disputes that systematically harm women (McLaughlin et al., 2012). The model describes workplace disputes, including sexual violence, consisting of origins, processes, and outcomes. Empirical findings suggest that individual, occupational, and organizational level variables influence the roots of sexual violence. In contrast, the processes and products of sexual violence disputes are documented at the individual level. It is suspected that the prevalence of sexual violence in the workplace contributes to the persistence of sex segregation.

The object of sexual violence is women. Women have traditionally been the object of sexual violence, which includes all forms of harassment, coercion, and coercion experienced by women from men (Handayani et al., 2019; Smith et al., 2018). Women are subjects who are vulnerable to sexual violence. This can be seen from the increasing number of cases and various types of violence that occur (Purwanti & Zalianti, 2018). The majority are victims of male sexual violence, and, in many cases, the perpetrator is known to the victim (Dartnall & Jewkes, 2013). Theoretically, sexual violence against women is a form of discrimination that continues the subordination of women's structures and patriarchy at society (Alkan & Tekmanlı, 2021; Banarjee, 2020; Bonar et al., 2022)

To overcome the crime of sexual violence, need law enforcement, and cannot be separated from the understanding of law in the structure of human life as a regulator of social life (Cotterrell, 1995). Law is a set of regulations by state authorities or government to regulate human behavior in society, are coercive, and have sanctions (Hidana et al., 2020). The functioning of the law is highly dependent on the law enforcement process itself. Rahardjo (2009) emphasized that law enforcement is a series of processes of elaborating legal ideas and ideals that contain moral values such as justice and truth into concrete forms.

Law enforcement of violence against women in Aceh has received sharp attention from various parties, both in Aceh and nationally. This is related to the increasing number of cases of sexual violence in Aceh. Even though Aceh is the only area that applies Islamic law, which applies different punishments than other areas for perpetrators of sexual violence. Aceh, which is framed by Islamic law, both formally and culturally, is facing the phenomenon of an increase in sexual violence, which was acknowledged by one of the Deputy Chairmen of The People's Representative Council of Aceh,

Safaruddin, as reported by the online media Aceh Tribunnews (2021) because of weak punishment so that it does not cause a deterrent effect for perpetrators.

For this reason, it is necessary to study the social construction of sexual violence in law enforcement to see the enforcement construct that everyone in the law enforcement agency understands. This research is critical to look at the social construction of sexual violence law enforcement, the legal basis, and legal problems that occur to obtain a legal sociology framework that is useful for improving the law enforcement process and legal substance.

Method

This research was conducted in Aceh Utara Regency. Respondents in the study amounted to 21 people who came from several Aceh Utara law enforcement bodies, including Lhoksukon District Court, Sharia Court, District Attorney, Resort Police, Lawyers, and Sharia police. The sample selection was carried out by accidental sampling, a method of determining the sample by taking respondents who happen to exist or are available somewhere following the research context (Creswell & Poth, 2018).

The data in this study consisted of secondary data and primary data. The researcher collected secondary data from literature studies, journals, judges' consideration, and others. At the same time, preliminary data was taken directly from the field through interviews or a list of questions (questionnaires). Data collection uses interview instruments and literature studies to obtain accurate and in-depth results. The data obtained were analyzed descriptively qualitatively, namely the data analysis method used to describe and describe existing phenomena, both natural and human engineering, which pay more attention to the characteristics, and quality of activities (Creswell & Poth, 2018)

After the data is collected, the following process is data reduction. This data reduction includes data summarizing, deleting, and grouping based on the formulation of the problem. The discussion process of research results is more focused. After reducing the interview data, searching for sexual violence case documents, both available online and on the Lhoksukon Sharia Court website, was carried out as secondary data from interviews. Secondary data was also used as interview material and confirmation to the respondents. Then the data is presented and studied based on the theory and the results of previous research, and the concluding process is carried out.

