



## **The Application of Restorative Justice for Children as Criminal Offenders in the Perspective of National Law and Qanun *Jināyat***

Rizanizarli Rizanizarli

Universitas Syiah Kuala, Banda Aceh, Indonesia

Mahfud Mahfud

Universitas Syiah Kuala, Banda Aceh, Indonesia

Riza Chatias Pratama

Universitas Syiah Kuala, Banda Aceh, Indonesia

Fikri Fikri

Universitas Syiah Kuala, Banda Aceh, Indonesia

Email: rizanizarli@usk.ac.id

**Abstract:** This study aims to examine the application of restorative justice to children as criminal offenders based on the 2012 SPPA Law and the 2014 Qanun *Jināyat*. This study is an empirical legal study using a statutory approach and restorative justice theory. Data collection techniques were carried out through in-depth interviews and literature studies. The results of the study show that Article 5 paragraph (1) of the 2012 SPPA Law stipulates that if a child commits a crime or *jarimah*, a restorative justice approach must be prioritized, and in Article 7 paragraph (1), it is stated that at investigation, prosecution, and examination level of a child's case in the district court, it is mandatory to attempt diversion. The Qanun *Jināyat* of 2014 does not separately regulate the settlement of children who commit crimes. However, it designates laws and regulations *regarding* juvenile justice. Qanun *Jināyat* regulates the handling of children who carry out a *jarimah ikhtilaṭ* to carry out an examination guided by the law mentioned above. However, in the case of children who commit crimes of *ikhtilaṭ* and are investigated by the police, the process is carried out in a restorative justice and diversionary manner. The forms of settlement in restorative justice are reconciliation with or without compensation, return to parents or guardians, social rehabilitation, and religious rehabilitation. This study argues that restorative justice treats children in a dignified manner oriented towards justice and the interests of the child. Likewise, the study shows that SPPA Law and Qanun *Jināyat* complement each other.

**Keywords:** Restorative justice, diversion, children as criminals, national law, *ikhtilaṭ*, qanun *jināyat*

**Abstrak:** Penelitian ini bertujuan mengkaji penerapan restorative justice pada anak sebagai pelaku pidana berdasarkan Undang-Undang SPPA 2012 dan Qanun Jināyat 2014. Kajian ini merupakan studi hukum empiris dengan menggunakan pendekatan perundang-undangan dan teori keadilan restoratif. Hasil penelitian menunjukkan bahwa Pasal 5 ayat (1) UU SPPA 2012 mengatur jika anak yang melakukan tindak pidana atau jarimah wajib mengutamakan pendekatan keadilan restoratif dan dalam Pasal 7 ayat (1) disebutkan pada tingkat penyidikan, penuntutan, dan pemeriksaan perkara Anak di pengadilan negeri wajib diupayakan diversi. Qanun Jināyat Tahun 2014 tidak mengatur secara tersendiri tentang penyelesaian tentang anak yang melakukan pidana akan tetapi menunjuk peraturan perundang-undangan mengenai peradilan anak. Qanun Jināyat mengatur penanganan terhadap anak yang melakukan jarimah ikhtilaḥ dilakukan pemeriksaan berpedoman pada UU tersebut di atas. Namun penanganan anak yang melakukan pidana ikhtilaḥ jika disidik oleh pihak kepolisian maka prosesnya dilakukan secara restorative justice dan diversi. Bentuk-bentuk penyelesaian secara restorative justice yaitu: perdamaian dengan atau tanpa ganti kerugian, penyerahan kembali kepada orang tua/wali, rehabilitasi sosial dan rehabilitasi keagamaan. Penelitian ini berargumen bahwa keadilan restoratif memperlakukan anak sebagai pelaku secara bermartabat berorientasi pada keadilan dan kepentingan anak. Demikian juga studi tersebut menunjukkan bahwa antara UU SPPA dan Qanun Jināyat saling melengkapi.

**Kata Kunci:** Restorative justice, diversi, anak sebagai pelaku pidana, hukum nasional, ikhtilaḥ, qanun jināyat

## Introduction

The problem of children committing crimes, or, in other terms, children in conflict with the law (*Anak Berhadapan dengan Hukum/ABH*), is a serious concern in the national and international context. It is part of an effort to protect the rights and justice of children, both by the government and by the community.<sup>1</sup> Various forms of legal protection to ensure children's rights can be provided both through formal and non-formal legal institutions in society.<sup>2</sup>

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<sup>1</sup>Suci Ramadhan and JM. Muslimin, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought," *Juris (Jurnal Ilmiah Syariah)* 22, No. 1 (2022). Fauzul Hanif Noor Athief and Resti Hedi Juwanti, "Court Decisions on Post-Divorce Children's Livelihood: Islamic Law Analysis on Their Practices in Indonesia and Malaysia", *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 20, No. 2 (2020). Wikan Sinartio Aji, "The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia," *JILS (Journal of Indonesian Legal Studies)* 4, No. 1 (2019), p. 73-88.

