

ANALYSIS ON FLAGELLATION IMPOSED AS A SANCTION FROM THE PERSPECTIVE OF CHILD PROTECTION

NURINI APRILIANDA

Faculty of Law, Brawijaya University, East Java, Indonesia
Email: nurini.aprilianda@ub.ac.id

MUFATIKHATUL FARIKHAH

Faculty of Law, Brawijaya University, East Java, Indonesia
Email: mufatikhatul@ub.ac.id

LIZA AGNESTA KRISNA

Faculty of Law Samudra University, Aceh, Indonesia
Email: agnes_krisna@unsam.ac.id

Abstract: Aceh came up with a sharia-based compilation of penal law, Qanun Number 6 of 2014 concerning Islamic Criminal law. Qanun Jinayat (Islamic Criminal Law) governs the provisions regarding a child involved in *jarimah* (crime). Several principles set forth in the regulatory provisions of Qanun Jinayat differ from those in the national judicial system of juvenile crime. This study discusses the imposition of flagellation on children by Qanun Jinayat from the perspective of child protection. The study was conducted based on the socio-legal approach. The research result shows that flagellation imposed on a child contravenes the child protection principles in the national judicial system of juvenile crime. Flagellation is stipulated in Qanun Jinayat based on the consideration that it is the essence of punishment in Islamic law. However, Qanun Number 6 of 2014 concerning Islamic Criminal law should be reviewed according to the principles of child protection in the national judicial system to reach the objectives of legal protection for children, especially those facing legal disputes.

Keywords: Flagellation, Sanction, Child Protection

Abstrak: Aceh menetapkan kompilasi hukum pidana berbasis syariah, yaitu Qanun Nomor 6 Tahun 2014 tentang Hukum Jinayat. Qanun Jinayat mengatur ketentuan mengenai anak yang terlibat dalam jarimah, dimana beberapa asas yang diatur dalam ketentuan pengaturannya berbeda dengan yang ada dalam sistem peradilan nasional pidana anak. Kajian ini membahas tentang perbedaan penanganan terhadap pelanggaran Qanun Jinayat oleh anak yang dikenakan deraan ditinjau dari aspek perlindungan anak. Kajian ini dilakukan berdasarkan pendekatan sosio-legal dan sosio-yuridis. Hasil penelitian menunjukkan bahwa pencambukan yang dilakukan terhadap anak bertentangan dengan prinsip perlindungan anak dalam sistem

peradilan nasional pidana anak. Pencambukan yang diatur dalam Qanun Jinayat didasarkan pada pertimbangan bahwa pencambukan merupakan inti dari hukuman dalam hukum Islam. Qanun Jinayat perlu dievaluasi dengan mengacu pada prinsip perlindungan anak dalam sistem peradilan nasional untuk mencapai tujuan perlindungan hukum pada anak khususnya yang menghadapi sengketa hukum.

Kata Kunci: Pencambukan, Sanksi, Perlindungan Anak

INTRODUCTION

The enforcement of the sharia of Islam in Aceh complies with Law Number 44 of 1999 concerning the Administration of the Special Region of Aceh and Law Number 11 of 2006 concerning the Governing of Aceh¹. These two laws serve as legal fundamentals in the enforcement of the sharia of Islam in Aceh, under the Unitary State of the Republic of Indonesia, which is based on law².

One of the organic laws directly mandated by Law Number 11 of 2006 is Qanun Aceh. Qanun is a set of rules enforced at the local level and formulated by several authorized institutions and individuals, including the House of Representatives of Aceh (hereinafter referred to as DPRA), the House of Representatives of each Regency/Municipality, the Governor of Aceh and the Regent/Mayor of each Regency/Municipality³. Qanun commands authority in Aceh simply because it directly receives a mandate from the law. Based on the law, Qanun explains and implements the materials of Law Number 11 of 2006⁴.

On the 22nd of October 2014, the Governor of Aceh promulgated Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law. Qanun Jinayat (Islamic Criminal Law) outlines the illicit acts prohibited in the sharia of Islam, and the violators are sanctioned according to *uqubat hudud* and/or *ta'zir* (prescribed punishment for crimes)⁵. This Qanun sets forth the principles of Islam, legality, justice, balance, merit, protection of human rights, and lessons for the people. Qanun Jinayat refers to the well-being of all people as elaborated in the Qur'an and the Sunnah, which serve as the fundamentals of Islam to which the people of Aceh have long adhered⁶.

