

AUTHORITY CONFLICT OF THE COURTS IN ACEH: A CASE STUDY OF SETTLEMENT FOR CHILDREN SECLUSION IN CHILDREN PROTECTION

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Abstract

This study aims to discuss about Shari'a Courts, Adat Courts and The Juvenile Criminal Courts authority. And also to discuss about the concept of legal certainty, child protections and conflict jurisdiction of the courts cases involving Khalwat Moslem children in Aceh. These study adopted two approaches, namely normative and empirical approaches. The results showed that, all courts have jurisdiction to try cases of Khalwat Moslem children in Aceh. Therefore, there is legal uncertainty and conflict of jurisdiction courts. At the same time, resulting in the protection of the child is not fully guaranteed.

Keywords : cases of khalwat children, child protection, conflict jurisdiction of courts, legal certainty

Abstrak

Kajian ini bertujuan membahas kewenangan Mahkamah Syar'iyah, Pengadilan Adat dan Pengadilan Pidana Anak. Kajian juga bertujuan membahas konsep kepastian hukum, perlindungan anak dan konflik kewenangan pengadilan dalam menyelesaikan kasus khalwat yang melibatkan anak beragama Islam di Aceh. Kajian ini menggunakan dua pendekatan, yaitu pendekatan yuridis normatif dan empiris. Hasil kajian menunjukkan bahwa, ketiga-tiga pengadilan mempunyai kewenangan menyelesaikan kasus khalwat anak beragama Islam di Aceh. Karena itu, terjadi ketidakpastian hukum dan konflik kewenangan pengadilan. Pada masa yang sama mengakibatkan perlindungan kepada anak tidak terjamin sepenuhnya.

Kata kunci: kepastian hukum, khalwat anak, konflik kewenangan pengadilan, perlindungan anak

Preface

In terminology, seclusion is an act committed by two or more people of the opposite sex with no bond of marriage which legal or not *muhrim*, where the act is done in a quiet place that allows certain immoral acts of sexual occur or likely to occur adultery.¹ Article 1 paragraph (20) Qanun (Regulation) Aceh No. 14 of 2003 on Seclusion, define a seclusion is an act happen in quiet place between two *mukallaf* people or more of the opposite sex and not mahram or without marriage. Both of these definitions emphasize the qualifications a person

who can be expressed as the perpetrator seclusion. The qualification is the form of fulfillment elements such as: the act was committed by a man with a woman or more; the perpetrator is not a *muhrim*; committed in a quiet place; and the perpetrator does not have a legal marriage bond. Aceh Qanun No. 14 of 2003 adds one more element, the perpetrator is a 'mukallaf (has entered a phase of legal age)'.²

Mukallaf word in terms of Islamic law refers to the minimum age limit to someone who can be asked Islamic legal responsibility.² Referring to the view of Imam Shafi'i quoted by Ahmad Izuddin mention that, the age of legal age (mukallaf) someone either male or female is when it has been up to the age of 15 years

¹ Anita Abdul Rahim, Adibah Abdul Rahim, dan Nazura Abdul Manap, "Hukuman bagi Kesalahan Seksual di bawah Enakmen (Perda) Jenayah Syariat Negeri Sembilan, 1992: Keperluan kepada Hukuman yang Lebih Berat", *Jurnal Undang-Undang dan Masyarakat*, Vol. 16 2013 Edition, Bangi-Malaysia: Universiti Kebangsaan Malaysia, page 30.

² A. Jazuli, 1996, *Fiqh Jinayat*, Jakarta: Raja Grafindo Persada, page 3.

old.³ However, the Children Protection Act, the age of 15 is still classed as the age of the children. Article 1 point 1 of Law No. 35 of 2014 on the Amendment of Law No. 23 of 2002 on the Children Protection define children is "someone under 18 (eighteen) years old, including the unborn children". Reality in Aceh, seclusion case is including seclusion committed by children (children seclusion) who are Muslims can be trial on three types of courts, namely the Sya-r'iyah Court, Custom Court and Children Criminal Court whose authority is based on the laws and each regulations.

