



The application of diversion to children who commit jarimah zina in review according to qanun jinayat

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Abstract

Diversion is a process of transferring the settlement of cases of children in conflict with the law from the criminal justice process to a process outside the criminal justice system. The research question in this study is how the legal process against children suspected of committing criminal offences based on Qanun Jinayat and the Law on the Child Criminal Justice System and how the judge's consideration in determining the decision against the perpetrator of jarimah zina by the child in the Sigli Syar'iyah Court Decision Number 01/JN.Anak/2019/MS-Sgi. The research method in this article uses the library research method, with a normative-empirical approach, namely data processing and statutory provisions. The data obtained is then processed and analysed to provide a clear picture of the object discussed qualitatively and then the data is presented descriptively. Based on the results of the research, the implementation of diversion for children in conflict with the law at the Sigli Syar'iyah Court has been procedurally accepted and resolved in the judge's consideration by stopping the examination process of the child's case and ordering the clerk to send a copy of the diversion case determination to the Public Prosecutor by referring to the provisions of the Child Criminal Justice System Law and Qanun Jinayat.

Keywords: Diversion, zina, qanun jinayat

Introduction

A child in the eyes of Indonesian positive law is commonly defined as a person who is not yet an adult (minderjarig/person under age), a person who is underage/underage or often also referred to as a child under the supervision of a guardian (minderjarigeondervoordji). Based on some of these criteria, it can be concluded that Indonesian positive law does not regulate standardised legal rules and universally applicable legal rules in determining the age limit for a child.^[1]

Children and the younger generation are two things that cannot be separated, because children are part of the younger generation. Childhood is a period that is still in the process of growth, development and understanding of their environment, so children sometimes do not understand what they have done and what the consequences of their actions are, therefore special apparatus are needed that can foster and guide children by paying attention to the nature, character and circumstances of children and must be handled differently from adults.^[2]

Children are the hope and foundation of parents, the hope of the nation and state who will continue the baton of development and have a strategic role, have special characteristics or characteristics that will ensure the continued existence of the nation and state in the future. Children need to have the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. Moreover, childhood is the stage of forming the character, personality and character of a human being, so that later he/she has the strength and ability and stands firm in life.^[3]

Various kinds of problems are often faced in an effort to carry out responsibilities for the welfare and protection of children, namely the emergence of problems of children in conflict with the law. Law No. 11/2012 on the Child Criminal Justice System states that children in conflict with

the law are children in conflict with the law, children who are victims of criminal offences and children who are witnesses to criminal offences.^[4]

Crimes committed by children are too extreme to be called a crime, because basically children have unstable psychological conditions, the process of psychological stability, producing critical attitudes, aggressiveness and showing behaviour that tends to act to disturb public order. This cannot be said to be an act of crime, but rather delinquency caused by an unbalanced psychological condition and the perpetrator is not yet able to realise and understand the actions that have been committed.^[5]

Children with all their meanings and definitions have different characteristics from adults, this is a starting point in viewing the rights and obligations of a child which will also distinguish their position before the law. In consideration of Law No. 11/2012 on the Juvenile Criminal Justice System, children are a trust and a gift from God Almighty who has dignity as a whole human being. To maintain their dignity, children are entitled to legal protection in the justice system. Prior to the enactment of Law No. 11/2012 on the Juvenile Criminal Justice System, the majority of cases of Children Against the Law (ABH) were resolved through the courts and 90% were sentenced and imprisoned.^[6]

According to Retno Wulan Sutianto, child protection is part of National Development. Protecting children is protecting human beings and developing human beings as fully as possible. This is reflected in the nature of national development, which is the development of the whole Indonesian human being who is virtuous. Ignoring the issue of child protection means that it will not strengthen national development. The absence of child protection will lead to various social problems that can disrupt law enforcement, order, security and national development.^[7]

A criminal offence where the main perpetrator is a child is a serious problem faced by every country. In Indonesia, these issues are often discussed in seminars organised by relevant government agencies. This is not far from the area of special treatment for young offenders.^[8]

A child who is suspected of having committed a criminal offence will be processed in accordance with the rules of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Juvenile Justice is handled by special investigators handling children's cases, prosecutors who are also specialised in handling children's cases, and the active role of law enforcement is very necessary in resolving cases about minors so that it is far from the elements of inequality, violation and injustice in establishing children's rights.^[9]

