

THE POSITION OF QANUN 6 OF 2014 ON JINAYAT LAW TOWARD ACT 11 OF 2012 ON JUVENILE CRIMINAL JUSTICE SYSTEM RELATED TO CHILD CRIMINAL PUNISHMENT

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Abstract

This paper aims to describe the differences and the position of the legal rules for juvenile crimes between Qanun 6 of 2014 and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. This research is descriptive qualitative research. The results show that Qanun Number 6 of 2014 also regulates criminal sanctions for children, which are normatively regulated in Law Number 11 of 2012. In addition, Qanun, as Aceh Islamic criminal law legalizes canning punishment for children, as well as the double-track system adopted by The Law of Juvenile Criminal Justice System is not explicitly accommodated in Qanun. Qanun at the level of a Regional Regulation is part of the hierarchy of laws and regulations that should be in line with what generally applies at the national level. Law Number 11 of 2006 is being the basis of the authority to make Qanun, as long as there is no court decision invalidates it, Qanun Number 6 of 2014, which is a derivative of Law Number 11 of 2006, can be declared as "*lex specialis*" of The Juvenile Criminal Justice System law which regulates child crime. However, it does not rule out the possibility that in the future, the judicial review of the article can be conducted.

Abstrak

Tulisan ini bertujuan untuk mengetahui perbedaan sekaligus kedudukan aturan hukum tindak pidana anak pada Qanun 6 Tahun 2014 terhadap Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak. Penelitian ini merupakan penelitian kualitatif deskriptif. Hasil penelitian

menunjukkan bahwa Qanun Nomor 6 Tahun 2014 turut mengatur tentang sanksi pidana anak, yang secara normatif telah diatur dalam Undang-Undang Nomor 11 Tahun 2012. Selain itu, Qanun sebagai aturan pidana Aceh melegalkan hukuman cambuk bagi anak, serta sistem dua jalur yang dianut dalam UU SPPA tidak diakomodir secara tegas dalam Qanun. Qanun yang setingkat Perda merupakan bagian dari hirarki peraturan perundang-undangan yang seharusnya sejalan dengan apa yang berlaku secara umum di tataran nasional. Adanya Undang-Undang Nomor 11 Tahun 2006 merupakan dasar dari wewenang pembuatan Qanun, maka selama belum ada putusan yang membatalkannya, Qanun Nomor 6 Tahun 2014 yang merupakan turunan dari Undang-Undang Nomor 11 tahun 2006 dapat dinyatakan sebagai "lex specialis" dari Undang-Undang SPPA yang mengatur pidana anak. Meskipun demikian, tidak tertutup kemungkinan di kemudian hari aturan tersebut dapat dilakukan judicial review.

Keywords: child criminal law, juvenile court, qanun Aceh, the hierarchy of laws.

Introduction

Articles 45, 46, and 47 of the Criminal Code regulated juvenile crimes until these articles were declared null and void by the issuance of Law Number 3 of 1997 on The Juvenile Court as amended on Law Number 11 of 2012 on Juvenile Criminal Justice System. Juvenile Criminal Justice System Act of 2012 prefers diversion programs as a form of restorative justice to proceed young offenders committing a crime.

The law was intended to protect children's rights, which is part of human rights as guaranteed in the 1945 Constitution.¹

Furthermore, the United Nations Convention on the Rights of the Child was ratified on 20 November 1989. Article 16 paragraph (2) of the Convention states: "*The child has the right to the protection of the law against such interference or attacks.*"² Furthermore, Article 37 letter (a) of the

¹ Article 28 B paragraph (2) of the 1945 Constitution states: "*Every child has the right of life sustainability, growth and development and has the right to be protected from violence and discrimination*

² United Nations Convention on the Rights of the Child, Article 16, paragraph (2), <https://www.unicef.org/child-rights-convention/convention-text#:~:text=Article%2016&text=No%20child%20shall%20be%20subjected,against%20such%20interference%20or%20attacks.>, accessed 15 November 2019

Convention state that no child may be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below eighteen years of age.³

The implementation of Islamic law in Aceh is a special thing in the modern legal system. This is inseparable from the fact that the autonomy of a province in the state has allowed implementing a legal sub-system separately. Islamic law in Aceh has been living values (existing values) in Acehnese society for centuries. The legal system in Indonesia through the 1945 Constitution has also explicitly stated religious freedom, which can be interpreted as freedom to practice religious teachings for its adherents.⁴

With the enactment of Act Number 11 of 2006 on the Government of Aceh, Aceh's authority in carrying out its privileges in the field of sharia, including *jinayat* (Islamic crime law), has its legal basis. It can be seen in Article 125 of the Act that the application of *sharia* consists of the substance of Islamic teachings (*aqidah*, *sharia*, and morals).⁵ This is the legal basis for the formulation of Islamic laws and regulations in Aceh, commonly called Qanun Jinayat. The pros and cons of Qanun enacted in 2014 are already in existence. Nevertheless, Qanun Jinayat of Aceh remains a legal product that is valid and approved in the Republic of Indonesia.

As a statutory regulation in Indonesia which also contains some special provisions relating to *fiqh* adapted to the needs of the Acehnese people, of course, different rules or conflicts of the principles with higher regulations are found. One of them is related to child criminal policy in Qanun Number 6 of 2014 on Jinayah Law, especially the implementation of canning as the punishment for the juvenile and the double-track system adopted by The Law of Juvenile Criminal Justice System is not explicitly accommodated in Qanun.