Results and Discussion

Social construction is closely related to the role of humans as social beings and humans interact with other humans (Mustaffa et al., 2021; Schneider & Sidney, 2009). During the process of social interaction, social construction is formed. Social construction is born simultaneously from the process of human social life and obtains mutual agreement. Hacking (1999) classifies two meanings of social construction, namely the social construction of ideas (or concepts, or theories, that is, mental representations) and social constructions of objects (or individuals, properties, types, facts, named entities in the world, which are different from mentality. Thus, social constructions exist in the form of ideas and reality.

Social construction has a broad meaning such as ideology, politics, economy, society, culture, law, defense, security, and defense. Social construction of law enforcement can be interpreted to describe the law and the social context of law enforcement. The extent to which social construction affects understanding and the resulting legal impact. In this study, social construction refers to interpreting or defining an event, person, value, or idea in a certain way and giving value. The reality of the sexual violence law enforcement process shapes these values, leading to the personal construction of a bigger picture of reality.

Law enforcement bodies in Aceh are generally not much different from other provinces. In some respects, Aceh has privileges and specialties that are different from other regions. However, in the context of law enforcement for the crime of sexual violence, there are some notable differences, such as the existence of the sharia police and sharia courts. It is a consequence of implementing special autonomy in the province of Aceh. Aceh Province has different privileges from other regions, namely special authority to organize religious life, customs, education, and the role of the community. Ulama in determining regional policies (Article 3). The implementation of religious life in the region manifests in the application of Islamic law for its adherents in the community. The area of application of Islamic law is to maintain inter-religious harmony (Article 4).

Article 125 of the Law of the Republic of Indonesia Number 11 of 2006 concerning the Government of Aceh explains the meaning of Islamic law and its implementation. Islamic law applied in Aceh includes *aqidah*, *syariah*, and morals. Islamic law provides worship, *ahwal al-syakshiyah* (family law), *muamalah* (civil law), *jinayah* (criminal law), *qadha'* (judicial), *tarbiyah* (education), *da'wah*, symbols, and the defense of Islam.

In 2018 the police and prosecutors processed the law for the perpetrators of raping children in the Lhoksukon District Court using the law enforcement basis for the child protection law. However, the defendant's lawyer filed a pretrial with the exception being that he filed an objection to the panel of judges because the prosecutor used the legal basis of the national law, even though the *qanun jinayat* in Aceh had applied. The board of judges granted the defendant's exception and refused to try the rape case because it was the authority of the Sharia Court. Based on this jurisprudence, until now, law enforcers in Aceh, when processing criminal acts of sexual violence, using the *qanun jinayat* as a legal basis. The *qanun jinayat* itself is defined as a criminal law that regulates behavior that is prohibited by sharia, such as *khamar* (alcohol consumption), *maisir* (gambling) *khlawat* (certain intimacy outside married), *ikhtilat* (intermingling between women and men), *liwath* (homosexuality), *musahaqah* (lesbianism), *qadzaf* (false accusation), *zina* (fornication), sexual harassment, and rape (Fadlia & Ramadani, 2018).

This fact shows that judges can be involved in the formation of law through their decisions made and guided by other judges in the future as jurisprudence. According to Simanjuntak (2019), jurisprudence is an essential source in the civil law tradition. Every discourse on jurisprudence in the civil law tradition implies that the civil law tradition recognizes law other than what is contained in the law. There is also the law that comes from judge law (judge-made law) (*rechtstersrecht*) which is better known as jurisprudence (*jurisprudentierecht*). Jurisprudence is a social construct that was born in the process of law enforcement. The decision of the Lhoksukon District Court judge who rejected the criminal case of sexual violence and delegated it to the Lhoksukon Sharia Court was guided by all law enforcers in Aceh Utara and extended to the entire Aceh Province.

Based on Aceh Qanun Number 7 of 2013 concerning the *Jinayat* Procedural Law, the flow of the law enforcement process for sexual violence in Aceh compared to other regions is slightly different but very distinctive, namely at the time of execution. In the execution process, a typical Acehnese institution was involved, namely the *Wilayatul Hisbah* (WH), known as the sharia police. The involvement of the WH in the law enforcement process for the crime of sexual violence, especially during the execution of the caning. In carrying out the caning, the sharia police acted as the executive committee for the whip execution at the request of the prosecutor. The sharia police as the whip organizing committee prepares all the preparations for the event, from the budget to the technical implementation of the event.