One thing is certain, children will lose their various rights, such as the right to freedom, the right to growth and development, the right to obtain education and health services and other basic rights of children. In general, the results of the mapping also found that children undergoing legal proceedings often experience problems, especially in the fulfilment of their rights, including:^[10]

- a. No schooling opportunities due to detention;
- b. Inadequate access to health services;
- c. The child's living conditions are not very good, such as inadequate bedding;
- d. Underage children detained with adults are particularly vulnerable to violence;
- e. Child detention often causes children to become stressed.

Based on Article 1 Point 7 of Law No. 11/2012 on the Juvenile Criminal Justice System, the definition of diversion is "the transfer of the settlement of children's cases from the criminal justice process to a process outside criminal justice".

Cases that often occur in the community where the perpetrator is a child, then in resolving the case a diversion mechanism is used, which makes the child's case transferred from the criminal justice process to the process of services outside the criminal justice or the transition process in the social sphere. The process of resolving the diversion concept is left to law enforcers, namely the police, prosecutors, judges and other law enforcement agencies in an effort to deal with young or underage criminal offenders without using formal criminal justice channels. The use of the diversion concept aims to reduce the negative impact on children during the judicial process. The settlement of the case is based on the provisions of Law No. 11/2012 on the Juvenile Criminal Justice System.

In Aceh Qanun No. 6/2014, there are no separate rules on how to handle cases of jarimah zina involving children, but Article 66 states that the rules of the juvenile justice system are the guidelines in investigating crimes committed by children. If the act of adultery is committed by a child who is not yet 18 years old, then they are categorised as Children Against the Law (ABH), therefore the guidelines in this case are Aceh Qanun Number 6 of 2014 and Law Number 11 of 2012 concerning the Juvenile Justice System. In accordance with the provisions of the Law, diversion is prioritised in handling cases of children who commit criminal offences. The juvenile justice system must seek to protect the best interests of the child.^[11]

Article 66 of Aceh Qanun No. 6/2014 on Jinayat Law states:

"If a child who has not reached the age of 18 (eighteen) years commits or is suspected of committing a Jarimah, then an examination of the child shall be conducted guided by the laws and regulations concerning juvenile criminal justice".

Based on Article 67 paragraph (1) of Qanun Aceh Number 6 Year 2014 on Jinayat Law, it states:

"If a child who has reached the age of 12 years but has not yet reached the age of 18 years or who is not yet in a marital relationship commits a criminal offence, then the child may be subject to 'Uqubat at a maximum of 1/3 (one third) of the 'Uqubat determined for adults and/or returned to his/her parents/guardians or placed in a place provided by the Government of Aceh or the District/City Government".

Furthermore, Article 33 paragraph (1) of Qanun Aceh Number 6 Year 2014 on Jinayat Law states: "Every person who intentionally commits jarimah zina, shall be punished with 'Uqubat hudud flogging 100 (one hundred) times". When connected as referred to in Article 33 paragraph (1) with Article 67 paragraph (1), the child who commits jarimah zina can be subject to 'Uqubat at most 1/3 (one-third) or the equivalent of 33 lashes. Meanwhile, the purpose of Article 7 paragraph (2) of Law Number 11 Year 2012 on Juvenile Criminal Justice System, it is understood that diversion is implemented in the event that the criminal offence committed is punishable by imprisonment under 7 (seven) years.

If the provision as referred to in Article 7 Paragraph (2) of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System is connected with the provision as stipulated in Qanun Jinayat above (33 times of flogging) and Qanun Jinayat Procedure Law regulates the equality of flogging with imprisonment is 1 (one) time of flogging is equivalent to 1 (one) month of imprisonment. Thus 33 times of flogging is equivalent to 33 months of imprisonment or 2 years 7 months 5 days, which means that the threat of punishment for jarimah zina according to the above provisions is under 7 (seven) years of imprisonment. Furthermore, with diversion, the threats as mentioned above are eliminated and the case examination process is stopped by being given a transitional alternative based on the provisions of Article 67 paragraph (1) of Qanun Aceh Number 6 of 2014 concerning Jinayat Law, namely being returned to his parents/guardians or placed in a place provided by the Government of Aceh or the District / City Government. Based on the description above, it is deemed necessary to conduct a systematic research on the application of diversion to jarimah zina committed by children.