³ United Nations Convention on the Rights of the Child, article 37, letter (a)

⁴ Ridwan Nurdin, *Kedudukan Qanun Jinayat Aceh Dalam Sistem Hukum Pidana Nasional Indonesia*, *Jurnal Miqat*, Vol.XLII, No. 2 Juli–Desember 2018, p.357, <http://jurnalmiqotojs.uinsu.ac.id/index.php/jurnalmiqot/article/view/542>, accessed, 21 November 2019

⁵ Act Number 11 of 2006 on the Government of Aceh, Article 125

Although etymologically interpreted as a law, in practice, Qanun is only a kind of Local Regulation governing the administration of government and Acehnese society's life. This is stated in Act Number 12 of 2011 on the Establishment of Laws and Regulations, including the Law on the Governing of Aceh itself. The question that arises is how the implementation of the Qanun if the norms set forth are contrary to the higher laws.

Problem Formulation

Based on the explanation above, the writer tries to formulate the problems examined in this paper as follows: 1. What aspect caused the discordance between Qanun Number 6 of 2014 on Jinayat Law towards Act Number 11 of 2012 on Juvenile Criminal Justice System, especially related to the juvenile criminal sentence? 2. What is the hierarchical position of Qanun Number 6 of 2014 on Jinayat Law towards Act Number 11 of 2012 on Juvenile Criminal Justice System related to the juvenile criminal sentence?

Research Method

The research method used is a descriptive qualitative research method by trying to give a picture of the current problem based on the facts that appear. According to Soenaryo, analytical descriptive research describes existing problems (actual) by collecting data, compiling, classifying, analyzing, and interpreting it.⁶ Furthermore, the research method is used by the formulation of the problem that is the focus of this study.

Next, the description results will be discussed and analyzed with the perspectives of theories and opinions of experts. The aim is to affirm a conclusion that can describe and answer the issues raised in this study.

Discussion

Juvenile Criminal Punishment, Between Legal Protection and Enforcement of Qanun

⁶ Soenaryo, *Metodologi Riset I*, (Surakarta: UNS Press, 1985), p.8

The characteristic of criminal law that distinguishes it from other laws is the existence of a sentence in the form of criminal sanctions. According to Darwan Prints, a crime is "*a punishment sentenced to someone who is legally proven and convicted of committing a crime.*"⁷ The term "punishment" is general and conventional, and it has a broad and changeable meaning. The term is not only used in the field of law but also in everyday terms in the fields of education, morals, religion, and others, while the term "criminal" is a more specific term, which indicates sentence in the field of criminal law.⁸ Soejono also emphasized that "punishment is a sanction for violation of a legal provision, whereas criminality more likely to clarify on the sanctions imposed on criminal law offense."⁹

According to Simon, a criminal sentence or *straf* is suffering which by criminal law has been associated with violation of a norm, which by a judge's verdict has been handed down for someone who is guilty.¹⁰ Van Hamel defines criminality as a special affliction, which has been imposed by the competent authority to impose a sentence on behalf of the state as responsible for the general legal involvement for a criminal offender that is solely because the person has violated a rule of law that must be enforced by the state.¹¹

The meaning of a criminal sentence cannot be separated from the provisions of the criminal law itself because it becomes the main force of the criminal law. Criminal law, according to Moeljatno, is a part of all applicable laws in the country, which held the basics and rules: 1. determine which actions should not be taken, which are rejected, accompanied by threats or sanctions in the form of certain penalties for anyone who violates the prohibition 2. determine when and in what cases those who have violated the prohibitions can be imposed or convicted as threatened; 3. determine in what way the imposition of criminal acts can be carried out if there are suspected people violated

⁷ Darwan Prints, *Hukum Anak Indonesia*, (Bandung: Citra Aditya Bakti, 2003), p. 23.

⁸ Muladi & Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, (Bandung: Alumi, 2010), p.2.

⁹ Soejono, *Kejahatan dan Penegakan Hukum di Indonesia*, (Jakarta: Rineka Cipta, 1996), p. 35.

¹⁰ P.A.F. Lamintang, *Hukum Penitensier Indonesia*, (Bandung, Armico, 1984), p.35.

¹¹ P.A.F. Lamintang, *Hukum Penitensier...*, p. 34.

the prohibition.¹² Sanctions in criminal law are divided into two namely: sentence and treatment. Sentence is actually reactive to an act, whereas treatment is more anticipatory action against the perpetrators. The focus of the criminal sentence is aimed at the wrongdoing that someone has done through the imposition of suffering so that the person concerned becomes deterrent. The focus of treatment is more focused on efforts to help perpetrators to change.¹³

Determination of types of crimes and actions for children in conflict with the law (young offenders) cannot be separated from the goals and guidelines for punishment. In general, the imposition of criminal sanctions against lawbreakers is often seen as the goal of criminal law. Therefore, if the offender has been convicted, the violation of the law is considered to have ended. There are two things that become the rationale for organizing criminal justice processes for children, namely: 1. that a child who commits a crime is not seen as a criminal but must be seen as someone who needs help. 2. juridical approach to children should prioritize persuasive-educative and approaches (psychiatric/psychology) that is, as far as possible avoid legal processes that are merely punitive, causing mental degradation, discouragement and avoid the process of stigmatization that can inhibit the natural process of maturity development and independence.¹⁴

Barda Nawawi Arif as quoted by Waluyadi states that: "*There is an urgent problem that must be solved when talking about procedures applied to children who commit a crime with the necessity of implementing procedures that lead to the good of the child. Such a problem must be answered, it is because according to the law the person who commits a crime must be punished. Meanwhile, when talking about something that is best for children, the keyword is by not punishing him*".¹⁵

One of the general principles in the Convention on the Rights of the Child is the best action for children (best interest of the child). Article 3 paragraph (1) states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".¹⁶

¹² Moeljatno, *Asas-asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1993), p. 1.