In Qanun Jinayat, all illicit acts are referred to as *jarimah*. However, *uqubat* means consequences or punishments, while *hudud* means crimes whose punishments are fixed in the Qur'an. Therefore, *uqubat hudud* refers to punishment set by Allah SWT in the Qur'an or the Sunnah⁷. Hudud punishment is God's law, which is resistant to

- 1 Zaki Ulya, 'Refleksi Memorandum of Understanding (MoU) Helsinki Dalam Kaitan Makna Otonomi Khusus Di Aceh' [2014] Jurnal Konstitusi.
- 2 Muhammad Siddiq Armia, 'Autonomy in Aceh-Indonesia, from Armed Conflict to Regulation Conflict', *The Annual International Conference (AIC)*, Syiah Kuala University (Syiah Kuala University 2017).
- 3 Fajri M Kasim and Abidin Nurdin, 'Study of Sociological Law on Conflict Resolution through Adat in Aceh Community According to Islamic Law' (2020) 4 Samarah 375.
- 4 Ifdhal Kasim, *Analisis Qanun-Qanun Aceh Berbasis Hak Asasi Manusia* (AA Sudirman ed, Demos: Lembaga Kajian Demokrasi dan Hak Asasi 2011).
- 5 Zaki Ulya, 'Dinamika Penerapan Hukum Jinayat Sebagai Wujud Rekonstruksi Syari'at Islam Di Aceh' (2016) 5 Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional 135.
- 6 Muhammad Natsir, Cakra Arbas and Meta Suriyani, 'Law on Khamr Under Qanun Jinayat in Aceh and Brunei Darussalam: A Comparative Study' (2019) 26 Jurnal Media Hukum 71.
- 7 Marsaid Marsaid, *Al-Fiqh Al-Jinayah (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam* (Jauhari Jauhari ed, Rafah Press 2020).

change or modification. *Ta'zir*, however, means *uqubat* that is set forth in Qanun. *Ta'zir* is optional, with its weight ranging from the highest to the lowest⁸.

The punishment in Qanun Jinayat is structured to have alternatives, consisting of flagellation, jail sentence, or fine. Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law has several provisions associated with *uqubat hudud*: (a) Article 15 concerning *Khamar* (alcohol), (b) Article 33 concerning Adultery, and (c) Article 57 concerning *Qadzaf* (false adultery accusation). However, articles concerning *ta'zir* include Article 18 concerning *Maisir* (gambling), Article 23 concerning *Khalwat* (close proximity with the opposite gender), Article 25 concerning *Ikhtilath* (intermingling of both genders), Article 46 concerning Sexual Harassment, Article 48 concerning Rape, Article 63 concerning *Liwath* (sodomy), and Article 64 concerning *Mushahaqah* (sexual acts between women).⁹

In Qanun Jinayat (Islamic Criminal Law), *uqubat*, or punishment, is not only imposed on adults, commonly referred to as those who have reached the age of *baligh* (maturity), in Islam, but it also applies to children who have not reached the age of *baligh*¹⁰. Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law defines a child, in Article 1 point 40, as a person who has not reached 18 years and is unmarried.

A chapter of Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law specifically governs children. Chapter VI concerning *jarimah* (crime) and *uqubat* (punishment) for children governs the age at which children are subject to punishment and the weight of *uqubat* imposed on children. Obviously, it is necessary to govern this aspect, recalling that criminal offenses or *jarimah* are not only committed by adults but also by children. In terms of offenses, there seems to be no difference between those committed by adults and those by children, but possible differences may lie in the offenders themselves¹¹.

The imposition of flagellation on children is mentioned in the Decision of Court of Appeal Number 01/JN.Anak/2019/MS.Aceh, highlighting the crime of sexual harassment against a child. Two perpetrators, who were categorized as minors (they were 16 and 17 years respectively) were charged to court. The General Prosecutors instituted a case, with prosecution Number PDM-10/LSK/10/anak/2018, dated 12th of November 2018, against the defendants and accused them of "deliberately committing the crime of sexual harassment against a child," which is governed by Article 47 of Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law and Law Number 11 of 2012 concerning Judicial System of Juvenile Crime. In the charge, the

8 Mardani, *Hukum Pidana Islam* (Cet 1, Prenada Media Group 2019).

9 Nyak Fadhlullah, 'Metode Perumusan Qanun Jinayah Aceh : Kajian Terhadap Pasal 33 Tentang Zina' (2017) 7 in *Right* (Jurnal Agama dan Hak Azazi Manusia) 16 <<http://ejournal.uin-suka.ac.id/syariah/inright/article/view/1456/1262>>; Nyak Fadlullah, 'Positivisasi Hukum Islam Dan Persinggungannya Dengan Kelompok Etnonasionalis Di Aceh' (2020) 54 *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* <<http://asy-syirah.uin-suka.com/index.php/AS/article/view/734>>.