The children position as perpetrators of seclusion in Aceh is a dilemma given that there are three types of courts can prosecute them. This fact allows seclusion children perpetrators do not get legal uncertainty when there are certain people who return filed cases that have been settled in a court to a different court. From the other side will make the children do not get the protection as guaranteed by Article 28 B paragraph (2) of the Constitution of 1945 the results of the second amendment stated "every children has the right to live, grow, and develop as well as deserve to get protection from violence and discrimination".

Based on the above problems can be formulated as follows: *first*, to what extent a person's age limit that can be classified as a Children; *second*, which are the competent court to administer the case of children seclusion in Aceh, and how the legal certainty; and *third*, what aspects of legal protection against perpetrators of children seclusion in facing the court in Aceh?

Discussion

Definition of Children Age Limitation

In general, what is meant by a children is a male or a female who has not adult.⁴ Layyin Mahfiana interpret the children is a normal human condition who are still young and are de-

termining its identity as well, very unstable soul so very susceptible to environmental influences.⁵ In the study of law, although the age of the children has to do with maturity, will remain closely associated with the children's age when someone will be able to take legal action.

In the terminology of the law, the penalty for adults is different from the penalty imposed on children. The penalty for an adult is in the form of legal sanction to provide a deterrent effect, while more children are sentenced to the protection, prevention and development.⁶ Thus, if there is a child who committed the crime, then the State was obliged to give them the action and treatment specially. Therefore, it is important to know the minimum and maximum age restriction for someone who can be classed as the age of the children. So if someone is facing the law no one trial or to which court is the person would be tried.

According to the Code of Civil Law (KUH-Pdt), the children age limit can be determined by the person's age marriage. A man can be into marriage if he 18-years-old fully, whereas for a woman 15-years-old fully. This means, aged men and women who can be classed as a children is different where a man is still classed as a children if he has not reached 18 years old, while women before reached 15 years old. Conditions of marriage age in civil law only applies to non-Muslims. As for the Muslims, they are submissive to the Islamic marriage law, Law No. 1 of 1974 on Marriage. Article 7 paragraph (1) Marriage Law states that "marriage is only allowed when the man reaches the age of 19 (nineteen) and the woman has reached the age of 16 (sixteen)". Compared with the age of the children set out in KUHPdt, the provision of children age limit in the law of marriage is higher, reaching 19 years old for men and 16 years old for women. Definition of the children

³ Ahmad Izuddin, "Problematika Implementasi Hukum Islam di Indonesia; Studi Kasus Pernikahan Pujiono dan Luthfiana Ulfa", *De Jure, Jurnal Syariat dan Hukum*, Vol.1 No. 2 2009 Edition, Malang: Universitas Islam Negeri Malang, page 5.

⁴ Syaik Shalih bin Fauzan al-Fauzan, 2005, *Ringkasan Fikih Lengkap*, (Asmuni, Penerj.), Jakarta: Darul Falah, page 27.

⁵ Layyin Mahfiana, "Perlindungan Hukum Terhadap Tersangka Anak Sebagai Upaya Melindungi Hak Anak", *Jurnal Muwâzâh*, Vol. 3 No. 1 July 2011 Edition, Pekalongan: Sekolah Tinggi Agama Islam Negeri, page 387.

⁶ *Optional Protocol To The Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution And Child Pornography*, United Nation, 2000 which ratified by Law No. 10 of 2012.

age limit is also found in the Code of Criminal Law (KUHPid). Article 45 KUHPid states, the definition of children are those who have not yet reached maturity, or not yet 16 years old. KUHPid not distinguish whether someone's age-sex male or female as KUHPid and Law No. 1 of 1974 above. Children age limit in the definition above does not show clearly limits the minimum age of a children.

This situation also applies to the definition of the children under customary law. In fact, the provisions of the maximum age limit of the children under customary law is blurred. Because there is no clear provision the minimum and maximum age limits of someone is still classed as a children or not. Children age limit in customary law is only determined by the characteristics inherent in the children. Soepomo⁷ says traits of a person age limit is still classed as children under customary law is characterized by traits of maturity, which are: *first*, can work alone; *second*, being able to do what is required in social life responsibly; and *third*, can take care of their own wealth.