¹³ Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana, Ide Dasar Double Track System Dan Implementasinya*, (Jakarta: Raja Grafindo Persada, 2002), p. 32.

¹⁴ Barda Nawawi Arif in Waluyadi, *Hukum Perlindungan ...*, p. 46.

¹⁵ Barda Nawawi Arif in Waluyadi, *Hukum Perlindungan ...*, p. 47

¹⁶ Convention on the Rights of the Child, Article 5, paragraph (1)

Theoretically, there have been many opinions expressed by scholars about the purpose of punishment. From several existing theories, there are two views of the philosophy of criminalization, namely the philosophy based on retributive and other on restorative justice. In the case of child punishment, attention is directed on the premise that the implementation of juvenile justice is aimed at realizing child welfare by prioritizing the best interest of children as an integral part of social welfare.¹⁷

The very basic thing in the discussion of punishment is the philosophical foundation of punishment. In this philosophy, justice in criminal law is given a measure that is reflected in the type of sentence system. With the legislation of Juvenile Criminal Justice System of 2012 Act, child crime has been regulated based on a philosophical restorative sentence, namely the settlement of children in conflict with the law cases by emphasizing restoration back to its original state and not retaliation. As a consequence, the regulations which also regulate child crime must not contradict these values.

On the other hand, daily life and behavior patterns of Acehese people can be said to reflect Islamic law, which means that it is in accordance with Islamic law. In a long history, the Acehese people have placed Islamic law as a guide to their lives in all its advantages and disadvantages form. The appreciation of Islamic law then raises Acehese culture which was reflected in their traditional life. This custom continues to grow and live in the life of Acehese people which then accumulates in the forms of *badih-badih maja* (wise words) such as: “*Adat bak Potemeureuhoem, hukoe bak Syiah Kuala, qanun bak Putroe Phang, reusam bak Laksamana.*” This means that customary law is in the hands of the government and religious or shari'ah law is in the hands of ulama.¹⁸ “*Adat ngen hukoe lagee zat ngen sijent.*” This means that law and adat are two things that cannot be separated in the life of Acehese society.¹⁹

¹⁷ Lilik Purwastuti yudaningsih dan Sri Rahayu, *Reformasi Perlindungan Hukum Terhadap Anak Sebagai Pelaku Tindak Pidana Dalam Peradilan Pidana di Indonesia*, Jurnal Ilmu Hukum, Vol. 6, No. 2, 2013, p. 116, <https://online-journal.unja.ac.id/jimih/article/view/2121>, accessed, 20 November 2019

¹⁸ Mohd. Din, *Stimulasi Pembangunan Hukum Pidana Nasional dari Aceh Untuk Indonesia*, (Bandung:Unpad Press, 2009), p. 38.

¹⁹ Mohd. Din, *Stimulasi Pembangunan Hukum...*, p. 37

This is the formation legal basis of Islamic criminal regulations called Qanun Jinayat Aceh. The pros and cons of Qanun arise in 2014 are certainly there. However, despite the controversy, Qanun Jinayat of Aceh is still a law product recognized by the state.

However, as legislation in force in Indonesia which contains several provisions of fiqh²⁰ and adjusted to the needs of the Acehnese people, different rules or conflicting principles with higher regulations are certainly found. One of them is the provisions related to children's *uqubat*²¹ (criminal sanction) in Aceh Qanun Number 6 of 2014 on Jinayah Law which is contrary to the spirit of the Juvenile Criminal Justice System Act.²²

Juvenile Criminal Punishment between Act Number 11 of 2012 on the Juvenile Criminal Justice System and Qanun Aceh Number 4 of 2016 on Jinayat Law

²⁰ What is meant by fiqh is fiqh jinayat or Islamic Criminal Law. In some contemporary literature, fiqh jinayah has been compiled in a special book. However, in classical literature, fiqh jinayah is only a subsection in the middle or end of the discussion with titles such as *Kitab al-Jinayat* (Jinayat chapter), *Kitab al-boudoud* (Chapter of punishment based on shariah), etc. The main object of the study of jinayah fiqh can be divided into 3 (three) parts, namely *ar-rukn as-syar'i* (formal aspect), *ar-rukn al-madi* (material aspect), and *ar-rukn al-adabi* (moral aspect). (see Nurul Irfan and Masyrofah, *Fiqih Jinayah*, (Jakarta: Amzah, 2013)), p. 1-2.

²¹ *Uqubat* as described in Article 1 Qanun Number 4 of 2016 concerning Jinayah Law is a sentence that can be imposed by a judge against Jarimah perpetrators. *Jarimah* itself is an act that is prohibited by Islamic Sharia and regulated in Qanun.

²² Based on the research conducted by the Institute for Criminal Justice Reform, Aceh Qanun No. 6 of 2014 on Law of Jinayat contradicts at least 10 (ten) laws, including: Criminal Code, Law No. 39 of 1999 on Human Rights, International Covenant on Civil and Political Rights which was ratified by Law No. 12 of 2005, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was ratified by Law No.5 of 1998, Law No. 12 of 2011 concerning the Formation of Legislative Regulations, Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, Law No. 23 of 2002 concerning Child Protection, as amended by Law No. 35 of 2004, Law No. 8 of 1981 concerning Criminal Procedure Law, Law No.48 of 2009 concerning Judicial Power; and The Convention on the Elimination of all forms of Discrimination Against Women which was ratified through Law No.7 of 1984. (see at Institute For Criminal Justice Reform, "ICJR dan Solidaritas Perempuan Ajukan Hak Uji Materil Qanun Jinayat Aceh ke Mahkamah Agung, <https://icjr.or.id/icjr-dan-solidaritas-perempuan-ajukan-hak-uji-materil-qanun-jinayat-aceh-ke-mahkamah-agung/> accessed on 5 March 2021).