<sup>2</sup>Fajri M. Kasim, et, al., "The Protection of Women and Children Post-Divorce in Shariah Courts in Aceh: A Sociological Perspective," *Ahkam: Jurnal Ilmu Syariah* 22, No. 1 (2022). Ida

All this time, children who commit criminal offenses are legally processed as perpetrators of other criminal offenses; for example, they are given sanctions and imprisoned. Then, based on Law No. 11 of 2012 on the Juvenile Criminal Justice System (*Undang-Undang Sistem Peradilan Anak/SPPA*), children who commit criminal offenses are not legally processed but are processed in a diversionary manner, and then restorative justice is carried out.<sup>3</sup>

Restorative justice is an attempt to discuss an injustice and admit wrongdoings that have been committed as a starting point for restoring an injustice.<sup>4</sup> Protection of children in conflict with the law is regulated in the 2012 SPPA Law, which is based on the principle of restorative justice. It is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a just solution by emphasizing recovery, not retaliation. Settlement through diversion and restorative justice is used to keep children out of the judicial system and away from stigmatization, with the intention that children will return to the social context fairly.

Diversion is the delegated authority given to law enforcement officers to adopt discretionary actions in dealing with or resolving the problem of juvenile offenders without the use of formal mechanisms. The measures comprise stopping, continuing, or releasing from the criminal justice process or returning or giving over to the community or other forms of social service activities.<sup>5</sup>

Diversion is applicable to all stages of examination and is designed to mitigate the adverse impact of children's involvement in the legal system. As a result, not all cases involving children in conflict with the law must be settled through formal justice; they can be resolved in the best interests of the child and the victim through a restorative justice approach.

Diversion is also not a way to avoid law and justice. Instead, it is a way to keep law and order in society. As one of the apparatuses involved in dealing with children in conflict with the law, the police must pay special attention to the

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Bruheim Jensen, et.al., "Child Protection Social Workers' Constructions of Children and Childhood: An integrative Review", *Child & Family Social Work* 25, No. 1 (2019).

<sup>3</sup> Mahfud Jufri, et.al., "Restorative Justice: An Alternative Process for Solving Juvenile Crimes in Indonesia," *Brawijaya Law Journal: Journal of Legal Studies* 6, No. 2 (2019). Sarwadi and Bambang Tri Bawono, "Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia", *Jurnal Daulat Hukum* 3, No. 4 (2020).

<sup>4</sup> John Braithwaite, "Setting Standards for Restorative Justice." *British Journal of Criminology* 42, no. 3 (2002), p. 564.

<sup>5</sup> Israr Hirdayadi and Hera Susanti, "Diversi dalam Sistem Peradilan Pidana Anak di Indonesia dan Tinjauannya Menurut Hukum Islam," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 6, No. 2 (2017). Isnatul Rahmi and Rizanizarli, "Penerapan Restorative Justice dalam Penyelesaian Tindak Pidana Pencurian Oleh Anak dalam Perspektif Adat Aceh," *Syah Kuala Law Journal* 4, No. 1 (2020).

unique condition of children. One way to avoid placing children in prison and stigmatizing their status as inmates is by adopting a diversion mechanism through restorative justice. Restorative justice is the practice of addressing illegal acts by bringing together victims and perpetrators (suspects) for a discussion.<sup>6</sup>

Restorative justice is a settlement procedure that occurs outside of the criminal justice system and involves victims, perpetrators, the relatives of victims and perpetrators, the community, and others with an interest in a crime in order to reach an agreement and resolution.<sup>7</sup> Restorative justice is considered a new paradigm for addressing criminal acts.

The application of restorative justice based on the 2012 SPPA Law requires law enforcement authorities (investigators, public prosecutors, and judges) to always seek diversion in every process of settling children in conflict with the law.<sup>8</sup> Diversion can be characterized as a measure taken by law enforcement personnel who handle juvenile crime cases outside of the criminal justice system.<sup>9</sup>

In Aceh Qanun No. 6 of 2014, there are no separate rules for how to handle *jarimah ikhtilaf* cases involving children. However, Article 66 says that the rules of the juvenile justice system guide the investigation of crimes committed by children. *Ikhtilaf* is an intimate act such as making out, touching, hugging, and kissing between men and women who are not husband and wife with the consent of both parties, either in closed or open places.<sup>10</sup> If the act of *ikhtilaf* is committed by a child who is not yet 18 years old, then it is categorized as a Child in Conflict with the Law (ABH); therefore, the guidelines for this case are Qanun Jināyat 2014 and UU SPPA 2012.

According to the provisions of the law, diversion is prioritized in the handling of children who commit criminal acts. The implementation of this diversion is intended to protect the child from the negative consequences of the criminal justice system.<sup>11</sup> The juvenile justice system must strive to protect the child's best interests. In most cases, juvenile criminal justice is a process that is only concerned with formal law enforcement and not with the best interests of the child.

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<sup>6</sup> Marlina, *Peradilan Pidana Anak di Indonesia: Pengembangan Konsep Diversi dan Restorative Justice*, (Bandung: Refika Aditama, 2009), p. 37.

<sup>7</sup> Olivia BR Sembiring, "Perlindungan Hukum Terhadap Anak Yang Berkonflik Dengan Hukum", *Tesis*, Universitas Indonesia, 2006, p. 58

<sup>8</sup> Law No. 11 of 2012 concerning the Juvenile Criminal Justice System.

<sup>9</sup> Marlina, *Pengantar Konsep Diversi dan Restorative Justice Dalam Hukum Pidana*, (Medan: USU Press, 2010), p. 28.