10 Nurini Aprilianda, Mufatikhatul Farikhah and Liza Agnesta Krisna, 'Critical Review Selecting a Proper Law to Resolve Sexual Violence Against Children in Indonesia' (2022) 6 *Samarah* 954. See also, Muhammad Siddiq Armia and others, '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' (2022) 17 *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 113.

11 Liza Agnesta Krisna and Kuat Puji Prayitno, 'Dualism of Regulation of Criminal Law in Aceh: Criticizing the Neglected Legal Certainty', *Proceedings of the 1st Workshop on Multidisciplinary and Its Applications Part 1* (EAI 2019) <<https://eudl.eu/doi/10.4108/eai.20-1-2018.2282431>>.

General Prosecutors suggested a 45-month jail sentence for defendant I and a 35-month jail sentence for defendant II, reduced by the temporary detention period served under the order asserting that all the defendants remain in jail¹².

In the first instance, the panel of judges of Syar'iyah Lhoksukon Court gave the judgement, under Decision Number 01/JN.Anak/2018/MS.Lsk., on the 28th of November 2018. The details of the judgement are as follows: (1) Defendant I and Defendant II pleaded guilty to the jarimah of sexual harassment against a child, as stipulated in Article 47 of Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law. (2) Defendant I was sentenced to undergo a correctional program for 15 months, while defendant II was sentenced to undergo a correction program for 10 months, reduced by the period the defendants had spent in detention, while they remained in the correctional department of the government of Aceh.

The General Prosecutors submitted an appeal to the Shar'iyah Court of Aceh. In the decision of the court, the appeal was granted, revoking the decision of the Shar'iyah Court of Lhoksukon Number 01/JN.Anak/2018/MS.Lsk. The details of the judgement are as follows: (1) Defendant I and Defendant II pleaded guilty to the jarimah of sexual harassment against a child, as stipulated in Article 47 of Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law. (2) Defendant I was sentenced to a ta'zir of flagellation for 30 times and Defendant II for 20 times, to be witnessed by the public of the Correctional Department. Also, the defendants were sentenced to a correctional program to be conducted by the state for one year, reduced by the period they had already spent in detention. Furthermore, they would be posted to an Islamic boarding school as appointed by the Local Government of the Regency of North Aceh.

The above case indicates that Qanun Jinayat has set forth principles that are not in accordance with the general criminal system of juvenile crime¹³. This difference triggers a considerable conflict: there is conflicting criminal sentencing with respect to Qanun Jinayat and the national judicial system of juvenile crime. According to Qanun Jinayat, a minor has to bear flogging in the eyes of the public. This punishment is intended to serve as deterrence and is given as an act of retaliation¹⁴. However, in the national judicial system of juvenile crime, the principle to protect the identity of a child dealing with a legal case is set forth to avert any stigma and retaliation that may harm children. This is considered a concept of the restorative justice principle. Restorative justice requires the resolution of a criminal case by involving the offender, victim, families of both of them, and other parties to find just solutions by emphasizing the

12 Irfina Asshughra, Fuadi Fuadi and Muhammad Natsir, 'Urgensi Perubahan Qanun Jinayat Sebagai Pemenuhan Perlindungan Anak Di Aceh' (2022) 4 Meukuta Alam: Jurnal Ilmiah Mahasiswa 86. See also, Faradilla Fadlia and Ismar Ramadani, 'The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia' (2018) 2 Journal of Southeast Asian Human Rights 448.

13 Ira Nurliza, 'Hukuman Mati Terhadap Pengedar Narkotika Tinjauan Maqasid Al-Syari'ah' (Universitas Islam Negeri Ar-Raniry 2019).

14 Muhammad Siddiq Armia, 'Public Caning: Should It Be Maintained or Eliminated? (A Reflection of Implementation of Sharia Law in Indonesia)' (2019) 7 QIJIS: Qudus International Journal of Islamic Studies 301. See also, Muhammad Siddiq Armia and Muhammad Syauqi Bin-Armia, 'Introduction: Form Over Substance, Achieving Objectives While Preserving Values' (2023) 8 Petita : Jurnal Kajian Ilmu Hukum dan Syariah i; Muhammad Siddiq Armia and Muhammad Syauqi Bin-Armia, 'Introduction: Maintaining the Constitutional Rights to Create a Better Society' (2023) 8 Petita : Jurnal Kajian Ilmu Hukum dan Syariah 69.

recovery principle, which brings things back to what they were before, not retaliation¹⁵.