Law No. 35 of 2014 on the Amendment of Law No. 23 of 2002 on Children Protection gives a clearer definition of a person age limit can still be referred to as children. Article 1, point 1 of Law No. 35 of 2014 on the Amendment of Law No. 23 of 2002 on Children Protection states, "child is a person under 18 (eighteen), including the unborn children." So, children are not only seen from the upper limit or before adulthood, but also children protection laws more clearly confirms that the children in the womb is also a child who needs to be protected.

In Juvenile Justice System, Law No. 11 of 2012 on the Criminal Children Justice System, Article 1 paragraph (3) states that, the definition of children are those aged between 12 years old to not reach the age of 18 years old. Minimum and maximum age limits which stated in this law very connected with the criminal justice process in which children between the ages

of 12 to 18 years old, a child has been able to be held accountable legally retort. Although treatment to them should be special and different from the treatment to adults.

The Authority of Syar'iyah Judicial Supreme Judging Children Seclusion

Since Law No. 44 of 1999 on the Special Status of the Aceh Province and subsequently amended by Law No. 18 of 2001 on Special Autonomy for Special Region of Aceh as Nanggroe Aceh Darussalam, Aceh's religious court is changed its name to the Syar'iyah Supreme with greater authority. In addition to the authority to administer the case of kinship as the inherent authority of the Religious Courts in Indonesia, Aceh Syar'iyah Supreme also given the authority to prosecute criminal cases (*jinayat*)⁸ specifically for Muslims in Aceh.⁹ A legal product that more specialized about Syar'iyah Supreme in Aceh is managed in Qanun (Regulation), the Qanun No. 10 of 2002 on Islamic Sharia Courts. Since then, Syar'iyah Supreme in Aceh begin to administer the Islamic criminal case. There are four criminal cases under the authority of the Syar'iyah Supreme, namely: the authority which managed in Aceh Qanun No. 11 of 2002 on the Islamic Sharia Implementation of Aqidah, Worship and syi'ar Islam; Aceh Qanun No. 12 of 2003 on Khamar (Liquor); Aceh Qanun No. 13 of 2003 on Maisir (Gambling), and Aceh Qanun No. 14 of 2003 on Seclusion (*sordid*).

Recent developments, the fourth Qanun has actually been incorporated in the new Qanun and Qanun Jinayat passed in 2014. This, as the mandate of Law No. 11 of 2006 on the Governing of Aceh. In fact, for the people of Aceh Law No. 11 of 2006 is a *lex specialis*

⁷ R. Soepomo in Andy Lesmana, *Definisi Anak*, available on <http://edukasi.kompasiana.com/2012/05/15/definisi-anak-463129.html>, retrieved on 12th August 2012.

⁸ Article 2 keputusan Mahkamah Agung Nomor KMA/070/SK/X/2004 on Devolving Some Judicial Authority from General Court to Syar'iyah Supreme at Nanggroe Aceh Darussalam Province, which states: "devolve some authority and General Court at Nanggroe Aceh Darussalam Province to Syar'iyah Supreme at Nanggroe Aceh Darussalam Province Jinayah cases for law subject which Muslims in the cases which set up in Qanun Nanggroe Aceh Darussalam Province".

⁹ Syamsul Bahri, "Pelaksanaan Syari'at Islam di Aceh sebagai Bagian Wilayah Negara Kesatuan Republik Indonesia (NKRI)", *Jurnal Dinamika Hukum*, Vol. 12 No. 2 May 2012 Edition, Purwokerto: Fakultas Hukum Universitas Jenderal Soedirman, page 363.

should be derivatives mandate regulation the law is no longer debated nationally. Unfortunately, the implementation of Qanun Jinayat is delayed because beside the rules has many shortcomings,¹⁰ other constraints are having to wait for the evaluation of the Ministry of the Home Affairs. Thus, the fourth practical qanun governing Islamic criminal law previously remain valid and applicable. Children Seclusion case becomes one of the authority of Syar'iyah Supreme terms of the age refers to Article 1 paragraph (20) Qanun (Regulation) Aceh No. 14 of 2003 on Seclusion stating age restrictions that may be imposed penalties ranging since someone was reached mukallaf.