The law for children committing a crime in Indonesia has actually been regulated in the Indonesian Criminal Code (commonly known as KUHP), namely Article 45, 46 and 47, but these articles are declared invalid with the issuance of Law Number 3 of 1997 on the Juvenile Court as amended on Act Number 11 of 2012 on the Juvenile Criminal Justice System. Therefore, if a child commits a crime then he will be legally processed according to Juvenile Criminal Justice System of 2012 Act. Like the previous, Juvenile Criminal Justice System of 2012 Act prioritizes diversion programs as the form of restorative justice in terms of criminalizing children who are proven to have committed crimes.

Regarding the rules for the punishment of minors in Part Two on Criminal, Act Number 11 of 2012 on Juvenile Criminal Justice System is stated as follows: Article 69 paragraph (1) states "*Children can only be sentenced or be subject to treatment based on the provisions in this Law. Paragraph (2): "A child who is not yet 14 (fourteen) years old may only be subject to treatment."*²³

Article 70 states: "*The lightness of the action, the personal condition of the child, or the condition at the time the act was committed, or what happened after, can be used as a basis for judges not to impose a criminal sentence or a treatment by considering aspects of justice and humanity.*"²⁴

Article 71 paragraph (1) states "*The principal criminal penalties for children consist: a. criminal warning; b. criminal with the following conditions: 1) guidance outside the institution; 2) community service; or 3) supervision; d. job training, e. coaching in institutions, and 3) imprisonment*". Paragraph (2) states "*Additional punishment consist: a. deprivation of profits derived from criminal acts; or b. fulfillment of customary obligations. Furthermore, paragraph (3) states "if in material law are threatened with cumulative criminal sanctions in the form of prisons and fines, fines punishment are replaced with job training"*". And in paragraph (4) it is stated "*Punishment imposed on the child is prohibited from violating their dignity*". Paragraph (5) regulates "*Further provisions regarding the form and procedure of criminal conduct as referred to paragraph (1), (2) and (3) shall be regulated by government regulation*"²⁵

²³ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 69, paragraph (1) & (2).

²⁴ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 70

²⁵ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 71, paragraph (1 to 5)

In the elucidation of Article 71 letter (b) it is said "*What is meant by "customary obligations" are fines or actions that must be fulfilled based on local customary norms that still respect the dignity of the child and do not endanger the physical and mental their health*".²⁶

Whereas the treatment regulated in Article 82 in the Third Part concerning Treatment as stated that treatment that could be imposed on the Child included: a. returns to parents/guardians; b. surrender to someone; c. treatment in a mental hospital; d. treatment at LPKS; e. the obligation to attend formal education and/or training provided by the government or private institution; f. revocation of driving license; and/or g. repairs due to criminal acts.²⁷

In the Elucidation of Article 82 letter (b) it is stated that what is meant by "surrender to someone" is surrender to adults who are deemed competent, having good behavior, and responsible, by the Judge and trusted by the Child. Letter (c) regarding treatment in a mental hospital is explained that "*This action is given to children who at the time of committing criminal offenses suffer from mental illness*". Furthermore, letter (g) stated that what is meant by "repair due to a criminal offense" for example repairing damage caused by a criminal offense and restoring the state in accordance with the condition before the occurrence of a criminal offense.²⁸

Qanun Number 6 of 2014 on Jinayat Law also regulates the crimes committed by children as stipulated in Chapter VI on Jarimah and Uqubat for Children, namely; Article 66 states "*If a child who has not reached the age of 18 (eighteen) years of age commits or is suspected of committing Jarimah, then the child is subject to an examination guided by the laws and regulations on juvenile criminal justice*".²⁹

Furthermore in Article 67 paragraph (1) states "*If a child who has reached the age of 12 (twelve) years but has not reached the age of 18 (eighteen) years or is unmarried perform Jarimah, then the child may be subject to 'uqubat at most 1/3 (one-third) of 'uqubat that has been determined for adults and/or returned to their parents/guardians or placed in a place provided by the Government of Aceh or Regency/ City Government'*". Furthermore, in paragraph (2) it is said that

²⁶ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 71.

²⁷ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 82.

²⁸ Act Number 11 of 2012 on Juvenile Criminal Justice System, Elucidation of Article 82 letter (b).

²⁹ Qanun Number 6 of 2014 on Jinayat Law, Article 66

"The procedures for implementing 'Uqubat against children which are not regulated in the legislation concerning the juvenile justice system are regulated in Governor Regulations".³⁰

The regulation in question is Regulation of the Governor of Aceh Number 5 of 2018 on the Implementation of Jinayat Procedural Law, Part Two, Implementation of Punishment for Children as follows: Article 38 states *"Forms of punishment for children who have aged 12 (twelve) to 18 (eighteen) years, namely: a. Caning, b. confinement, c. prison, d. fines, e. coaching by the state; and/or f. returned to his parents."*³¹

There is also the technical implementation of caning as mentioned in the previous discussion are as follows: Article 39 paragraph (1) states *"The execution of caning for children as referred to in Article 38 letter a is carried out by prosecutors"*. Paragraph (2) states *"Place of execution of caning for children is carried out in a closed place and may not be broadcast or exposed to the media"*. Paragraph (3) states *"Whip Uqubat for children is carried out after there is a written recommendation from the child's doctor and psychologist"*. And in paragraph (4) it says *"The implementation of whip uqubat to children is accompanied by parents/guardians, doctors, child psychologists and supervising judges."*³²

As for the technical implementation of other penalties in the form of confinement, fines, fostering, and returned to parents / guardians for children as referred to in Article 38, it is regulated in Articles 40 to Article 43 of the Regulation.