The victim received assistance from the Integrated Service Center for the Empowerment of Women and Children during the legal process. The Social Service for Women's Empowerment and Child Protection in the Aceh Utara Regency Government carries out an empowerment and

rehabilitation process for victims of sexual violence, covering the economic, political, social, and cultural fields. Economic empowerment includes entrepreneurship training, job training, and skills training; assistance in developing productive financial enterprises; cooperation with the business world and philanthropic institutions; facilitation of capital provision; or expansion of access to information and promotion of production. Empowerment in the political field includes strengthening the capacity to be involved in decision-making, increased legal knowledge and awareness and increased leadership capacity. Lastly, social, and cultural empowerment provides for improving writing and reading skills; return to the family. While the rehabilitation process is in the form of medical and social rehabilitation. Medical rehabilitation at least includes health checks, treatment, counseling, and or therapy. At the same time, social rehabilitation is the fulfillment of basic needs, the confidentiality of the identity, acceptance in the family environment, and acceptance in the community.

Based on the *qanun jinayat*, the perpetrators of the crime of sexual violence in Aceh Utara were criminally charged (*uqubat*) with hudud and *ta'zir* punishments. Both *hudud* and *ta'zir* are forms of criminal punishment. *Hudud* is a punishment whose criminal sanctions have been explicitly regulated in the *Qur'an* and *Al-Hadith*.

There are three forms of sexual violence regulated in the *jinayat* law, namely adultery with children (Article 34), sexual harassment (Article 46), and rape (Article 56). The finger of sexual violence in the form of sexual harassment and rape was not subject to hudud as well as the finger of adultery with children. Every adult who commits adultery with a child, in addition to being threatened with *uqubat hudud* 100 (one hundred) times, can also be added with '*uqubat ta'zir* whipping of a maximum of 100 (one hundred) times or a fine of a maximum of 1,000 (one thousand) grams of pure gold or imprisonment maximum of 100 (one hundred) months (Articles 33 and 34). Meanwhile, rape of a child is punishable by '*uqubat ta'zir* whipping at least 150 (one hundred and fifty) times, a maximum of 200 (two hundred) times, or a fine of at least 1,500 (one thousand five hundred) grams of pure gold, a maximum of 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 the interview results, it was found problematic that the words "can be added" and "or", where these two words have different legal implications. It can be added, meaning that the judge can add other punishments besides the main sentence, while the word "or" is only given an alternative that must be chosen. That punishment for child adultery is possibly heavier than the child rape. The implication is that adultery with children has a more serious punishment than the rape of children. Meanwhile, for criminal acts of sexual harassment and rape, the punishment is alternative, namely whipping or imprisonment, or restitution. This raises a moral dilemma among law enforcers themselves. Respondents from the police and the prosecutor's office considered that the physical and psychological impact of child rape was much more severe than adultery with a child. This is in line with the findings of Walker et al (2021) that sexual violence against children is a crime that has short-term and long-term consequences and disrupts their developmental trajectory and long-term quality of life.

The implication is that the punishment for raping children should be heavier than adultery with children. However, in the *qanun* the punishment for rape is only three choices, one of which must be chosen, namely flogging or imprisonment or restitution. While national laws such as the law on child protection and the law on criminal acts of sexual violence, the punishment for perpetrators of sexual harassment and rape is imprisonment and restitution and even additional punishment in the form of castration. This shows the lower punishment for perpetrators of sexual violence in the *qanun jinayat* compared to national law. However, because it has become a stipulation in the *qanun jinayat*, law

enforcers must implement it. This is following the principle of legality, which is one of the important principles in the implementation of criminal law. The principle of legality requires that no act can be criminalized unless it is based on the provisions of the existing criminal legislation before the act was committed (Christianto, H, 2009). Perpetrators as well as victims have the right to justice. Justice is meant to be punished based on the applicable rules. On the other hand, Aceh Utara law enforcement wants a change in the editorial "or" in the *However*, because it has become a stipulation in the *qanun jinayat* to be replaced with the word "and or". Respondents assessed that if the perpetrators of the crime of sexual violence were punished only the caning punishment was seen by the community as too light. However, if it is only imprisonment without any restitution, it is considered not in favor of the victim.