The Authority of the Customary Court Judging Children Seclusion

Although the history of indigenous justice in Indonesia is often argued that legally, but without discouraging the debate, the facts in Aceh shows that the customary courts have recognized through Article 98-99 of Law No. 11 of 2006 on the Governing of Aceh. More specifically, the recognition and authority of customary courts in Aceh Qanun manage in No. 9 of 2008 on the Development of Indigenous and Customs. This proves that the traditional court has to be more formal¹¹ than the traditional institutions in other areas.

Authority of customary courts in resolving the case of seclusion is based on the content of Article 13 (1) Aceh Qanun No. 9 of 2008. The seclusion case which means including the cases of the children according to the age limits who has described in the part of children age limit above. Because of this, there is no reason to castrate the authority of Customary Courts administer seclusion cases, including children seclusion cases.

The Authority of the Children Criminal Court Judging Children Seclusion

If the Supreme Court referred to the devolving some authority case from the General Court to Syar'iyah Supreme, actually authority to administer the Children Seclusion on the Children Criminal Court must be disregarded. But the practice, still found cases of children seclusion also administer by the Children Criminal Court.¹² Although the children protection principles with particular procedure is fulfilled by the court, such as: completion is done behind closed doors to the public (Article 3 (h) of Law No. 11/2012); judges do not wear uniform or formal attributes (Article 22 of Law No. 11/2012); court restorative justice approach (Article 5 (1) of Law No. 11/2012); Solving a diversion (to achieve peace between the victim and the child, the child outside the settlement of litigation, prevent children from the deprivation of liberty, and encourage people to participate) (Article 5 (3) of Act No. 11/2012), the children criminal court in Aceh should refused to administer the case of children seclusion as opposed to the decision of the Supreme Court.

Many courts have the same powers in prosecuting cases can lead to the completion of the children seclusion which influence children seclusion cases do not get legal certainty. This is because, the parties are not satisfied in a court may complain back cases that have been decided by the court to another court.

Concept of Legal Certainty

The concept of legal certainty which is developed by Hans Kelsen¹³ although challenged by Gustav Radbruch still used as a reference in Indonesia. According to Gustav, the rule of law is not the only value that determines the law because in addition to the legal certainty, there are two other principle whichv also im-

¹⁰ Efa Lela Fakhriah Dan Yusrijal, "Kewenangan Mahkamah Syar'iyah Di Aceh Dihubungkan Dengan Sistem Peradilan di Indonesia", *Jurnal Ilmu Hukum*, Vol. 3 No. 2 2013 Edition, Riau: Universitas Riau, page 130.

¹¹ Teuku Muttaqin Mansur, dkk, "Kewenangan Penyelesaian Kasus Khalwat Melalui Peradilan Adat di Aceh", *Jurnal Hukum Respublika*, Vol. 13 No.1 November 2013 Edition, Riau: Universitas Lancang Kuning, page 53.

¹² Ainal Mardhiah, Judge on Children Criminal Court, Banda Aceh, interviewed on 1st September 2012.

¹³ Hans Kelsen, 2005, *Pure Theory of Law*, (Max Knight Pernerj.), Clark, New Jersey, The Law Book Exchange, page 1. Lihat juga Hans Kelsen, "The Basic Norm", *California Law Review*, Vol. 47 No.1 March 1959 Edition, page 109 - 110.

portant, namely purposiveness¹⁴ (benefit) and justice (fairness). The views Gustav by I Nyoman Nurjaya be regarded as a breakthrough law and suitable for use by people of Indonesia are multicultural in which the law can not only be viewed from the aspect of the constitution and laws, but also the need for a legal breakthrough, so that the absence of clear rules will not hinder the community to run the judiciary, including the Indigenous Justice.¹⁵ Judge in creating legal certainty is also characterized by the justice, rule of law and expediency.¹⁶ The above concept has been implemented in Aceh, where in addition to the applicable General Court, also run system Syar'iyah Supreme and Customary Court. Unfortunately, all three of the judicial system has not been set properly, so as an example the case of Muslim children seclusion in Aceh conflict of authority (conflict of jurisdiction) between the justice systems with other judicial systems. In the end, children who in the case by law are not protected properly.