Research method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this writing is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data.^[12] Based on the background above, the problem formulation in this research focuses on the application of diversion to jarimah zina committed by children.

Result and discussion

Implementation of Diversion in Sigli Syar'iyah Court Based on Qanun Jinayat and Law on Juvenile Justice System Based on Article 1 of Aceh Qanun No. 11/2008 on Child Protection, the definition of a child is someone who is not yet 18 years old, including those in the womb. Children in conflict with the law are children as perpetrators and victims of crimes ranging from the level of investigation, investigation to the implementation of court decisions. Then based on Article 40 paragraph (1) it is stated that children who are dealing with criminal offences can be resolved outside the court if:

1. Children aged 12 years and under
2. The punishment is up to 1 (one) year
3. The consequences of the criminal offence are material and not related to the body or life.
4. All cases of theft that are not related to body and soul
5. Fights that do not result in physical disability or loss of life.

Then in Article 20 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, it is stated:

"In the event that a criminal offence is committed by a child who has not reached the age of 18 years and is brought before a court of law after the child has exceeded the age of 18 years but has not reached the age of 21 years, the child will still be brought before a juvenile court. Furthermore, based on Article 21 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System jo. Article 67 of Government Regulation No. 65/2015 on the Implementation of Diversion and Handling of Children Under the Age of 12 (twelve years), in the event that a child who has not reached the age of 12 years commits or is suspected of committing a criminal act, then the investigator, community supervisor will make a decision to hand him/her over to parents/guardians or include him/her in a programme of educational and coaching activities at a government agency or social welfare institution."^[13]

The parties involved in the juvenile criminal justice process are:

1. Investigator, is a Paediatric Investigator
2. Public Prosecutor, is the Children's Public Prosecutor
3. Judge, is the Juvenile Judge
4. Community Supervisor, is a functional law enforcement official who carries out community research, guidance, supervision, assistance to children inside and outside the criminal justice process.
5. Social Worker, is someone who works both in government and private institutions who have the competence and profession of social work.

Then in the investigation process will be carried out by investigators who are determined based on the decision of the head of the police or other officials appointed by the Head of the Indonesian National Police. Prosecution will be conducted by public prosecutors who are appointed based on the Decree of the Attorney General or other officials appointed by the Attorney General. In conducting an investigation into a child's case, the investigator is obliged to ask for considerations or suggestions from the community supervisor after the criminal offence is reported or complained about, then the Community Research Centre is obliged to submit the results of community research no later than 3 (three) days from the request of the investigator.

In case No. 01/JN.Anak/2019/Ms-Sgi at the Sigli Class I-B Syar'iyah Court regarding the act of jarimah zina (adultery) on a child committed by a child aged 15 (fifteen) years or calculated not yet an adult with a man aged 22 years or calculated to have entered adulthood. The case was reported by the community to the police and from the police level reported to the Public Prosecutor, then from the Public Prosecutor forwarded the case to the court level. At the court, a case registration or register containing the case number is made by the President of the Court, then a determination of the Panel of Judges is made and case data is provided to the Chairperson of the Panel and then the Panel of Judges studies the case of the child. Examination of child victims investigators are required to request social reports from social workers or social welfare personnel after the criminal offence is reported, then against children who are submitted as children in conflict with the law (ABH) at the level of investigation, prosecution and examination of children's cases at the Sigli Class I-B Syar'iyah Court must be pursued for diversion.

After the Panel of Judges studied and considered the child's case with the result that diversion must be sought, the Panel of Judges then invited the Public Prosecutor, BAPAS, community leaders and parents/guardians of the child to carry out diversion efforts. Then after deliberations with due regard to restorative justice and it was agreed by all parties at that time to implement diversion, the diversion effort in the child's case was successfully carried out. Then the perpetrator and child victim will be returned to the community or parents/guardians and the case of jarimah zina (adultery) on the child will be terminated by attempting diversion.