Law Number 11 of 2012 concerning Juvenile Justice System (hereinafter referred to as UU SPPA) indicates that Indonesia has taken serious measures to give protection to children, especially those dealing with legal cases. The most fundamental principle is that the approach to juvenile judicial system, which was retributive in Law Number 3 of 1997, has shifted to a restorative approach. Therefore, it is imperative to conduct an in-depth study on the handling of children who violate Qanun Jinayat from the perspective of the national judicial system of juvenile crime¹⁶. It is also essential to find out the philosophical basis of the regulation on flagellation imposed on children by Qanun Jinayat and how the regulations regarding children in Qanun Jinayat differ from those stipulated in UU SPPA. It is necessary to achieve harmony and mutual support regarding the juvenile systems of national law and the law of Aceh. Both should complement each other.

Methods

This paper is based on the results of normative legal research, using primary legal materials (laws related to the issues studied) as the main legal material. However, secondary legal materials were sourced from law journals, doctrines and expert opinions related to the subject matter that will be discussed and studied in this paper. Further, this paper also employs non-legal materials, in the form of interviews with relevant stakeholders. Such legal materials are analyzed prescriptively.

Results

The Interpretation of “Child” and the Age Limit of a Child as a Criminal Offender in the National Judicial System of Juvenile Crime and Qanun Jinayat

Children are vital since they represent the future of the state in time to come. The laws concerning criminal offenses committed by children in Indonesia are not yet unified but are codified into several different laws and regulations¹⁷. From the perspective of legal science, children are defined based on certain age limits. However, due to varied provisions among the domains of knowledge and societies, there is no consensus on the age limit of a person who is to be categorized as a child.

(1) From the sociological aspect

Indonesian people have a strong adherence to adat (customary) law regardless of the differences between their childhood and adulthood. However, these differences are not only based on age but also on social facts in day-to-day social interaction. Ter Haar suggests that people, either boys or girls, reach their adulthood when they are married, are separated from their parents, and decide to live independently¹⁸. Furthermore, Soepomo asserts that in West Java, immature children are those who have not reached a certain age, who have not reached the age of baligh, who are not

15 Nurini Aprilianda and Liza Agnesta Krisna, 'Reconstruction of Types of Sentencing in the Juvenile Justice System in Indonesia (Discussion Against the Criminal Position of Warning)' (2023) 5 Jambura Law Review 1.

16 Jacob Hattu, 'Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan Anak' (2014) 20 Jurnal Sasi 47.

17 Andi Rachmad, Yusi Amdani and Zaki Ulya, 'Kontradiksi Pengaturan Hukuman Pelaku Pelecehan Seksual Terhadap Anak Di Aceh' (2021) 10 Jurnal Hukum dan Peradilan 315.

18 Sarwirini Sarwirini, 'Kenakalan Anak (Juvenile Delinquency): Kausalitas Dan Upaya Penanggulangannya' (2011) 16 Perspektif 244.

strong enough, still young, and incapable of taking care of themselves¹⁹. In this perspective, the scope of adulthood, as most people of West Java believe, should fit the following criteria:

- (a) Working independently.
- (b) Being capable of performing tasks required in society and being responsible.
- (c) Being capable of taking care of one's own assets.

Similarly, in Islamic Law, whether a person is considered mature or immature depends on whether he/she is baligh (has reached the age of maturity) or not. If a person is baligh (mature), he/she is characterized by physical changes. A man is deemed baligh if he has experienced wet dreams, while a woman is considered baligh if she has shown signs of menstruation²⁰.

(2) From the psychological aspect

Regardless of age limit, whether a person is mature or not can be seen from his/her psychological development. Zakiah Daradjat in Muzakkir's writings explains that human development is divided into several phases²¹:

- a. Infancy, up to two years old
- b. Toddler, from 2 to 5 years old
- c. Childhood, from 5 to 12 years old
- d. Teenage, from 13 to 20 years old
- e. Early adulthood, from 21 to 25 years old

(3) From the legal aspect

The Convention on the Rights of the Child states as follows: "For the purposes of the convention, a child means every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier"²².

The child as intended in Article 1 of Law Number 23 of 2002 concerning Child Protection is defined as follows: "a child is a person who has not reached the age of 18 years, including the unborn". According to Article 1 of the Convention on the Rights of the Child, a child is a person under 18 years old and is unmarried, including the unborn in terms of the consideration of the baby's interest²³. Article 1 (5) of Law 39 of 1999 concerning Human Rights defines a child as a person under 18 years old unless, according to the law applicable to the child, maturity is reached earlier²⁴.

Article 45 of the Criminal Code stipulates that "in terms of the delivery of criminal justice on a minor due to a criminal offense committed before he/she reaches 16...", while Law Number 11 of 2012 concerning Judicial System of Juvenile Crime (UU SPPA)

19 Halimah Nurmawanti, 'Sanksi Pidana Bagi Anak Yang Melakukan Tindak Pidana Pencurian: Analisis Putusan Nomor 14/PID.SUS.ANAK/2015/PN.BKS.' (UIN SYARIF HIDAYATULLAH JAKARTA 2019).