Concept of Children Protection

The concept of children protection has been laid out in Article 28B paragraph (2) the results of the second amendment to the Constitution of 1945 which states that "every children has the right to live, grow, and develop as well as deserve to get protection from violence and discrimination". This concept is then translated into Law No. 23 of 2002 on Children Protection, as amended by Law No. 35 of 2014. Article 1 paragraph 2 of the Law states, "children protection is all activity to ensure and protect the children and rights in order to live, grow, develop and participate optimally in

accordance with human dignity, as well as protection from violence and discrimination." Layyin Mahfiana¹⁷ legal protection of children is not only juridical, but also non-judicial. Juridical protection is basically a legal protection given to children in both the written law and customary law which guarantees the protection of children in accordance with their needs so that they can enjoy their rights properly. While non juridical includes protection in the areas of social, health, and education.

Although in another view, the problem of legal protection for children is not only legal protection in the judicial process, but also includes a very broad spectrum.¹⁸ In this context, Iman Jauhari¹⁹ said, "to position children's rights in a legal system is to depict a fundamental aim of life. To the author's mind, a fundamental aim is to develop humanity in adherence of religious principles. As such, children's rights in a legal perspective, includes the legal aspect of the children's environment", the rights of children in the legal perspective has a universal aspect to the interests of the children. Laying the rights of children in view of the law, giving the impression that the basic purpose of human life is to build human beings who hold fast to the teachings of religion. Thus, the rights of children in view of the law covers the legal aspects within the scope of one's environment.

Therefore, the state must ensure that the children is given the opportunity to express their opinions on any administrative or judicial proceedings affecting the rights of the children, either directly or indirectly.²⁰ Do not be,

¹⁴ According to Stanley, *purposiveness* which intended in here is *it's utility in serving the public benefit*, look Stanley L. Paulson, Lon I. Fuller, "Gustav Radbruch, and the Positivist Theses", *Law and Philosophy*, Vol. 13 No. 3 August 1994 Edition, page 322.

¹⁵ I Nyoman Nurjaya, "State Law In A Multicultural Country Of Indonesia: Toward A Just And Equitable State Law In Legal Anthropology Point Of View", *US-China Law Review*, Vol. 9 2012 Edition, page 21.

¹⁶ Fence M Wantu, "Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata", *Jurnal Dinamika Hukum*, Vol. 12 No. 3 September 2012 Edition, Purwokerto: Fakultas Hukum Universitas Jenderal Soedirman, page 480.

¹⁷ Layyin Mahfiana, "Perlindungan Hukum Terhadap Tersangka Anak Sebagai Upaya Melindungi Hak Anak", *Jurnal Muwâzâh*, Vol. 3 No. 1 July 2011 Edition, Pekanbaru: Sekolah Tinggi Agama Islam Negeri, page 386.

¹⁸ Lukman Hakim Nainggolan "Masalah Perlindungan Hukum terhadap Anak", *Jurnal Equality*, Vol. 10 No. 2 August 2005 Edition, Medan: Fakultas Hukum Universitas Sumatera Utara, page 90.

¹⁹ Iman Jauhari, "A Comparison of Child Protection Law between Indonesia and Malaysia", *Journal of Law, Policy and Globalization*, Vol. 27 2014 Edition, page 91.

²⁰ Iman Jauhari, "Perbandingan Sistem Hukum Perlindungan Anak antara Indonesia dan Malaysia", *Asy-Syar'ah, Jurnal Ilmu Syari'ah dan Hukum*, Vol. 47 No. 2 Desember 2013 Edition, Yogyakarta: Universitas Islam Negeri Sunan Kalijaga, page 633.

rights conflict with the law precisely neglected and inhuman treatment by certain parties who sometimes used to seek its own, without caring that his actions had violated the rights of children.²¹ Here vital functioning of children protection, even if he is the perpetrator of seclusion, but he's rights when faced with all kinds of courts needs to be guaranteed and fulfilled as also guaranteed by the Constitution and laws protecting children.

Authority Conflict on Children Court in Aceh

Judicial practice in Aceh that allow you to complete children seclusion in three cases the court may give rise to conflicts of authority and legal uncertainty for the justice seeker. Although legal certainty written legislation sometimes also inconsistent with the ideals of harmonizing the life of the community.²² If such conflicts, especially in the formal court found dissatisfaction and disappointment society and justice seekers of judicial performance that are considered objective, less maintain integrity, and even less professional.²³ Obviously adding the noise of the justice seekers in getting justice.