This principle is indeed considered unfair to the victim so that it encourages the prosecutor's office to make legal breakthroughs by demanding caning and imprisonment for perpetrators of sexual violence. This is a progressive form of law enforcement, in which the prosecutor considers the community's sense of justice in handling a case. However, this was criticized by the Criminal Law Expert at the Universitas Malikussaleh Romi Asmara who stated that the prosecutor's move was contrary to the principle of legal certainty which obliges law enforcers to punish perpetrators of criminal acts based on applicable laws. In addition, this action is contrary to the principle of justice, especially for the perpetrators because the perpetrators are prosecuted above the standard of punishment stipulated by law. Thus, the law guarantees legal certainty in society in addition to having to be based on justice, namely the principles of justice for both victims and perpetrators.

But in the end, the social construction of the police and the prosecutor's office was rejected by the Lhoksukon Sharia Court. This is based on the search for the decision documents of the Lhoksukon Sharia Court judge in the case directory of the Supreme Court, it was found that all those related to sexual harassment and rape were sentenced to prison, while adultery with children was sentenced to 100 (one hundred) whip and imprisonment. This means that judges are still basing the rules on the *However*, because it has become a stipulation in the *qanun jinayat* where perpetrators of sexual violence are only punished with whipping, or imprisonment or a fine. The judge's decision to reject the prosecutor's demands reflects legal legism as the main consideration. Legism that views there is no law outside the law, in this case the only source of law is the law.

According to Rahardjo (2009), the law undergoes an adaptation process according to their respective times. This is the basic meaning of progressive law. Law is not a stagnant and status quo system but follows the trail of historical developments under the demands of social change in society. Rahardjo emphasized that progressivism is based on the view of humanity, that humans are good, and have the qualities of compassion and concern for others as substantial capital for building a legal life in society.

Legally, judges don't need to worry about implementing progressive decisions because there is already a very strong legal umbrella, namely Article 5 of Law no. 48 of 2009 concerning Judicial Power. This article states that "judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. The judge's decision is not only based on the legal text but also on the victim's sense of justice or the wider community. The implication of this legal progressivism places judges not only as law enforcers but theoretically, they can be lawmakers. In specific contexts, judges are encouraged to make new laws that function as social engineering tools. If the formation of law by judges is followed constantly by other judges, it can be used as a source of formal law in the national legal system (Suhariyanto, 2015).

To mediate the legal problems, all respondents agreed to revise the *qanun*. Legal changes occur when there is a gap between conditions, relationships, and events in society and existing legal arrangements (Halim, 2015). The legal problems that exist in the *qanun* need to be resolved because

public opinion, including law enforcers, sees that many weaknesses in the qanun are designed to be corrected. The *qanun* revision, in addition to correcting deficiencies, also considers the dynamic development of the law and the aspirations of the people. In fact, there is no eternal criminal law. The law will always change with the times. If a legal system is "considered" no longer compatible with the legal paradigm that develops in society, then the legal system must be changed.

Formally and materially, the law must reflect the aspirations of the people. Legal products that are made arise from hopes, aspirations and are in accordance with the context of the social needs of the community. The implication is that the process of changing the qanun must involve the participation of the Acehnese people at large, not just the political elite. The law basically must be built democratically and nomocratically in the sense that it must invite participation and absorb the aspirations of the wider community through fair, transparent, and accountable procedures and mechanisms.

However, all elements of law enforcement agree that if the victim is a child, the sentence will be further aggravated, and mitigating factors are not considered in the investigation, prosecution, and trial process. This shows that children as victims of a crime also get special protection in accordance with the crime they suffered. In all legal systems there is a social consensus that the best interests of children are identical with those of their parents.