20 Tri Anjaswarni and others, *Deteksi Dini Potensi Kenakalan Remaja (Juvenile Delinquency) Dan Solusi* (Zifatama Jawara 2020).

21 Muzakkir Muzakkir, 'Generasi Muda Dan Tantangan Adab Modern Serta Tanggung Jawab Pembinaannya' (2015) 8 Al Ta'dib 111.

22 Konvensi Hak-Hak Anak 1989 1.

23 Michael Anthony Wirasmita, Putu Tuni Cakabawa Landra and I gede Pasek Eka Wisanjaya, 'Perlindungan Hukum Terhadap Hak Anak Yang Menjadi Tenaga Kerja Migran Indonesia Di Negara Lain' (2015) 3 Kertha Negara 1.

24 Tegar Sukma Wahyudi and Toto Kushartono, 'Perlindungan Hukum Terhadap Hak Anak Yang Menjadi Korban Perlakuan Tindak Kekerasan Dalam Rumah Tangga Dihubungkan Dengan Undang-Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak' (2020) 2 Jurnal Dialektika Hukum 57.

asserts that a child is the person involved in a legal dispute and has reached 12 or more years but is still under 18 years old when he/she is alleged to commit a crime.

Qanun Number 6 of 2014 concerning Islamic Criminal Law²⁵, however, has two articles regarding children involved in jarimah:

Article 66: if a child under 18 years old is alleged to commit jarimah, he/she is subject to investigations that are pertinent to the legislation concerning the judicial system of juvenile crime.

Article 67 (1): if a child has reached his/her 12th year but not his/her 18th year or is unmarried when he/she commits jarimah, the child is then subject to 1/3 (one third) of the uqubat for adults and/or he/she is to be returned to his/her parents or to be placed in a location prepared by the Government of Aceh or the Government of the Regency/Municipality.

Philosophical Basis of the Regulations concerning Flagellation imposed on Children in Qanun Jinayat

The sharia of Islam in Aceh has a strong legal basis due to the enactment of Law Number 44 of 1999 concerning the Administration of the Special Region of Aceh²⁶. Other related laws include Law Number 18 of 2001 concerning Special Autonomy for the Special Region of Aceh as Nanggroe Aceh Darussalam Province and Law Number 11 of 2006 concerning the Governing of Aceh. These laws provide a strong foundation for the implementation of the sharia of Islam²⁷.

The concept of sharia, according to Law Number 44 of 1999 concerning the Administration of the Special Region of Aceh, "is required in Islamic teachings in all aspects of life"²⁸. Local Government Regulation Number 5 of 2000 concerning the Implementation of Sharia of Islam implies that sharia involves aqidah (creed in Islamic theology), religious activities, mu'amalah (part of Islamic jurisprudence), morality, education, and Islamic preaching/amar makruf nahi mungkar. Sharia also involves baitul mal (public treasury), social life, syiar Islam (religious celebrations), the defense of Islam, qadha (fulfilling duties), jinayat (Islamic criminal law), munakahat (marriage), and inheritance²⁹. Since Local Regulation Number 5 of 2000 was passed, the implementation of sharia in Aceh has been extended to cover the criminal law aspect. The presence of this criminal law aspect is new in the application of Islamic law in Aceh³⁰.

The local regulation received the authority to prescribe criminal sanction or uqubat from Law Number 11 of 2006 concerning the Governing of Aceh, which gives Aceh the authority to run its own specialty of Sharia, including jinayat (Islamic criminal law)³¹.

25 Yusi Amdani, 'Konsep Restorative Justice Dalam Penyelesaian Perkara Tindak Pidana Pencurian Oleh Anak Berbasis Hukum Islam Dan Adat Aceh' (2016) 13 Al-'Adalah 61.

26 Asshughra, Fuadi and Natsir (n 12).

27 Muhammad Natsir and others, 'Inconsistency Of Legal Norms For The Criminal Action Of Zakat As A Source Of Regional Original Income In Aceh' (2023) XI Russian Law Journal 445.

28 Ulya (n 1).

29 Misran Misran, 'Pelaksanaan Syari'at Islam Di Aceh (Analisis Kajian Sosiologi Hukum)' (2012) 1 Legitimasi: Jurnal Hukum Pidana dan Politik Hukum 1.

30 Alyasa Abubakar, *Pelaksanaan Syariat Islam Di Aceh Sebagai Otonomi Khusus Yang Asimetris (Sejarah Dan Perjuangan)* (EMK Alidar ed, Dinas Syariat Islam Aceh 2020).