The study found that in Aceh, a child offender may be tried in court seclusion, is dependent upon the party who first conduct an investigation. When the investigation was initially conducted by the police Shari'a (Wilayah Hisbah), then the children seclusion confirmed case will be tried in the Syar'iyah Supreme.²⁴ If the initial investigation conducted by the village communities/indigenous functionaries, then the case will be resolved in the Customary

Courts.²⁵ Similarly, if the police are investigating the beginning, then the case will be forwarded to the Children Criminal Court.²⁶ However, there are also cases of children seclusion after being investigated by the police handed over to the police law,²⁷ or handed over to communities/indigenous functionaries.²⁸ Conversely, there are also cases that were originally captured by the community/indigenous fungsionari, then taken to the police, or police law. And there is also a case that was originally investigated by the police law, then handed over to the police. Thus, the practice of settlement of children seclusion in Aceh will be tried in court where, really depends who is doing the investigation. This uncertainty can make the actors concerned, is there after the decision of one court, he will be sued back to the same case to another investigator? This situation can make a child in conflict with the law are duly receive protection and special handling, such as in the balls back and forth. They also will face court repeatedly. In the end, will make the children depressed and not protected properly according to law. In fact, the situation may lead to the perpetrators do not feel comfortable throughout the case was not enforceable (inkrah), although in reality the others he had to get out of one of the court's decision.

Closing

Conclusion

From the above it can be concluded that, Syar'iyah Supreme and Customary Court has the authority to settle the case Muslim children seclusion. While the Children Criminal Court despite some Supreme Court decision letter No. KMA/070/SK/X/2004 on Delegation of Authority

²¹ Absori, "Perlindungan Hukum Hak-Hak Anak dan Implementasinya di Indonesia pada Era Otonomi Daerah", *Jurnal Jurisprudence*, Vol. 2 No. 1 March 2005 Edition, Surakarta: Program Magister Ilmu Hukum Universitas Muhammadiyah, page 80.

²² Yanis Maladi, "Eksistensi Hukum Adat dalam Konstitusi Negara Pasca Amandemen", *Mimbar Hukum*, Vol. 22 No. 3 October 2010 Edition, page 460.

²³ Bambang Sutiyo, "Mencari Format Ideal Keadilan Putusan dalam Peradilan", *Jurnal Hukum*, Vol. 17 No. 2 April 2010 Edisi, Yogyakarta: Universitas Islam Indonesia, page 219.

²⁴ Oesin Mohd Muhsin, Judge in Syar'iyah Supreme Banda Aceh, Banda Aceh, interviewed on 16th February 2013.

²⁵ Fakruddin, Keuchik (Kepala Desa) Lueng Bata, Banda Aceh, interviewed on 13th July 2012.

²⁶ Ainal Mardiah, Judge in Children Criminal Court, Banda Aceh, interviewed on 1st September 2012.

²⁷ Evendi, Penyidik, Polisi Syariat (Wilayah Hisbah) Banda Aceh, Banda Aceh, interviewed on 17th February 2013.

²⁸ Teuku Muttaqin Mansur, "Penyelesaian Kasus Mesum Melalui Pengadilan Adat Gampong di Aceh", *Media Syariat, Jurnal Hukum Islam dan Pranata Sosial*, Vol. 14 No.1 January - June 2012 Edition, Banda Aceh: Fakultas Syariat Universitas Islam Negeri Ar-Raniry, page 310.

majority of the Court of General Jurisdiction Syar'iyah in Aceh Province, in practice also still hear the case Muslim children seclusion. Authority of the third court has resulted in legal uncertainty for actors seclusion, when they would get a *inkrah* court decision. On the other hand, the circumstances is causing the children who involved are not fully guaranteed by law. In addition, uncertainty limits the authority granted by law to the respective court, also has caused conflict judicial authority in resolving the case of seclusion children in Aceh.

Because of this, it is recommended to the interested parties in order to make changes to laws and regulations relating to the authority of the court to resolve the case seclusion Muslim children in Aceh. And ensure the authority of the court and the others are not mutually contradictory. Thus, children in conflict with the law are guaranteed better protection.

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