

## **Application of Punishment Criminal Offender Mahram Child Rape on Qanun Jinayat**

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### **Abstract:**

**Introduction:** This research is motivated by problems that arise related to the decision of judges in the first-level Syar'iyah Court in Aceh, especially in Aceh Besar and Aceh Barat districts, which have given minimal sentences to jarimah perpetrators or perpetrators of rape of mahram (biological children) children, namely with a sentence 150 months in prison for cases that occurred in Aceh Besar and 160 months in prison for cases that occurred in Aceh Barat. This is not in accordance with the principles in Islamic law, namely the principle of MaqasidSyari'ah in the level of necessity, namely the protection of heredity (*hifz-un-nasli*) and protection of honor (*hifz-ul-irdi*) and the Law on Child Protection. In the qanunjinayat Aceh regulates the penalty of mahram rape mahram with ta'zir punishment of 150 to 200 months in prison and / or can be sentenced to flogging or a fine, whereas in the Child Protection Act the penalty is 15 years and added a third if the parent is even parents already castrated castration and death sentence. By subjecting the minimum sentence, the sentence cannot be considered relevant to the criminal act or the mahat committed, because the rape of the mahram is a criminal act or the mahat which is heavier than the type of mahat or other sexuality crime.

**Research Method:** This study aims to determine how the punishment is more in accordance with the principles of MaqasidSyari'ah regarding criminal acts or rape by roman biological father (*mahram*) in the Aceh qanunjinayat number 6 of 2014. Types of juridical normative research using the legal approach method used to analyze the decisions of judges and other laws and regulations that are still related to the punishment of the perpetrators of the mahram rapists of children of mahram, the case approach is used because the judges' decisions impose very low sentences and do not comply with the principles of Maqasid Syari'ah, a comparative approach is used to compare laws others outside the Aceh qanun that are relevant to the problem. Primary and secondary legal materials. Data analysis techniques use grammatical interpretation, also using legal arguments.

**Discussion:** Based on this research, it can be concluded that the decision of the judge of the Syar'iyah Court of Jhanto Aceh Besar with a sentence of 150 months in prison, and the decision of the judge of the Syar'iyah Court of Meulaboh, Aceh Barat with a sentence of 160 months of imprisonment concerning the rape of the mahram rape of a mahram child is not in accordance with the MaqasidSyari'ah principles and is unable to provide mashlahat in the form of justice against child victims of biological father rape.

**Conclusion:** Based on this research it can be concluded that the Qanun Jinayat Aceh has not fulfilled the principles of Islamic maqasid, therefore it has implications for not being protected or achieving the justice expected by the victims in this case children. This is evidenced by the large number of cases of the same verdict by judges in the District Court in the Law Territory of Aceh Province. therefore to overcome this must begin from the revision of Qanun Jinayat so that the punishment of the perpetrators of rape of mahram children is even more severe because the pelakt is the child's father.

**Keywords:** Rape, Jarimah, Mahram, Ta'zir, MaqasidSyariah.

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### **I. INTRODUCTION**

Aceh is the only province that has been given the privilege to carry out Islamic Syari'ah in full or comprehensive in Aceh. Apart from that, other special powers were given to run their own forms of government. For this reason 'Umara together with' ulama have made, formulated and ratified several laws and regulations or in Aceh called Qanun.<sup>1</sup> One of the legislation or qanun that has been made is qanun number 6 of 2014 concerning jinayat law, which discusses ten types of tuesa or criminal acts. So in this paper we will discuss one of the ten Jarimah, the rape fingers, which will focus on article 49 regarding the rape of mahram children.

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<sup>1</sup>Qanun number 6 of 2014 concerning jinayat law, page 2.

Mahram, according to IbnAthirRahimahullah, said that it is forbidden to marry a relative such as a father, son, brother, uncle or others who still have mahram ties. Then also Muhammad KhasyadRahimahullah mentioned an unlawful person to marry on the basis of a bond because of marriage, nasab, dairy or other reasons. And Sheikh Shaleh Al-FauzanRahimahullah said all people who are illegitimate are married forever because of nasab reasons such as fathers, children and brothers or from other causes of marriage such as siblings, fathers or step children. Thus, the definition of mahram as a whole is a prohibition or award relating to the law such as marriage, safar, limitation aurat seta law shaking hands and others.<sup>2</sup>

Rape itself has defined its meaning in the qanunjinayat, namely sexual intercourse against the faraj or anus of a person or other person as a victim with the perpetrator's balls or other objects used by the perpetrator or against the victim's pharaoh or the victim's mouth by mouth or against the mouth of the victim with the penis of the perpetrator by violence or coercion or coercion threats to victims. While in the meaning of language, rape (rape) comes from the Latin rapare which means to steal, force, seize, or take away. Then according to the Big Indonesian Dictionary, rape means, "subjugating with violence, coercing with violence, intimidating, and groping". Rape means "the process, method, act of raping, violating with violence, provoking, violating with violence". It shows that the main element inherent in rape is violence in relation to sexual relations committed by violating the law.<sup>3</sup>

In ordinary rape or rape by men against adult women who are not mahram is found in article 48 qanunjinayat imprisonment ranging from 125 to 175 months in prison. The form of punishment in the qanunjinayat is not only imprisonment, but depends on the judge deciding whether the convicted person will be sentenced to prison or a fine or caning. Article 49 concerning rape of a mahram child has stated that every person who intentionally commits Jarimah Rape of a person who has a Mahram relationship with him, is threatened with 'UqubatTa'zir whip at least 150 (one hundred fifty) times, at most 200 (two hundred) times or a fine of at least 1,500 (one thousand five hundred) grams of pure gold, a maximum of 2,000 (two thousand) grams of pure gold or a maximum of 150 (one hundred fifty) months in prison, a maximum of 200 (two hundred) months.