31 Natsir and others (n 27).

Another law regarding the regulation of illicit acts according to sharia is Qanun Aceh Number 6 of 2014 concerning Islamic Criminal Law. The application of Qanun Jinayat also affects the administration of criminal law for children in Aceh since Qanun Jinayat governs uqubat imposed on children. The aspects of implementing uqubat on children that are not stipulated in the legislation concerning juvenile justice system are regulated by Governor Regulation Number 5 of 2018 concerning the Application of Jinayat Procedural Law³². The procedural law applied in the case handling of a child accused of jinayah refers to the law concerning juvenile judicial system, while the substantive law used refers to Qanun Jinayat. This situation represents the tangled state of laws with different principles³³.

The philosophy behind the regulation of flagellation imposed on children in Qanun Jinayat could be traced to the general explanation and academic drafts of Qanun Jinayat. In the general provisions, Article 66 and Article 67 did not give a comprehensive explanation. According to the study of academic drafts by Al Yasa' Abu Bakar, conducted on the 6th of November 2018, there are no philosophical bases regarding flagellation as a sanction imposed on young violators of Qanun Jinayat³⁴. Flagellation is a form of punishment in Islamic law associated with two words: uqubat and whip. The word "whip", in terms of etymology, refers to flagellation, to beat with a whip. The whip can also be understood as a tool made of fibre material or wood skin fibre; the fibre materials are twisted into a rope with the aim of directing someone to become a better person. To flog or to whip means to beat with a whip repeatedly. "Whip" means "jald" in Arabic, derived from the word jalada, meaning beating skin or beating with a whip made of leather.

The legal basis of the application of the uqubat of flagellation is important in the application of sharia in Aceh. The uqubat of flagellation is imposed on fornication by the Quran (An-Nur:2) and on qadzaf (false adultery accusation). Also, several hadiths give similar punishment for khamar (alcohol consumption).

The Quran prescribes the following punishment for fornication: Repeatedly whip a man and a woman who fornicate a hundred times, and do not let compassion for either of them stop you from performing the mandate from Allah, and if you fear Allah and the judgement day, the punishment should be witnessed by others who believe in Allah."

Therefore, flagellation is the soul of the sanction in Qanun Jinayat, and children are not exempted from serving the punishment prescribed by Qanun Jinayat. However, the flagellation imposed on children is less in terms of number of lashes compared to adults. This reduced number of lashes is appropriate given the weak physical condition of a child.

Analysis of Flagellation on Children from the Perspective of Child Protection

The juvenile justice system constitutes the whole process of the case handling, ranging from investigation to counseling after punishment. To enforce the law for children as

32 Hudzaifah Achmad Qotadah and Adang Darmawan Achmad, 'Qanun Jinayat Aceh Antara Implementasi, Isu Dan Tantangan' (2020) 14 Adliya: Jurnal Hukum dan Kemanusiaan 171.

33 Mohd Din and Al Yasa Abubakar, 'The Position of the Qanun Jinayat as a Forum for the Implementation of Sharia in Aceh in the Indonesian Constitution' (2021) 5 Samarah: Jurnal Hukum Keluarga dan Hukum Islam 689.

34 Zuraimy Ali and others, 'Domestic Violence In Malaysia : A Study On Causes And The Role Of The Social Welfare Department' (2023) XI Russian Law Journal 1060.

young criminal offenders, a legal consequence must be set, since sentencing is related to the objective of law enforcement³⁵.

Thus, it is essential to understand the objective of sentencing to find out why the law needs to be enforced. Sentencing not only has a punitive action but is also intended to put children back on track by preventing them from performing immoral acts. There are two regulations in Aceh regarding the handling of children involved in criminal offenses, namely Qanun jinayat and UU SPPA. However, these two legal norms are different in the following ways:

1. The definition of a child

There are differences in the definition of a child between UU SPPA and Qanun Jinayat. First, Qanun Jinayat defines a child as a person who has not reached 18 year unless he/she is married regardless of his/her age. Therefore, if an individual gets married before 18 years, they can no longer be defined as a child. That is, the status of a child changes after marriage. However, UU SPPA, normatively, defines a child as a person who has not reached 18 years regardless of his/her status as a criminal, victim, witness, or a married person. This is in line with what is set forth in the law on child protection (Law Number 23 of 2002 concerning Child Protection), which is the latest rule on the issue

Second, Qanun Jinayat does not clearly set an age limit for a child to be subject to rehabilitation and sentencing. Unlike Qanun Jinayat, UU SPPA clearly sets the scope within which children are subject to specified rehabilitation and criminal sentencing. Although Article 66 of Qanun Number 6 of 2014 concerning Islamic Criminal law states that investigation of the crime committed by a child complies with UU SPPA, without any clear regulations in terms of the norms of law, there would be inconsistency regarding the type of rehabilitation given by law enforcers.