<sup>10</sup> Aceh Qanun Number 6 of 2014 concerning Jināyat Law.

<sup>11</sup> Interview with Elfiana, Head of Unit I PPA Aceh Regional Police, Banda Aceh, August 6 2021.

Law enforcement is obligated to seek juvenile justice diversion. It is possible to do so by transferring the settlement of child cases from the criminal justice system to processes outside of the criminal justice system. Children conflict with the law are dealt with first, followed by restorative justice.

This study is an empirical legal study using a statutory approach and restorative justice theory. Legislative studies, namely law of SPPA 2012 and Qanun Jināyat 2014 concerning children as perpetrators of adultery crimes. While the theory of restorative justice is a legal approach that emphasizes the creation of justice and balance for criminal offenders and the provision of compensation for victims.<sup>12</sup> Data collection was carried out in two ways, in-depth interviews with key informants and literature studies. The key informants were the police, prosecutors, judges at the Syar'iyah Court, judges at the District Court, the Social Service, *Wilayatul Hisbah* (sharia police) and Correctional Institutions in Aceh.

### **Punishment of Children Through Educational Sanctions**

Punishment and sentencing as a means of combating crime are constantly evolving and being debated. This shift is natural because humans constantly update and improve their well-being by reflecting on past experiences.<sup>13</sup> In essence, the history of criminal law is the history of crime and punishment, both of which are inextricably linked to criminal acts or crimes. Crime is a human issue because there must be crime wherever there are humans (crime is eternal as eternal as society).<sup>14</sup>

The causes of crime and how to eliminate it are issues that are constantly debated. As a result, abolitionism emerged, which claimed that prisons were unnecessary for eradicating crime. The 2012 SPPA Law was based on sociological and philosophical considerations because it was recognized that children are an essential part of human, national, and state survival. Based on these considerations, children must be continuously fostered, both physically, mentally, and socially, as well as for their own protection.

Guidelines for handling children in conflict with the law are the Beijing Rule and the Convention on the Rights of the Child (*Konvensi Hak-Hak Anak/KHA*). Beijing Rules and the CRC require that children are not treated the

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<sup>12</sup> Jonaedi Efendi and Johnny Ibrahim, *Metodologi Penelitian Hukum: Normatif dan Empiris*, (Depok: Prensamedia, 2018). Marshall Tony F, *Restorative Justice an Overview*, London: Information and Publications Group, 1999).

<sup>13</sup> M. Sholahuddin, *Sistem Sanksi dalam Hukum Pidana Ide Dasar Double Track System dan Implementasinya*, (Jakarta: Raja Grafindo Persada, 2007), p. 1.

<sup>14</sup> Sahetapy, J. E. *Kausa Kejahatan*, (Surabaya: Pusat Studi Kriminologi, Fakultas Hukum Universitas Airlangga, 1979), p. 1.

same as adults; deprivation of independence is a last resort, which is a guarantee of children's rights not to be separated from their parents.<sup>15</sup>

In addition to discussing the judicial process, the juvenile criminal justice system discusses sentencing. Both legislators and judges must pay close attention to the issue of sentencing when determining the type of sanctions to be imposed. Punishment must be based on the assumption that the child requires criminal sanctions in order to remedy themselves.

The 2012 SPPA Law was enacted to ensure better handling of children in conflict with the law in the criminal justice process for the best interests of the child. Punishment is not a way to solve problems; in fact, in its implementation, it is prone to violations of children's rights. Philosophically, the purpose of punishing children is to achieve child welfare. However, existing regulations show that the purpose of punishing children, besides containing elements of legal protection, also contains retaliation. Therefore, in imposing crimes and actions, it is very dependent on the judge in choosing the right sanctions for children.

UU No. 11 of 2012 adheres to a double-track system: it is the imposition of punishment and action (*maatregelen*), the purpose of punishment is not solely criminal imposition but corrective action. The goals of punishment and corrective actions have a starting point in different basic ideas. Punishment aims to inflict suffering on the perpetrator as a result of his actions and also as a form of statement of reproach.

The primary distinction between criminal sanctions and corrective actions is whether or not there is an element of reproach, not whether or not there is an element of suffering. Corrective actions are sanctions that are not retaliatory in nature and are only intended to protect the community from threats that could harm its interests.<sup>16</sup>

Formulation of a double-track system specifically in the criminal system in accordance with the objectives of sentencing. All of these aim to provide protection to children in the judicial process, from investigation to guidance after serving a sentence. Arrangements regarding the types of criminal sanctions and actions are regulated in Chapter V Articles 69 to 83 of the 2012 SPPA Law. Article 71 paragraph (1) regulates principal crimes; Article 71 paragraph (2) regulates additional crimes; and Article 82 regulates corrective actions. Article 69 states that children who commit criminal acts can only be sentenced or subject to action; this is what distinguishes them from the provisions contained in the Criminal Code.

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<sup>15</sup> Nandang Sambas, *Pembaruan Sistem Pemidanaan Anak di Indonesia* (Jakarta: Graha Ilmu, 2010), p. 117.

<sup>16</sup> M. Sholehuddin, *Sistem Sanksi...*, p. 70.