From the results of the diversion agreement, the peace outcome can be in the form of or compensation, handover back to parents/guardians, participation in investigation/training at an educational institution or LPKS, community service. In the event that an agreement is reached, each official responsible for implementing diversion shall issue a termination of investigation, prosecution, termination of examination, case and if no agreement is reached, the examination process shall continue. Furthermore, in the event that no agreement is reached within the specified time, the community supervisor shall immediately report to the official to follow up the examination process.

Obstacles and barriers in the diversion process

In the practice of diversion efforts, there are several obstacles or obstacles that can come from various parties involved in the diversion process. Despite efforts, the diversion process still cannot be implemented perfectly by authorised law enforcers. These obstacles include:

1. Internal Barriers

- a. Obstacles in obtaining an agreement between the victim and the child in conflict with the law;
- b. Human resources regarding specialised public prosecutors for children.

2. External Barriers

- a. Limited adequate facilities and infrastructure in implementing the diversion process;
- b. There are often different understandings of the process of handling children in conflict with the law among law enforcers;

- c. Co-operation between public prosecutors and community counsellors;
- d. The general public's understanding of diversion; and
- e. Regulations on the supervision of the implementation of diversion agreements.

According to Adam Muis, Judge of Sigli Class IB Syar'iyah Court explained that:

"Diversion must be pursued at all levels, where the diversion process will involve several interested institutions, namely BAPAS, prosecutors and judges who act as facilitators, children who will be accompanied by parents/guardians/community leaders such as the village head and other village officials. The obstacles that often occur in the deliberation or mediation process are usually from various parties, for example from the child victim who objects to the results of the joint deliberation which leads to diversion, or from any party who feels objected to the mediation process and the determination of the diversion".

Rubaiyah also argued that

"When in the process of deliberation or mediation, if the result of the mediation is one party objecting or disagreeing, then the diversion will fail. This is also an obstacle in the diversion process. Then, the lack of time given by the Law for law enforcers to seek diversion. Because the law only provides a maximum limit of 30 (thirty) days. Some locations are still very far from the police station so it takes a long time. Moreover, summoning witnesses and victims is also difficult, because they will not necessarily be present at the appointed time. The solution is to make the best use of time so as not to exceed the time limit set by the law. ^[14]

What is stated above is in accordance with the provisions of Article 15 of the SPPA Law which stipulates that the diversion process is carried out within a maximum period of 30 (thirty) days from the date of initiation of diversion. The results showed that the obstacles to the implementation of punishment of children as perpetrators of criminal acts are from statutory factors, community factors, such as the absence of certified child investigators and the rules of the execution process against children do not yet exist, so that the process of handling children's cases as perpetrators in the qanun jinayat is the same as the process of handling cases against adults, the only difference is regarding the punishment and the procedure for implementing 'Uqubat.

Judges' considerations in determining diversion for children

Judges have independent freedom in considering the severity of criminal sanctions against the decisions they handle. Freedom by judges is absolute and cannot be interfered with by any party. This happens in order to ensure that the decision in court is truly objective. The freedom of judges to find the severity of criminal sanctions must also be guided by the maximum and minimum limits and their freedom must be based on a sense of justice both for the defendant and for the community and is responsible to God Almighty.

Article 29(2) of the amended Constitution of the Republic of Indonesia Year 1945 states that "Judicial Power shall be exercised by a Supreme Court and the judicial bodies subordinate thereto within the General Court, Religious Courts, Military Courts and State Administrative Courts and by a Constitutional Court". With the amendment of the 1945 Constitution of the Republic of Indonesia, specifically

Chapter IX on Judicial Power Article 24 has brought important changes to the implementation of judicial power, as a response to these adjustments, Law Number 4 of 2004 on Judicial Power and Law Number 5 of 2004 on the Supreme Court were born.