In general, legal rules on juvenile crimes contained in Juvenile Criminal Justice System of 2012 Act and Qanun Jinayat are not too different. In this case Qanun Jinayat, Chapter VI about Jarimah and Uqubat for Children Article 66 states *"If a child who has not reached the age of 18 (eighteen) years old performs or is suspected of committing Jarimah, then the child is subject to an examination as guided by the laws and regulations concerning juvenile criminal justice system (Juvenile Criminal Justice System of 2012 Act)"*.³³ The same thing is stated in article 222 paragraph (6) of Qanun Number 7 of 2013 that the trial of Jarimah case conducted by a child in the Sharia

³⁰ Qanun Number 6 of 2014 on Jinayat Law, Article 67, paragraph (1 & 2).

³¹ Regulation of the Governor of Aceh Number 5 of 2018 on the Implementation of Jinayat Procedural Law, Article 38.

³² Regulation of the Governor of Aceh Number 5 of 2018 on the Implementation of Jinayat Procedural Law, Article 39, paragraph (1 to 4)

³³ Qanun Number 6 of 2014 on Jinayat Law, Article 66.

Court is guided by the laws and regulations on the Juvenile Court.³⁴ Based on this article, it can be concluded that in the case of examining children in conflict with the Qanun Jinayat law are still subject to the provisions contained in the Juvenile Criminal Justice System of 2012 Act.

The Syar'iyah Court as a special court authorized to handle jinayat cases must refer to the Juvenile Criminal Justice System of 2012 Act in the matter of examining child criminal cases. These include the application of restorative justice and diversion in each examination process as well as the judge must be certified as a juvenile judge. Restorative justice and diversion are principally intended as an effort to avoid and keep children away from the judicial process, detention and imprisonment, deprivation of liberty and punishment that can only be done as the last effort (*ultimum remedium*), and to avoid stigmatization of children.

The provisions as referred have been regulated in Article 37 of the Governor of Aceh Regulation Number 5 of 2018 on the Implementation of Jinayat Procedural Law: Paragraph (1) states: "*that at the level of investigation, prosecution and examination of children's cases, an attempt must be made to restorative justice through diversion towards children conducting Jarimah.*" Then in paragraph (2), it says: "*Judges who handle child cases are child judges, who are certified in accordance with the provisions of the Laws and Regulations.*"³⁵

Significant differences arose when Qanun Jinayat regulate the types of punishment that could be imposed on children. Article 67 paragraph (1) states "*If a child who has reached the age of 12 (twelve) years but has not reached the age of 18 (eighteen) years or is not married perform Jarimah, then the child may be subject to 'uqubat at most 1/3 (one-third) of 'uqubat that has been determined for adults and/ or returned to their parents/ guardians or placed in a place provided by the Aceh Government or Regency/ City Government*". Furthermore, in paragraph (2) it is said that "*The procedures for implementing 'Uqubat against children which are not regulated in the legislation concerning the juvenile justice system are regulated in Governor Regulations*".³⁶

³⁴ Qanun Number 7 of 2013 on Jinayat Procedural Law, Article 222, paragraph (6)

³⁵ Governor of Aceh Regulation Number 5 of 2018 on the Implementation of Jinayat Procedural Law, Article 37, Paragraph (1 & 2)

³⁶ Qanun Number 6 of 2014 on Jinayat Law, Article 67, paragraph (1 & 2)

The rules as above are certainly contradictory with article 69 paragraph (1) of Juvenile Criminal Justice System of 2012 Act Chapter V concerning Crimes and Actions which stated that children can only be sentenced to criminal or be subject to actions based on the provisions in the law. Furthermore, in paragraph (2) it is stated that children who are not yet 14 years (fourteen) years of age may only be subject to treatment.³⁷

Normally, child criminal sanctions on Qanun seem to be non-problematic and even lighter compared to Juvenile Criminal Justice System of 2012 Act which only limits criminal restrictions on the freedom imposed on children at the most 1/2 (half) of the maximum imprisonment threatened with adults. However, this will be different if it is related to the provisions of Article 4 paragraph (1) Qanun Jinayat which states that *uqubat* as referred to in Article 3 paragraph (1) letter (c) consists of: a. *Hudud*; and b. *Ta'zir*. Based on Article 1 Qanun Number 4 of 2016 on Law of Jinayat, *hudud* is a type of '*uqubat* (punishment) whose form and magnitude has been determined in the Qanun strictly, while *ta'zir* is the type of '*uqubat* specified in qanuns whose form is optional and their magnitude within the highest and / or lowest limits.