Types of main punishment and additional punishment as regulated in Article 71, paragraph (1), paragraph (1) a. warning sentences with the following conditions: 1) coaching outside the institution; 2) community service; or 3) supervision. b. work training; c. coaching in institutions; and d. prison. Paragraph (2) Additional punishments consist of: a) confiscation of profits derived from criminal acts; or b) fulfillment of customary obligations.

In accordance with the provisions of Article 69, paragraph (2) against children who are less than 14 years old can only be subjected to corrective action. According to Article 32, the detention of a child can only be carried out under the following conditions: a. The child is 14 (fourteen) years of age or older and is suspected of having committed a crime punishable by imprisonment for seven (seven) years or more. If, under material law, it is threatened with cumulative punishment in the form of imprisonment and fines, the fine shall be replaced by job training. Imprisonment can cause philosophical and practical losses.

Another disadvantage due to imprisonment is the stigmatization attached to child convicts after returning to society and other losses experienced by convicts and their families. Therefore, a prison sentence should be imposed as a last resort if other types of sanctions have not benefited him.

The types of corrective actions as regulated in Article 82 paragraph (1) that can be imposed on children are:

- a. returning them to parents/guardians;
- b. surrendering to someone;
- c. treatment in a psychiatric hospital;
- d. treatment in social welfare organizing Institution (*Lembaga Penyelenggaraan Kesejahteraan Sosial/LPKS*);
- e. the obligation to attend formal education and/or training held by the government or private agency;
- f. revocation of driving license;
- g. remedy for a crime.

Corrective actions can only be imposed for a maximum of 1 (one) year and can be submitted by the public prosecutor in the charges, except for criminal acts punishable by imprisonment for a minimum of 7 (seven) years. The act of surrendering a child to someone is done for the benefit of the child, while the act of caring for a child is intended to assist parents and guardians in educating and providing guidance to children.<sup>17</sup>

According to the above description, there are alternative sanctions for children, such as punishment or corrective action. If the judge determines that the child can still be nurtured in the environment of the parents, guardians, foster

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<sup>17</sup> Interview with Elfiana, Head of Unit I PPA Aceh Regional Police, Banda Aceh, August 6, 2021.

parents, or another person or institution, the corrective action is imposed. Punishment and corrective actions are two types of sanctions that can be imposed on children. Corrective action sanctions can include returning them to their parents or guardians or making them state children, and if possible, community service sanctions. This corrective action aims to continue providing education and coaching so that children can have a future.<sup>18</sup>

The goal of punishing children in the criminal justice system includes elements of legal protection for children with the objective of providing children with a prosperous future. Imprisonment is an alternative to criminal sanctions that can be used; this demonstrates that the goal of punishing children includes elements of retaliation in addition to other elements, so that children become deterrents and conflict resolution is achieved.

### **The Concept of Restorative Justice for Children as Offenders According to National Law**

In restorative justice theory, the process of resolving violations of the law is carried out by bringing victims and perpetrators (suspects) together in a meeting to resolve conflicts. During the meeting, the mediator provides an opportunity for the perpetrator to provide a clear picture of the actions he has taken. Restorative justice is a process in which all parties involved in a particular crime jointly solve the problem and decide how to handle the consequences in the future.

The evolution of criminal law in Indonesia has resulted in a paradigm shift in the philosophy of juvenile justice, which was initially retributive, then rehabilitation, and finally restorative justice.<sup>19</sup> Settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator or victim's family, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retribution is used to realize the concept of diversion as an instrument in restorative justice in the 2012 SPPA Law.<sup>20</sup>

According to Article 29 of the 2012 SPPA, investigators must seek diversion within 7 (seven) days of the start of the investigation. The diversion procedure is completed within 30 (thirty) days. If the diversion process is successful in reaching an agreement, the investigator submits the diversion minutes as well as the diversion agreement to the Sharia Court's head for a

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<sup>18</sup>Interview with Elfiana, Head of Unit I PPA Aceh Regional Police, Banda Aceh, August 6, 2021.

<sup>19</sup> Interview with T. Syarafi, Chief of the Lhokseumawe District Court, September 7, 2021.

<sup>20</sup>Interview with Ferry Ichsan, Attorney General of Pidie, August 27, 2021.



decision.<sup>21</sup> If the diversion process is unsuccessful, the investigator is required to continue the investigation and transfer the case to the public prosecutor by submitting the diversion minutes and social research reports.

A diversion agreement is a written agreement signed by the parties involved that results from a discussion. The victim and/or the victim's child's family must consent to the diversion agreement, as well as the child and his family's willingness. with the exception of: a) Criminal acts in the form of violations; b) Misdemeanor; c) Victimless crime; or d) The value of the victim's loss is not more than the value of the local provincial minimum wage.

The agreement between the perpetrator and the victim becomes the most important part of the process in the application of restorative justice, particularly diversion. The main source of diversion is the agreement. Diversion can occur at any level of examination in the Juvenile Criminal Justice System, from the stage of investigation to prosecution to the stage of examination in court.

The investigator can perform diversion during the investigation stage; if diversion is not performed, the investigator will proceed to the public prosecutor. After receiving a delegation of cases from the police, the public prosecutor can decide whether the case will be transferred to the court or a diversion can be applied. After receiving cases from the prosecutor's office, the court will attempt a diversion, and if that fails, the case will be tried formally.