2. Sentencing

Article 71 of UU SPPA implies that a criminal can be subject to two types of sanctions: rehabilitation and sentencing

(1) Primary sentencing imposed on children involve the following:

- a. Warning.
- b. Conditional rehabilitation:
 - 1) Training outside the correctional department,
 - 2) Community service, or
 - 3) Supervision
- c. Job training.
- d. Training in a correctional department.
- e. Imprisonment.

(2) Additional sentencing:

- a. Seizure of benefits obtained from criminal offenses, or

35 Li Duan and others, 'An Investigation of Mental Health Status of Children and Adolescents in China during the Outbreak of COVID-19' (2020) 275 *Journal of Affective Disorders* 112. See also, Mary V. Greiner and others, 'Child Welfare Experiences with Automated Medical Data Sharing for Children in Protective Custody' (2022) 136 *Children and Youth Services Review* 106453; Samantha Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment' (2021) 41 *Oxford Journal of Legal Studies* 1066 <<https://doi.org/10.1093/ojls/gqab014>>; Kelly Chong Yan Chan and Edward Lui, 'Citizenship, Charges And Common Law Constitutional Rights' (2022) 81 *The Cambridge Law Journal* 225 <<https://www.cambridge.org/core/product/6A959F14C59A5F380ECB95AAC5C7B832>>.

- b. Fulfillment of customary responsibilities.
- (3) If a child is sentenced to imprisonment and fines in substantive law, fines are replaced by job training.
- (4) Sentencing imposed on a child must not violate the dignity and the rights of the child.
- (5) Further provisions regarding the forms and the procedures of sentencing as intended in paragraph (1), paragraph (2), and paragraph (3) are governed in Government Regulation

Qanun Jinayat highlights two types of uqubat: hudud and ta'zir, where the former refers to flagellation and the latter to flagellation, imprisonment, or fines alternatively imposed on the perpetrator. Additionally, ta'zir also comes in the form of restitution, correctional program by the state and compensation given to the parents. In Article 38 of Governor Regulation Number 5 of 2018 concerning Application of Jinayat Procedural Law, the forms of sentencing for children are given as follow:

Article 38 stipulates sentencing for 12 to 18-year-old children:

- a. Flagellation,
- c. Imprisonment,
- d. Jail sentence,
- e. Fines,
- f. Correctional program by the State, and/or
- g. Returning the child to his/her parents.

3. Flagellation imposed as a sanction on children

A young violator of Qanun Jinayat is subject to flagellation. Sentencing an individual to this uqubat is intended to achieve the main objective of Islamic law: to protect five main principles, including religion, mind, dignity, property, and descendants. More generally, the objective of Islamic law is to maintain the well-being of all people and to avert any damage. Specifically, religious leaders state that the objective of sentencing in Islamic law is to deter and reform³⁶.

The uqubat of flagellation means that the body of a criminal will be flogged with a whip made of rotan, which is 0.75 to 1 cm in diameter and 1 meter in length. The whip has double tips running long to the other end as the handle.

The imposition of flagellation on children is explained in detail in Governor Regulation Number 5 of 2018 concerning the Application of Jinayat Procedural Law. Article 37 of Chapter IX concerning Procedures of the Imposition of Flagellation on Children states as follows:

- (1) At the inquiry stage, restorative justice should be suggested in the prosecution and investigation of cases through the use of diversion with regard to the child that committed jarimah.
- (2) The judges handling the case of the child must be those specially assigned to handle juvenile cases with specific qualifications in the domain according to legislation.
- (3) The diversion as intended in Article (1) is given to children aged 12 to 18.
- (4) Diversion cannot be given to:
 - a. A child repeating jarimah

³⁶ Marsaid (n 7).

- b. A child subjected to more than 84-time flagellation or 840 gram of gold fines or more than 84-month imprisonment.
- (5) Further regulations concerning the procedures of diversion as intended in Paragraph (1) are implemented according to legislation

Furthermore, Article 39 explains:

- (1) Flagellation, as intended in Article 38, is executed by a prosecutor
- (2) Flagellation must be executed confidentially and must not be broadcast on media
- (3) Flagellation for children must be executed following a written recommendation issued by a GP or a psychologist
- (4) Flagellation for children must be executed with the presence of parents/guardians or a child psychologist.