Based on Law No. 4/2004 on Judicial Power, judicial power according to the 1945 Constitution of the Republic of Indonesia is an independent power exercised by a Supreme Court and judicial bodies under it, and by a Constitutional Court to administer justice in order to uphold law and justice. Article 1 of Chapter I of the Law on Judicial Power explains that judicial power is an independent state power to administer justice to uphold law and justice based on Pancasila, for the implementation of the rule of law of the Republic of Indonesia. Based on Article 2, the exercise of judicial power as referred to in Article 1 is carried out by a Supreme Court and different judicial bodies under it within the state administrative judiciary and by a Constitutional Court. ^[15]

The imposition of criminal judgements by judges uses juridical and non-juridical considerations. Juridical considerations are considerations of judges based on factors revealed in the trial and by law have been determined as things that must be contained in the decision. Juridical considerations alone are not sufficient to determine the value of justice in the punishment of minors, without being supported by non-juridical considerations that are sociological, psychological and philosophical in nature. ^[16]

Based on Decision Number 01/JN.Anak/2019/MS-Sgi that the child perpetrator who committed the crime of jarimah zina, namely the child perpetrator, was determined to determine the legal determination of diversion efforts by considering that because based on the Community Supervisor Report dated 09 Mai 2019 the diversion agreement had been completed, the examination process of the child's case must be stopped, taking into account the provisions of Article 12 paragraph (3), paragraph (4) and paragraph (5) of Law Number 11 of 2012 concerning the Criminal Justice System for Children who are not yet 12 (twelve) years old, namely:

On the basis of the considerations under the above Articles, it is determined:

1. Terminate the examination process of a juvenile case
2. Instruct the Registrar to send a copy of this decision to the Public Prosecutor.

Based on the act of jarimah committed by the perpetrator, the child is the perpetrator of the crime, based on several causal factors, including the lack of attention and guidance from parents and family towards the growth and behaviour of children, the low morality of morals and character and the lack of religious understanding of the limits of actions prohibited by law and religion, as well as parents who over-indulge children and obey all the wishes of children so that children tend to be free to do whatever they want. All of these were the fault and negligence of the parents, the child's family and relatives, and the surrounding community. Therefore, the judges did not solely believe that the actions of the child perpetrator were purely the personal fault of the child but rather the collective fault of the parents, family, relatives and the community as well as the state as a whole. In considering this decision, the judge used juridical and non-juridical considerations. Juridical considerations are the charges of the Public Prosecutor, Witness Statements,

Testimony of Child Perpetrators, Evidence, jarimah acts, aggravating circumstances, mitigating circumstances, matters revealed in the trial, Articles in the Juvenile Criminal Justice System Law and Qanun Jinayat. Considerations that are non-judicial in nature are based on the Community Research Report from the Sigli City Correctional Centre, testimony from parents/guardians or foster parents. Based on this, it is the judge's consideration in determining the diversion effort against child perpetrators who commit jarimah zina.

Conclusion

The legal basis for the implementation of diversion for children in conflict with the law is the legal basis derived from Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Article 59 of Government Regulation Number 65 of 2015 concerning Guidelines for Implementing Diversion and Handling Children who are not yet 12 (twelve) years old, Law Number 35 of 2014 concerning Child Protection, and Aceh Qanun Number 6 of 2014 concerning Jinayat Law. The implementation of diversion for children in conflict with the law at the Sigli Syar'iyah Court has been successfully carried out with procedures from the provisions of the SPPA Law and Qanun Jinayat.

The consideration of the Sigli Syar'iyah Court judge Number: 01/JN.Anak/2019/Ms-Sgi against the crime of jarimah zina committed by minors is determined by the determination of diversion efforts. In determining these vivo efforts, the judge goes through several stages or processes, namely the stage of determining criminal acts. From this stage, the judge determines that the child offender can be applied for diversion efforts with Article 12 paragraph (3), paragraph (4) and paragraph (5) of Law Number 11/2012 concerning the Child Criminal Justice System. Furthermore, in terms of determining the diversion effort, the judge used the consideration approach that because based on the Community Supervisor Report dated 09 Mai 2019, an agreement had been made on the determination of diversion in the case of a child who committed the crime of jarimah zina. Then from these considerations, in determining the determination of diversion efforts, the judge also considers the aggravating and mitigating circumstances for the child offender. Furthermore, in making a determination, the judge uses the concept of Law Number 48 of 2009 concerning the Power of Judges. In the determination of diversion of case Number: 01/JN.Anak/2019/Ms-Sgi against children who commit the crime of jarimah zina, it is in accordance with the provisions of qanun jinayat by taking into account the rights of children and societal values.

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