The restorative form implemented at the Banda Aceh Syariah Court is based on the agreement of the parties involved in the diversion process, which must be taken into account as a result of the agreement not being burdensome to the child and can serve as a lesson not to repeat the action.<sup>22</sup>

The results of the diversion agreement can be:

- a. Reconciliation with or without compensation.
- b. Surrendering to parents/guardians;
- c. Participation in education or training at educational institutions or LPKS for 6 (six) months or less than 6 months or more; or
- d. Community service.

The agreement's outcomes are outlined in the diversion agreement. If the diversion process fails to produce an agreement, the juvenile justice process is resumed at each level. After successful diversion, there is a process

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<sup>21</sup> Interview with A. Latif, Registrar of the Syar'iyah Court, Banda Aceh, September 1, 2021.

<sup>22</sup> Interview with Yusri, Judge of the Banda Aceh Syar'iyah Court, August 10, 2021.

of social reintegration in the case under consideration for this study. The child will be entrusted to an institution for guidance during the process (LPKS).<sup>23</sup>

In the coaching process, the child is given training for his or her own self-development. After completing coaching, a positive effect can be seen in the child; for example, the child may regret what he did before and know that what he did was wrong or disgraceful. Then the child will be returned to his parents or family. However, in some cases, there are parents or family members who have not been able to forgive and accept the child's return to their family.

### Restorative Justice for Children of *Ikhtilaḥ* according to Qanun Jināyat

The penal system in Islamic law differs from that of Anglo-Saxon law, which is governed by transcendental rules. The will of the government, parliament, and judiciary comprise the rules. Islamic criminal law is mainly based on the Qur'an and hadith and the judge's discretion. Apart from that, in practice, Islamic Criminal Law is also guided by the opinions of schools, especially the four schools of thought; Hanafi, Maliki, Shafi'i, and Hanbali.<sup>24</sup>

In Islamic law, perpetrators of criminal acts can face criminal charges if they meet the requirements for prohibited acts, do them of their own free will, and are aware of the consequences of their actions.<sup>25</sup> Criminals (*jarīmah*) can face punishment if their actions are held accountable. Every criminal act must contain elements of an unlawful nature; the act can be blamed; and the act committed is a punishable act under the law.<sup>26</sup>

In Islamic criminal law, a criminal is referred to as *'uqubah*, which means punishment or retribution for a crime. According to Abu Zahrah, punishment is torture in exchange for the perpetrator of the crime, and punishment is a *syara'* stipulation in eliminating *mafsadah*, and *mafsadah* itself is a benefit.<sup>27</sup>

According to Islam, the essence of punishment for perpetrators of a *jarīmah* is prevention and retribution (*ar-rad'u wa al-zajru*), improvement, and teaching (*al-islah wa al-tahzib*). The goal is for the perpetrators of *jarīmah* to not repeat their actions. Furthermore, it serves as a deterrent to others from doing the

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<sup>23</sup> Mursyid Djawas and Riska Fajrina, "Efektifitas Lembaga Perlindungan Anak Terlantar: Studi pada Panti Asuhan Suci Hati di Meulaboh, Kabupaten Aceh Barat," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 3, No. 2 (2019).

<sup>24</sup> Heru Susetyo, dkk, *Sistim Pembinaan Narapidana Berdasarkan Prinsip Restorative Justice*, (Jakarta: BPHN, 2013), p. 95.

<sup>25</sup> A Hanafi, *Asas-Asas Hukum Islam* (Jakarta: Bulan Bintang, 1986), p.154.

<sup>26</sup> A. Haliman, *Hukum Pidana Syari'at Islam Menurut Ajaran Ahl al-Sunnah*, (Jakarta: Bulan Bintang, 1991), p. 66.

<sup>27</sup> Muhammad Abu Zahra, *Al-Jarīmah Wa al-'Uqubah fi Fiqh a-Islam*, (Mesir: Dar al-Fikri, 1974), p. 112

same thing. Criminal acts in Islam are classified into three types based on the severity of the punishment: *hudūd*, *qīṣaṣ*, *dīyat*, and *ta'zīr*.<sup>28</sup>

*Hudūd* is an unlawful act in which the types of threats and punishment are determined by the *nas* (text), which is *ḥad* punishment (God's right). According to Ahmad Wardi, *Qīṣaṣ* is imposing a punishment analogous to the preparator's crime.<sup>29</sup> *Qīṣaṣ* can be replaced with *dīyat*, which is financial compensation for killing or injuring people.<sup>30</sup> If the guardian or heir who is killed pardons the killer from *qīṣaṣ*, unintentional killing, or killing that does not have an element of killing, the *dīyat* is required.

*Jarīmah ta'zīr*, or giving lessons, means a *jarīmah* that is threatened with *ta'zīr* punishment, namely punishment other than *had*, *qīṣaṣ* and *dīyat*. *Ta'zīr* contains elements of education, whether decided by a judge or what parents do with children. The *ta'zīr jarīmah* category includes such things as perjury, false witness, breaking promises, betraying the mandate, and blasphemy.