Flagellation is meant to achieve physical torture either in adults or young criminals. From the perspective of child protection, flagellation given as a sanction is not in accordance with the concept of child protection, as governed by legislation. The government, responding to all kinds of regulatory provisions regarding child protection, do not wish to let children bear such physical torture, which can harm their psychology and lead to traumatic conditions that threaten their life and future. Flagellation is a physical punishment executed in the public or in a correctional centre, which may lead to prolonged trauma for children.

This is contrary to the provisions of Article 3 Paragraph (1) of the Convention on the Rights of the Child, requiring that all actions taken by the government must be for the child's best interest. This provision implies that all interventions by social welfare organizations, including government and private institutions, courts, government agencies, and legislative bodies must consider the best interest of the child³⁷.

The concept of the child's best interest has been given the spotlight in UU SPPA, especially in Article 2, asserting that the judicial system of juvenile crime must be carried out by taking into account protection, justice, non-discrimination, child's best interest; respect to the views of the child; the growth and the survival of the child; the training and counseling of the child; proportionality; seizure of freedom and sentencing as the last decision; and prevention of retaliation.

UU SPPA, which replaced Law Number 3 of 1997 concerning Juvenile Judicial System follows a two-way system. Article 71 governs not only criminal sanctions but also rehabilitation. From the perspective of sentencing, criminal sanctions emphasize retaliation, since sentencing is intended to protect law and order as well as to prevent others from committing crimes³⁸. On the contrary, rehabilitation is intended to educate and does not emphasize retaliation. This approach aims to help the offender recover and reduce the will of the offender to repeat the crime.

37 Arrista Trimaya, 'Pengaturan Perlindungan Khusus Bagi Anak Korban Kekerasan Dalam Undang-Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak (Arrangements for Child Protection As Victim of Violence in Law Number 35' (2015) 12 Jurnal Legislasi Indonesia 1.

38 Mompang L Pangabea, *Pokok-Pokok Hukum Penitensier Di Indonesia* (UKI Press 2005). See also, Muhammad Siddiq et al Armia, 'Post Amendment of Judicial Review in Indonesia: Has Judicial Power Distributed Fairly?' (2022) 7 JILS 525; Muhammad Siddiq Armia, 'Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience' [2018] Intellectual Discourse.

Therefore, there is a need to review the concept of imposing flagellation on children in a way that aligns with UU SPPA, especially related to two principles of the Law: a. protection and b. prevention of retaliation. Protection involves direct and indirect acts that are intended to protect children from acts that physically/psychologically harm them, while prevention is intended to prevent retaliation from being imposed on children in the judicial process³⁹. Child protection aims to ensure that children live their lives according to their rights, with dignity and protection from violence and discrimination. This would promote the welfare of the state and improve the quality and moral state of Indonesia.

Conclusion

In terms of execution, there are no differences between the sentencing imposed on children and adults, but offenders have different motives for committing a crime. Therefore, the handling of children in criminal cases should be different from the handling of adults. Flagellation imposed on children contravenes the sentencing principles set forth in the national judicial system of juvenile crime. However, the *uqubat* of flagellation is the soul of sharia in Aceh. Thus, there is no rule exempting children from the punishment governed by Qanun Jinayat. Nonetheless, the concept of flagellation against children contrasts with the principles of UU SPPA, which serves as legal protection at the national level. UU SPPA stipulates two important principles in this regard: a. protection and b. prevention of retaliation. Therefore, flagellation in this context needs to be reviewed in accordance with UU SPPA. Aceh and Indonesia should be treated as one entity, not two entities. In other words, if Aceh implements a principle that bears a new norm, this norm should be subject to the principles of national law, thereby ensuring justice for all children.

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39 Junaidi Junaidi, 'Perlindungan Hukum Terhadap Hak Anak Di Indonesia' (2021) 8 *Journal of Law, Society, and Islamic Civilization* 1; A Hami Sarong, 'The Child Rights in Islamic Law with a Special Focus on Aceh' (2019) 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 31; Al Khanif, 'Women, Islam, and Modern Family Construction in the Perspectives of Legal Pluralism in Indonesia' (2019) Vol.4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*; Novi Endira, 'Tinjauan Hukum Islam Tentang Kekerasan Non Fisik Terhadap Anak Dalam Keluarga: Studi Kasus Di Gampong Pisang Kecamatan Labuhan Haji Kabupaten Aceh Selatan' (2016) Volume 1 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 154; Rosita, 'Quo Vadis Pekerja Anak Pada Perkebunan Tembakau Di Kabupaten Jember' (2017) 2 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*; Mohd Hisham Mohd Kamal, 'Human Rights Perspectives on Issues in the Implementation of Islamic Criminal Law in Malaysia' (2019) 4 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah* 67.

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