Furthermore in paragraph (2) it says "*Uqubat hudud as referred to in paragraph (1) letter (a) is a caning*". Then in paragraph (3) it says "*Uqubat ta'zir as referred to paragraph (1) letter (b) consists of: a. The main uqubat ta'zir; and b. Additional uqubat ta'zir. Main uqubat ta'zir as stated in paragraph (3) letter (a) consists: a. caning, b. fines, c. jail; and d. restitution*". Paragraph (5) states "*Additional Uqubat Ta'zir as referred to paragraph (3) letter (b) consists: a. coaching by the state; b. restitution by parents/guardians; c. returns to parents/guardians; d. termination of marriage; e. revocation of licenses and revocation of rights; f. confiscation of certain items; and g. social work.*"³⁸

Through provisions above connected with Article 67 of the Qanun, it can be concluded that in Aceh it is legal to impose caning for juvenile offenders although it is not regulated in the Juvenile Criminal Justice System of 2012 Act. Aceh Governor Regulation Number 5 of 2018 on the Implementation of Jinayat Procedure Law, Part Two about Implementation of Punishment Towards Children in Article 38 states

³⁷ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 69, paragraph (1 & 2)

³⁸ Qanun Number 6 of 2016 on Jinayat Law, Article 3, paragraph (1 to 5)

that the form of punishment for children aged 12 (twelve) to 18 (eighteen) years, namely: a. Caning, b. confinement, c. prison, d. fines, e. coaching by the state; and/or f. returned to his parents. "³⁹

Caning itself is not a sanction known in Indonesia as the Criminal Panel Code has set limits on what types of criminal sanctions may be imposed on a criminal offense. The caning punishment in Qanun Jinayat has strengthened the legitimacy of the use of corporal punishment in Indonesia although the criminal system in Indonesia strictly prohibits the use of caning. The use of caning is a violation of international law on torture, and other cruel, inhuman or degrading treatment that is contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which Indonesia is a State Party. Caning is now used not only for humiliation, but also to hurt both psychologically and physically which is clearly and expressly prohibited in national and international law,⁴⁰ even more so when it applies to children. Its reported in mid-April 2020 that even a country like Saudi Arabia issued a circular for the courts under it to replace the application of caning with the payment of fines, imprisonment, or community service/ social work.⁴¹

Another problem is Qanun Jinayat does not accommodate well about the application of the double-track system⁴² in criminal sanctions

³⁹ Aceh Governor Regulation Number 5 of 2018 on the Implementation of Jinayat Procedure Law, Article 38

⁴⁰ Institute For Criminal Justice Reform, "*Pemerintah Harus Evaluasi dan Hapuskan Penerapan Cambuk dalam Qanun Jinayat*", <https://icjr.or.id/iicjr-pemerintah-harus-evaluasi-dan-hapuskan-penerapan-cambuk-dalam-qanun-jinayat/>, accessed on 5 March 2021.

⁴¹ Institute For Criminal Justice Reform, "*Arab Saudi Akan Hapus Hukuman Mati untuk Anak dan Cambuk, Indonesia Harus Lebih Terdepan Dalam Reformasi Hukum Pidana*", <https://icjr.or.id/arab-saudi-akan-hapus-hukuman-mati-untuk-anak-dan-cambuk-indonesia-harus-lebih-terdepan-dalam-reformasi-hukum-pidana/>, accessed on 5 March 2021.

⁴² In the development of modern law, the term of "double track system" means that there is a separation between criminal sanctions and treatment. Development of this legal system which introduces treatment (*maatregel*) as another alternative from the main criminal, especially imprisonment. This happened because of disbelief against the success of "prison" as a form of punishment/sanction. The use of the double track system has become an international trend as the consequence

whereas the development of thinking about criminal individualization and punishment with a double-track system by formulating of criminal sanctions in the form of sentence and treatment needs serious attention. As a result, Qanun Jinayat only applies the treatment of returning to parents/guardians for children.

The provision of child sanction in the Qanun does not regulate the categories of children under 14 (fourteen) years of age, which in the Juvenile Criminal Justice System of 2012 Act can only be subject to treatment.⁴³ The treatment referred to Article 82 of the Juvenile Criminal Justice System of 2012 Act include a. returns to parents/guardians; b. surrender to someone; c. treatment in a mental hospital; d. treatment at LPKS; e. the obligation to attend formal education and/or training provided by the government or private institution; f. revocation of driving license; and/or g. repairs due to criminal acts.⁴⁴

In general, Qanun only contains a sentence in the form of uqubat, while sanctions for treatment not found in a number of qanun that has been set. In criminal law, the development of thoughts on the application of criminal sanctions through a double-track system has been accommodated in the Criminal Code Bill. It should also be noted in the qanun, for example by including sanctions in the form of the placement of the convicted person for some time in *Dayah* (Islamic boarding school).⁴⁵

of adopting the Neo-classical school which seeks to exploit the strengths and leaving the weaknesses of the two other schools of criminal law, namely the classical and the modern school (see at Gita Santika Ramadhani, Barda Nawawi Arief, & Purwoto, “Sistem Pidana dan Tindakan “Double Track System” Dalam Hukum Pidana di Indonesia”, *Diponegoro Law Review*, Volume 1, Nomor 4, Year 2012, <https://media.neliti.com/media/publications/19518-ID-sistem-pidana-dan-tindakan-double-track-system-dalam-hukum-pidana-di-indonesia.pdf>, accessed on 5 March 2021)

⁴³ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 69, paragraph (2)

⁴⁴ Act Number 11 of 2012 on Juvenile Criminal Justice System, Article 82

⁴⁵ Mohd. Din, *Kebijakan Pidana Qanun Aceh dalam Perspektif Kebijakan Hukum Pidana*, *Kanun Jurnal Ilmu Hukum*, No. 67, Th. XVII, Desember 2015, p. 579. <http://www.jurnal.unsyiah.ac.id/kanun/article/view/6087>, accessed, 20 November 2019

The Position of Juvenile Criminal Policy in Qanun of Jinayat Towards Act Number 11 of 2012 on Juvenile Criminal Justice System

The law that lives in society is the embodiment of the values (norms) contained in the society. In the theory of Hans Kelsen known as *Stufenbau theorie*, it is said that norms are stratified so that they form an arrangement or a hierarchy. What is meant by "hierarchy" is the classification of each type of statutory regulation based on the principle that the lower statutory regulations may not conflict with the norms of higher statutory regulations and so on. One of the objectives of this provision is for the existence of an orderly law and harmonization of the law.⁴⁶

According to Hans Kelsen, the unity of these norms is constituted by the fact that the creation of one norm -the lower one- is determined by another -the higher- the creation of which is determined by a still higher norm, and that this regressus is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity.⁴⁷ The statement that commonly known as *Stufenbau theorie* illustrates that the legal norms are tiered and multi-layered in a hierarchy of structures. A lower norm applies, sourced and based on other higher norms. Higher norms apply, sourced and based on higher norms up to the basic norms.