Punishment is divided into four groups: (1) corporal punishment, which includes capital punishment, cutting off hands, whipping, and stoning to death; (2) restricting freedom, which includes imprisonment or sending the convict to exile; (3) paying a fine; and (4) a warning given by the judge.<sup>31</sup>

In Islam, a prison or correctional institution (*Lembaga Pemasyarakatan/LAPAS*) is also classified as *ta'zīr*. *Ta'zīr* is a punishment that is not specifically explained by the text of *syara'* and to determine it, it is given to *waly al-amri* and *qadli*. This is in line with LAPAS, which aims to provide deterrence by coaching convicts so that the prison is said to be *Ta'zir*. However, scholars differ on the legality of imprisonment or LAPAS. Some of the Hambali groups and others are of the opinion that imprisonment/LAPAS has never been required in Islam. The reason was that at the time of the Prophet PBUH and Abu Bakr, there were no prison institutions, and the two of them never put anyone in jail but exiled them somewhere.

The purpose of punishment in Islamic Law includes:

1. Prevention and Deterrent Effect.

Prevention in Islamic criminal law is intended to provide a deterrent effect, not only for perpetrators but also for those who intend to commit crimes.<sup>32</sup>

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<sup>28</sup> Makhrus Munajat, *Dekonstruksi Hukum Pidana Islam*, Yogyakarta: Logung, 2004, p. 44.

<sup>29</sup> Ahmad Wardi Muslich, *Hukum Pidana Islam* (Jakarta: Sinar Grafika, 2005), p. 149.

<sup>30</sup> M. Abdul Mujieb, et.al., *Kamus Istilah Fiqh* (Jakarta: Pustaka Firdaus, 1994), p. 61.

<sup>31</sup> Adurrahman I. Doi, *Tindak Pidana dalam Syari'at Islam*, Diterjemahkan oleh Sulaiman Rasjid, (Jakarta: Rineka Cipta, 1992), p. 16.

<sup>32</sup> Mathew Lipman et. al., *Islamic Criminal Law and Procedure*, (New York: Praeger, 1988), p. 84.

## 2. Rehabilitation and Reform

Known as repentance, this encourages the concept of rehabilitation and reform for convicts. *Ta'zīr* and had punishment are for disciplining, correcting, rehabilitating, reprimanding, preventing, and providing a deterrent effect, the forms of which vary according to the crimes committed.

## 3. Prevent, eliminate revenge, and seek reconciliation with victims or their relatives.<sup>33</sup>

There are many different types of punishment in Islam, each of which serves a different purpose. For example, the death penalty for intentional homicide can deter family vengeance. If, on the other hand, relatives forgive, the offender may face other forms of punishment, such as paying a fine (*dīyat*) as a form of remorse, as well as compensation for the victim's relatives.<sup>34</sup> Punishment for children does not have clear provisions because, according to Islamic law, the child is a trust given by Allah SWT who must be looked after and cared for as well as possible. As a result, when a child commits a crime, the child is not held accountable, and the parents serve as the substitute.

According to Islamic law, children cannot be held criminally responsible for *hudūd*, *qiṣaṣ*, *dīyat*, and *ta'zīr*. In Islam, parents are obligated to educate their children, and if their children become offenders, this indicates that the parents are unable to carry out their obligations.<sup>35</sup> In Islam, the position of children is a "mandate" that must be upheld, and it is the responsibility of their parents to educate and raise their children in accordance with religious guidelines. If with guidance, Islam still makes concessions, such as those hinted at in a hadith, which states a child's "innocence" (*rat al-qalam*) until he reaches puberty (*aqil baliqh*), which is marked by the emergence of "dreams" (*ihtilam*) for men and menstruation for women.<sup>36</sup>

If a child steals or kills, he cannot be subject to any punishment, even Wahbah Zuhaili, explained that the status of the child's actions, in the category of fiqh, is not yet a criminal act (*jināyah*).<sup>37</sup> According to Islamic law, criminal responsibility is based on the power of thought and choice (*irādah* and *ikhtiar*). The position of the child differs according to the difference in the period of his life. The elements of *jarīmah* in Islamic criminal law are: 1. texts that prohibit and threaten the act; 2.

<sup>33</sup> Al-Mawardi, *Fiqh Islam*, Jilid 7, (Jakarta: Gema Insani Press, 2011), p. 271.

<sup>34</sup> Heru Susetyo, *Sistim Pembinaan Narapidana...*, p. 97.

<sup>35</sup> Interview with Marzuki, Aceh Wilayatul Hisbah Investigator, Banda Aceh, 31 August 2021.

<sup>36</sup> Lutfi Assyaukani, *Politik, HAM, dan Isu-isu Teknologi Fikih Kontemporer*, Bandung: Pustaka Hidayah, 1998, p. 164.

<sup>37</sup> Lutfi Assyaukani, *Politik, HAM...*, p. 165.

behavior that forms *jarīmah*; and (3) the fact that the perpetrator is a *mukallaf*.<sup>38</sup> Basically, people who do *jarīmah* are punished, but some of them are not punished because they are drunk, crazy, or not adults yet.<sup>39</sup>

Children, according to Abdul Qadir Audah, are only subject to *ta'dibi*. It is an instructive punishment that has no negative impact on their mental health. Because *ta'dibi* is not considered a crime, a child cannot be considered a recidivist even if they repeat the same act.<sup>40</sup> In Islamic law, there is no normative argument for criminal sanctions against children, let alone imprisonment. The *waliy al- amri* (government) arrangement is used because the criminal sanction for children is *ta'dibi*. A child cannot be punished for committing a jinayah because he or she does not meet the requirements of *ahl al-'uqūbah* (criminal receiver).