In addition to taking formal legal settlements, respondent lawyers and judges agreed to non-litigation or out-of-court efforts to resolve sexual violence cases. However, respondents assessed that non-legality measures could be taken if the victim was not a child, if the penalty was under 7 years, and not a repetition of a crime. In Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, this effort is known as diversion. Diversion aims to achieve peace between victims and children, resolve children's cases outside the judicial process, prevent children from deprivation of liberty, encourage the community to participate, and instill a sense of responsibility in children.

Non-litigation path is theoretically known as restorative justice. Restorative justice is a form of a new approach model in the settlement of criminal cases This restorative justice approach model has been used in several countries with a focus on its approach to perpetrators, Some of the assumptions that underlie the birth of restorative justice are that crime originates in social conditions and relationships in society; that crime prevention depends on society being responsible for correcting the conditions that cause crime; that the consequences of a crime must include the personal participation of those involved in the crime; and that the act of justice must be flexible enough to respond to specific circumstances, personal needs, and the appropriate course of action in each case (Hardjaloka, 2015; Maglione, 2022; Nazeri & Dhanapal, 2019; Suzuki & Jenkins, 2022).

However, several legal experts have criticized this restorative justice because it is considered too pro-perpetrator and weakens the position of the victim. Restorative justice is a set of ideals about the human soul that is generous, empathetic, supportive, rational (Nazeri & Dhanapal, 2019). It assumes that victims can be generous to those who have hurt them, that perpetrators can apologize and regret their behavior, that the individual mobile community can take an active role in support and assistance, and that a facilitator can guide rational discussion and encourage decision-making. decisions agreed between the parties and the interests of the antagonists. In addition, the use of out-of-court settlements can be a source of abuse of authority by law enforcers, especially if discretion is turned into a "commodity".

In Aceh itself, non-litigation efforts gained legal force with the enactment of Aceh *Qanun* No. 9 of 2008 concerning the Guidance of Indigenous Life and Customs. One of the objects of dispute resolution is sexual harassment (Article 13). Customary settlements are carried out at the village level

and regulated according to local village regulations and involve village leaders and community leaders. The types of sanctions that can be imposed in the settlement of customary disputes are as follows: advice, reprimand, apology, *sayam*, *diyat*, fines, compensation, ostracism by the *gampong*/village community, expulsion from the community, revocation of customary titles, and or other forms of sanctions in accordance with local customs. The families of those who violate the qanun are also responsible for the implementation of the customary sanctions imposed (Article 16). Thus, the non-litigation path can be an alternative problem solving as long as the parties agree.

Conclusion

The legal basis used in the law enforcement process of sexual violence against women in Aceh Utara is Aceh Qanun No. 6 of 2014 concerning *Jinayat* Law. Based on this qanun, the perpetrators of sexual violence in Aceh are criminally charged (*uqubat*) with hudud and ta'zir punishments. Hudud punishment is a punishment whose criminal sanctions have been explicitly regulated in the Al-Quran and Al-hadith. Regarding sexual harassment and rape, all of them were sentenced to prison, while adultery with children was sentenced to 100 (one hundred) lashes and imprisonment. There are three forms of sexual violence regulated in this qanun, namely adultery with children, sexual abuse, and rape.

There are substantial problems with the qanun *jinayat*, such as the phrase "or" in criminal charges which implies that law enforcers are obliged to choose one alternative punishment so that the view arises that this qanun has a lighter sentence than national law. The specificity of Aceh resulted in Aceh being able to implement Islamic law like the criminal law of sexual violence. This makes the qanun *jinayat* to be the only basis for law enforcement for the crime of sexual violence. In fact, the mode and development of the law regarding sexual violence is dynamic. For this reason, this study recommends revising the *jinayat* law by adopting contemporary developments in national law related to sexual violence and providing space for law enforcers in Aceh to use national laws and regulations without reducing Aceh's Islamic characteristics.

Acknowledgment

This article is a report on the results of research funded with PNPB funds from the Universitas Malikussaleh in 2022 through the lector research scheme. The Universitas Malikussaleh Research and Community Service Institute (LPPM) facilitated the research activity. For that, the researchers would like to thank the Rector of Universitas Malikussaleh and his staff, the Dean of the Faculty of Economics and Business and all lecturers and employees who has provided moral and material support for the implementation of this research.

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