The legislative hierarchy in the Indonesian legal system was first stated in The Decision Of The Provisional People's Deliberative Assembly Number XX/MPRS/1966, on the memorandum of the People's Representative Council of Mutual Cooperation about the sources of Indonesian Republic legal order and the order of Indonesian laws and regulations. Then, now it is contained in Law Number 12 of 2011 on the Establishment of Legislation.⁴⁸ In the hierarchy of legislation, the Criminal Code is higher than rules created by regional government. This is often the problem with regard to Qanun in Aceh because ideally the Criminal Code as basic of material criminal law should be used as a guide in making laws and regulations that contain

⁴⁶ Mohd. Din, *Kebijakan Pidana Qanun...*, p. 557

⁴⁷ Hans Kelsen, *General Theory of Law and State*, (New York: Russell & Russel, 1973), p. 124

⁴⁸ Mohd. Din, *Kebijakan Pidana Qanun ...*, p. 558

criminal provisions. From Indonesian perspective, Qanun is part of Indonesian legal system.

According to Act Number 12 of 2011, the position of Qanun Jinayat Aceh is in the sixth position or at the level of the Provincial Regulations. That is, Qanun Jinayat Aceh is at the same level as the Regional Regulations in other regions as mentioned earlier.⁴⁹ On top of Qanun there is a President Rules, Government Rules, Law/ Government Regulation In Lieu of Law, The Decision Of The People's Deliberative Assembly, and finally 1945 Constitution.⁵⁰ Besides being a Provincial Law of Aceh, Qanun is also part of the Islamic Sharia which is legalized in the form of a Qanun by the Regional People's Representative Assembly and approved by the Governor of Aceh. The regulation mentioned was in accordance with Article 1 point 21 of Act Number 11 of 2006 on the Government of Aceh which states, "*Aceb Qanun is a statutory regulation similar to provincial regulations governing the administration of government and the life of the Acebnese people.*"⁵¹

There are at least two opinions related to hierarchical position of Qanun towards other higher law, firstly, in spite of the privileges granted to the Province of Aceh (Law No. 18 of 2001 which was later amended on Law No. 11 of 2006), in its position at the level of regional regulations, Qanun should not be considered higher than the statutory regulations at the central level. The material contained in the Qanun must not exceed the material that should be contained in regional regulations. If there is a conflict of norm with the above law, the position of this regional regulation must be open to be ruled out by a higher hierarchy rules.

Here is actually seen the discordance between the principles of "*lex specialis derogat legi generali*" and "*lex superior derogat legi inferiori*". Qanun Jinayah Aceh is a legal product at the level of local regulations. Thus, the clash of special and general legal products assumed by the principle of "*lex specialis derogat legi generali*" must be scaled as a clash between local regulations as well, namely qanun with qanun. If the clash does not

⁴⁹ Act Number 12 of 2011 on Establishment of Regulations, Elucidation of Article 7, paragraph (1), letter (f)

⁵⁰ Act Number 12 of 2011 on Establishment of Regulations, Article 7, paragraph (1)

⁵¹ Act Nounber 11 of 2006 on the Government of Aceh, Article 1, point (21)

occur between fellow legal products of the same level, for example between qanun and government regulations, then the principle of "*lex specialis derogat legi generali*" cannot be applied. For this reason, the reference is the principle of "*lex superior derogat legi inferiori*". This was stated by Jimly Assiddiqie that the principle of "*lex superior derogat legi inferiori*" remained adhered as long as it relates to legal parts in a state system that is still centralized, because there is a strict legal corridor that applies nationally.⁵² The same thing was also stated by Maria Farida Indrati, one of the former Constitutional Judge who is also an expert in the field of legislation.⁵³

Andi Hamzah also stated that criminal penalties should not be based solely on a Government Regulation especially a Local Regulation (Perda). This relates to the principle of legality in criminal law; "*Nullum delictum nulla poena sine praevia lege poenale*" which means that an action cannot be convicted, except based on the strength of the provisions of existing criminal laws. The principle is also contained in Article 1 paragraph (1) of the Criminal Penal Code as a reference book for criminal law enforcement in Indonesia.⁵⁴

The second opinion states that basically Qanun is legally valid. Because, the existence of Act Number 11 of 2006 indeed gave extraordinary authority to the Aceh government to form a Qanun. This Act is also the basis so that in Qanun Jinayat, new criminal laws, new criminal procedural laws, and the Syariah Court can be made. In addition, the existence of Act Number 18 of 2001 on Special Autonomy for the Special Province of Aceh as the Province of Aceh and Act Number 11 of 2006 on the Government of Aceh indeed justify the application of Islamic sharia in this province which also called as Serambi Mekah. So in terms of equality aspects using the principle of "*lex superiore derogat legi inferiore*", Aceh Qanun does not seem to be in sync with the codified criminal law, but when viewed from the specific authority given by using the "*lex specialis derogat legi generali*" principle, it

⁵² Jimly Assiddiqie, *Pembabaran Hukum Pidana Indonesia*, (Bandung, Angkasa, 1995), p. 13