Islamic law does not limit disciplinary sanctions to children, and the punishment is determined by the government. Several fiqh experts, however, believe that reprimands and beatings are part of disciplinary sanctions, or *ta'dibi*. *Waliy al-amri* or the government can impose punishments on children based on their location and time in which they are. The punishment can be, for example, criminal reprimands and placing children in prisons or schools. Giving a child a punishment that is disciplined and not punished because he is not yet mature, it can be said that the child does not yet have *taklif* (criminal imposition), so the punishment imposed is only aimed at providing education and prevention so that he does not repeat the crime.

Provisions for the primary criminal sanctions and corrective actions in the 2012 SPPA Law are regulated in Article 71 and Article 38, while Qanun No. 6 of 2014 does not explicitly regulate the sanctions that can be imposed on children who commit *ikhtilat*. In Article 25 paragraph (1) it is stated in general, adults who intentionally commit *jarīmah ikhtilat*, are threatened with '*Uqūbat* lashing a maximum of 30 (thirty) times or a fine of up to 300 (three hundred) grams of pure gold or maximum imprisonment of 30 (thirty) months. Sanctions that can be applied to children who commit *jarīmah* are only mentioned '*uqūbat* at most 1/3 of the '*uqūbat* that has been determined for adults.

Article 67 of Qanun Number 6 of 2016 states:

- (1) If a child who has reached the age of 12 (twelve) years but has not yet reached the age of 18 (eighteen) years or is not yet married commits *jarīmah*, then the child may be subject to '*uqūbat* at most for 1/3 (one third) of the '*uqūbat* who have been determined to be adults and/or returned to their parents/guardians

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<sup>38</sup> Marsum, *Jināyat (HPI)*, (Yogyakarta: Perpustakaan Fakultas Hukum UII 1989), p. 6.

<sup>39</sup> Marsum, *Jināyat (HPI)*....., p. 174.

<sup>40</sup> Abdul Qadir Audah, *Ensiklopedi Hukum Pidana Islam*, (Translated) Jilid II, (Bogor: Kharisma Ilmu, 2008), p. 257.

or placed in a place provided by the Government of Aceh or District/City Government.

- (2) Procedures for implementing *'uqūbat* against children who are not regulated by laws and regulations regarding the juvenile justice system are regulated in a Governor's Regulation.

However, the issuance of Governor Regulation No. 5 of 2018 on the Implementation of the *Jināyat* Procedural Law on the Implementation of Punishments Against Children has been regulated in Articles 38 to 41. In Article 38, it is stated that the forms of punishment against children aged 12 (twelve) to 18 (eighteen) years are: a. whipping; b. confinement; c. prison; d. fine; e. coaching by the state; and/or f. returning to their parents.

The way that Islamic law defines punishment is different from how secular law defines crime. The difference is that the concept of crime in Islamic criminal law is based on shari'a and is part of the Islamic *aqeedah* (creed) that every Muslim must believe in its existence.<sup>41</sup> The concept is based on religious teachings, so all provisions relating to punishment, both as a legal norm and as a principle, are based on the Qur'an or hadith. Therefore, punishment should be a motivation for every Muslim not to commit a crime, not only because of the fear of being punished but also because of the fear of violating religious orders and suffering punishment in the hereafter. To realize the Islamic creed, the punishment must be approached through Islamic principles, because Islam is a religion that brings mercy to all human beings. The punishment offered in Islam brings benefit to every human being, regardless of ethnicity, race, nation, or religion. This can be seen from the objectives of punishment outlined in Islamic criminal law.

Wilayah Hisbah or the police have handled children who committed *jarīmah ikhtilaf* in Aceh from 2019 to 2021, and there were 8 cases, all of which were solved through diversion. Settlement by diversion at the Wilayah Hisbah level was 1 case; at the regional police level, 6 cases; and at the prosecutor's level, 1 case. There is no process for settlement of children who commit *jarīmah ikhtilaf* until they are submitted to the Syar'iyah Court or the District Court.<sup>42</sup> In the implementation of this diversion, almost all cases of *jarīmah ikhtilaf* committed by children were resolved by diversion at the regional police level. This is because the *Wilayah Hisbah* does not yet have a special investigator to handle child cases.<sup>43</sup> To become an investigator in child cases, one must comply with the 2012 SPPA Law, and the Wilayah Hisbah must meet the requirements as stated in

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<sup>41</sup>Interview with Marzuki, Aceh Wilayah Hisbah Investigator, August 31, 2021.

<sup>42</sup> Interview with Elfiana, Head of PPA Aceh Regional Police, Banda Aceh, August 6, 2021.

<sup>43</sup> Interview with Marzuki, Aceh Wilayah Hisbah Investigator, August 31, 2021.

Article 44 of Aceh Governor Regulation No. 05 of 2018 on the Implementation of Jināyat Procedural Law.

Due to the lack of special child investigators, the Wilayatul Hisbah works in collaboration with the Regional Police and Correctional Centers to handle the diversion settlement of children who commit *jarīmah ikhtilaṭ*. If a child commits *jarīmah ikhtilaṭ*, the *Wilayatul Hisbah* will refer the case to the Regional Police PPA Unit for resolution through diversion. In resolving cases of children who commit *jarīmah ikhtilaṭ*, investigators from the PPA Unit collaborate with the Correctional Center to obtain recommendations based on the findings of community research.

The fundamental considerations of restorative justice investigators are based on recommendations from community research from community centers, which is conducted in relation to the child's life, child background, parents, education, and others. Diversion is carried out if the child is between the ages of 12 and 18, the act committed by the child is not punishable by a maximum prison sentence of seven years, and the child is not a recidivist (first offender).<sup>44</sup> According to the study, the following factors are considered before choosing diversion: a) The nature and condition of the act; the first consideration for diversion is the seriousness of the action.<sup>45</sup> b) The degree of involvement of a child also play a huge role in considering diversion for him;<sup>46</sup>

The reaction of the child's parents and/or family to the action. Parental and family support is critical for successful diversion. If the family tries to cover up the child's actions, it will be difficult to implement an effective diversion plan. If a child has previously violated the law and received a sanction but has not responded positively, diversion is not an option, unless the previous violation was minor or occurred for an extended period of time. If it is in the public interest, the legal process needs to be applied.<sup>47</sup>

The process of diversion must regard:

- a. Interests of the victim.
- b. Child welfare and responsibility;
- c. Negative stigma avoidance;
- d. Avoidance of retaliation;
- e. Community harmony; and
- f. Propriety, decency, and public order.

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<sup>44</sup> Interview with Imil, Aceh Regional Police PPA Unit, Banda Aceh, August 6, 2021.

<sup>45</sup> Interview with Rullyanto, Correctional Center, Banda Aceh, August 7, 2021. Interview with Firmansyah, Social Service, Banda Aceh, 7 August 2021.

<sup>46</sup> Interview with Syukurniwati, Wilayatul Hisbah, Banda Aceh, August 5, 2021.

<sup>47</sup> Interview with Imil, Aceh Regional Police PPA Unit, Banda Aceh, August 6, 2021. Interview with Rullyanto, Correctional Center, Banda Aceh, August 7, 2021.

In the restorative process, investigators, public prosecutors, and judges must consider the type of crime, the age of the child, the results of social research from the correctional center, and support from the family and community environment.

For children who commit *jarīmah ikhtilaf* which are resolved through restorative, the punishment applied is placement in Social Welfare Development Institutions in 2 cases with a treatment period of 6 and 4 months, placed in social rehabilitation locations for children who need special protection 3 cases, community service 1 (one) case, mentoring at the Al-Jihad Gampong Jeulingke Mosque (Banda Aceh) 1 (one) case for 6 months for memorizing Al-Qur'an, community service 1 (one) case and one case returned to parents. Likewise, 8 cases were resolved by diversion at the Aceh Police as many as 6 cases, 1 case at the Pidie District Attorney, and 1 case resolved at the Satpol PP/WH Office.<sup>48</sup>

The implementation of restorative justice for children as perpetrators of criminal crimes, as explained in the 2014 Qanun Jināyat, demonstrates that the sanctions imposed are educational and guidance. Because Islamic criminal law brings benefit to every human being, and moreover, the perpetrators are children who are not yet mature. One of the proofs of this can be seen in the objectives of punishment that have been outlined in Islamic criminal law, which are to provide a deterrent effect and convey educational value to the offender.

## Conclusion

Handling children as criminal offenders through restorative justice, particularly on *jarīmah ikhtilaf*, is based on taking into account the nature and conditions of minor and moderate acts, the background of the offense, the child's attitude toward the action, the reaction of the child's parents and/or family, and suggestions made to make improvements or apologize to those who feel aggrieved. The goal of restorative justice is to keep children out of the judicial system so that children who violate the law are not stigmatized. This can have a positive impact on children's physical and psychological development and growth, as well as their social interactions in their environment. *Wilayatul Hisbah* does not yet have a special investigator for children, but in dealing with children who commit *ikhtilaf*, they have worked with the Aceh Regional Police to conduct investigations, which will then be resolved through restorative justice. Reconciliation with or without compensation; surrendered to parents or guardians; participation in education or training at educational institutions or LPKS for 6 (six) months; community services; treatment in children's social

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<sup>48</sup>Interview with Elfiana, Head of the Aceh Regional Police PPA Unit, Banda Aceh, August 6, 2021. Interview with Imil, Aceh Regional Police PPA Unit, Banda Aceh, August 6, 2021.



rehabilitation institutions; and coaching at mosques in which the children memorize the Al-Qur'an are some of the forms of implementation as a result of restorative justice agreements. This study also highlights that restorative justice for children as *ikhtilaf* perpetrators demonstrates that the law provides a fair and dignified space and prioritizes the interests of children as its main orientation. As a result, the sanctions imposed are also educational and do not intend to harm children and promoted a sense of justice. Similarly, with the existence of the Qanun Jināyat, which contains criminal crimes, this legal rule complements the SPPA Law, because it is stated in the Qanun Jināyat that specifically for children under the age of 18, the mechanism refers to this national law.

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