⁵³ Hukumonline, "*Kontroversi Qanun, Perda Dengan Karakteristik Khusus*", Fokus, <https://www.hukumonline.com/berita/baca/hol13872/kontroversi-iqanuni-perda-dengan-karakteristik-khusus>, accessed 26 November 2019

⁵⁴ Hukumonline, "*Pakar Hukum Berdebat Soal Sanksi Pidana Dalam Perda*", Berita, <https://www.hukumonline.com/berita/baca/hol18787/pakar-hukum-berdebat-soal-sanksi-pidana-dalam-perda/>, accessed 28 November 2019

has the basis of authority to formulate a criminal law or to have a criminal charge, because it has demonstrated equality.⁵⁵

Barda Nawawi Arief considered that the criminal provisions were legitimate even contained in Local Regulation based on 1945 Constitution Article 18 paragraph (2), Article 24 paragraph (1), and Article 28 D. Article 18 paragraph (2) states that the State recognizes the community along with their customary law and traditional rights. There is a law that applies unwritten (living law), he continued. Article 24 paragraph (1) regulates the judicial authority which administers justice to enforce law and justice. While Article 28 D emphasizes that everyone has the right to legal certainty.⁵⁶

Act Number 4 of 2004, Article 25 paragraph (2) and Article 28 paragraph (1). The first mentioned article stipulates that court decisions must contain certain articles of legislation or unwritten legal sources.⁵⁷ Whereas the last-mentioned article states that judges must explore and understand the legal values and sense of justice that lives in society. So in fact the judge may consider local law. He thinks that judges must explore and understand the legal values and sense of justice that lives in society. In addition, the State recognizes the community and their customary law along with their traditional unwritten rights (living law) so that judges may consider local law in the judicial process.⁵⁸

This opinion was reaffirmed by Amran Suadi and Mardi Chandra who stated that Act Number 11 of 2006 on the Government of Aceh, Article 125 paragraph (1) emphasized that Islamic Sharia implemented in Aceh consist of *aqidah* (faith), *sharia* and *akblaq* (morals). The Islamic Sharia includes worship, *ahwal syakhsyah* (family law), *mu'amalah* (civil law), jinayat (criminal law), *qadha* (justice), *tarbiyah* (education), dakwah, syariah and Islam defense.⁵⁹ Provisions regarding the implementation of

⁵⁵ Gian Manuahe, *Sinkronisasi Antara Hukum Pidana Lokal Dalam Peraturan Daerah Dengan Hukum Pidana Kodifikasi*, Jurnal Lex Crimen Vol. II/No.1/Jan-Mrt/2013, p. 63, <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/999>, accessed 23 November 2019

⁵⁶Hukumonline, “Pakar Hukum Berdebat Soal Sanksi Pidana Dalam Perda”, 28 November 2019,...

⁵⁷ Act Number 4 of 2004 on Judicial Authority, Article 25, paragraph (2)

⁵⁸ Act Number 4 of 2004 on Judicial Authority, Article 28, paragraph (1)

⁵⁹ Act Number 11 of 2006 on the Government of Aceh, Article 125, paragraph (1)

Islamic law are regulated by qanun. What is meant by Qanun of the Province of Aceh is a regional regulation as the implementation of law in the territory of Province of Aceh in the context of implementing special autonomy. Therefore, Qanun is a provincial regulation that regulates the administration of government and the life of Acehnese people. Qanun can override other laws and regulations by following the principle of *lex specialis derogat lege generalist* and the Supreme Court has the authority to conduct a material review on qanun.⁶⁰

Despite the existence of pros and cons, the second opinion seems to be more realistic, applicable and provides more legal certainty although with all the consequences. Qanun at the level of a Regional Regulation is part of the hierarchy of national laws and regulations. So that as a regional policy it should be in line with the law applied at the national level. However, with Law Number 11 of 2006 as the basis of the authority of the Governor and Regional People's Representative Assembly of Aceh to issue Qanun, as long as there is no decision from the Supreme Court that invalidates it, Qanun Number 6 of 2014 as a derivative of Law Number 11 of 2006 can be stated as "*lex specialis*" of the Juvenile Criminal Justice System of 2012 Act. Nevertheless, it does not rule out the possibility that in the future the judicial review of those articles can be conducted by the Supreme Court.

Conclusion

Based on the explanation above, it can be concluded that there are some differences between Qanun Number 6 of 2014 and Juvenile Criminal Justice System of 2012 Act related to child criminal sanctions. The Qanun regulates child criminal sanctions which normatively can only be guided on Juvenile Criminal Justice System Law. Another thing is Qanun Jinayat legalizes caning as uqubat which is not regulated in Law Number 11 of 2012, and also the double-track system which is adopted in Juvenile Criminal Justice System Law is not clearly accommodated in Qanun Jinayat.

Qanun which is equivalent to Regional Regulation is part of the hierarchy of national laws and regulations. So that everything that is categorized as regional policy should be in line with what is generally

⁶⁰ Amran Suadi dan Mardi Candra, *Politik Hukum: Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah*, (Jakarta, Kencana, 2016), p. 409

applicable at the national level. However, with Law Number 11 of 2006 as the basis of the authority of the Governor and Regional People's Representative Assembly of Aceh to issue Qanun, as long as there is no decision from the Supreme Court that invalidates it, Qanun Number 6 of 2014 which is a derivative of Law Number 11 of 2006 can be stated as "*lex specialis*" of the Juvenile Criminal Justice System of 2012 Act with all the consequences. However, it does not rule out the possibility that in the future the judicial review of those articles can be conducted by the Supreme Court.

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