The penalty for rape rahmah is to be classified into tajmahta'zir instead of the punishment of adultery as adultery has been mentioned in the Qur'anic text as well as many Hadith clearly and in detail by directly mentioning the number of penalties for the perpetrators of zina adultery. As for the rape fingers, it is not mentioned in the two sacred texts how much and how the punishment for the perpetrators of rape, so it is the duty of 'ulama and' umaraberijtihad in determining how much the punishment, therefore the rape jarmah is classified into ta'zir punishment

Ta'zir is a form of mashdar from Arabic which etymologically means to reject and prevent. This word also has the meaning to help or strengthen. This is as in the following word of God which means:

"So that you all believe in Allah and His Messenger, strengthen (religion), raise Him, and glorify Him in the morning and evening". (Surat al-Fath (48): 9) "

The word ta'zir in this verse also means to raise, pay attention, help, and strengthen (the religion of God). Meanwhile, Al-Fayyumi in Al-Misbah Al-Munir said that ta'zir is teaching and is not included in the hadith group. Al-Fayyumi's explanation has led to the definition of ta'zir in Syari'ah because he already mentioned the term had. Likewise with some definitions from Ibrahim Ani, et al., The drafting team of the Al-Mu'jam Al-Wasit dictionary that explains ta'zir is teaching that does not reach the provisions of had shar'i such as teaching someone who berates (other parties) ) but not accusing (someone else commits adultery). In this definition there is a sentence not up to the provisions of the shar'i. this is in accordance with the statement of Al-Fayyumi in the definition above, namely ta'zir is teaching and not included in the hadith group. As such, ta'zir is not included in the category of hudud punishment. However, that does not mean no harsher than hudud, in fact it is very likely a death sentence.<sup>4</sup>

Al-Mawardi in Al-AhkamAl-Sultaniyyah mentions ta'zir is the teaching (of the perpetrators) of sins that are not regulated by hudud. The legal status varies according to the state of sin and the culprit. Ta'zir is the same as hudud from one side, namely as a teaching (to create) well-being and to carry out threats of different types according to the sin (committed). The ta'zir definition proposed by Al-mawardi was quoted by Abu Ya'la. Then Abdullah bin Abdul Muhsin Al-Thariqi in Jarimah Al-Riswah fi Al-Syari'ah Al-Islamiyah defines ta'zir is

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<sup>2</sup>Arisman, Mahram and My Marriage in the Context of Islamic Law (Thematic Studies and Family Law Paragraphs), Faculty of Sharia and Law of Sultan SyarifKasim Riau UIN, Syari'ah Scientific Journal, Volume 17, Number 1, January-June 2018, page 48 .

<sup>3</sup>Ali Abu Bakar, ZulkarnainLubis, Law Jinayat Aceh, Kencana, Jakarta, 2019, p. 105.

<sup>4</sup>M. NurulIrfan, Masyrofah, FiqhJinayah, Amzah, Jakarta, 2018, pp. 136-137.

a legal sanction that must be enforced as the right of God or human rights because of disobedience without sanctions and expiation.<sup>5</sup>

This research leads to a principle in Islamic law that is the principle of Syari'ahmaqasid or the purpose of making a choice, so everything that is made or done by humans must be in accordance with the principles of Syari'ahmaqasid. MaqasidSyari'ahare principles that provide answers to questions about Islamic law. Maqasidsyariah includes the wisdom behind the law, for example improving social welfare as one of the wisdom behind zakat, increasing awareness of the presence of Allah SubhanahuWata'ala. As one of the wisdom behind fasting.Maqasid comes from Arabic (maqasid), which is a plural form of (maqad), which means purpose, target, principle, intention, final destination. Maqasid is an alternative statement for (masalih) or benefits. For example Abd al-Malik al-juwaini was the earliest contributor to the theory of maqasid using the terms al-maqasid and al-masalih al-ammah (public benefit) alternately.

The traditional classification divides maqasid into three levels of necessity, namely necessity or necessity, necessity or pilgrimage, and completeness or tahsiniyat. Daruriat is divided into protection of religion or hifzuddin, protection of body and soul or hifzun-nafsi, protection of property or hifzulmali, protection of reason or hifzul-aqli, and protection of heredity or hifzun-nasl. Some experts suggest that jurisprudence adds protection of respectability or hifzul-irdiin addition to the five inevitability that is very famous above. So in this study aims to find the level of punishment that is more beneficial according to the actions of the perpetrators by using the Maqasid principles above about protecting offspring and honor which rests on the maslahat so that a more appropriate punishment for the perpetrators of mahram rape mahram, because mahram rape is rahmah which is more cruel and inhumane when compared to the adultery Jarimah whose perpetrators commit these acts voluntarily while in the mahwah rape of the mahram child there is an element of coercion, threats, violence, even death threats. Plus that the perpetrators are parents (fathers, grandfathers, uncles and others) and who become victims are (biological children, grandchildren, parents and others) even underage. So it is appropriate to look for penalties that are more in line with the principles in Islam, namely the principle of MaqasidSyari'ah.<sup>6</sup>

## **II. MATERIAL AND METHOD**

This research conducted a comparative study between the concept of the objective of law Syari'ah in Islam which is called MaqasidSyari'ah at one level of necessity, namely "protecting offspring and protecting honor", and compared with the concept of the Law on child protection, by looking at the level of benefit that is will be achieved regarding the punishment of the perpetrators of rape of mahram children that occurred in Aceh, especially in cases that occurred in the Syar'iyahMeulaboh Court and the Syar'iyahJantho Court.

- a. The design of this study uses a comparative study between punishment in the qanunjinayat which uses the principles in Islamic law with the child protection law.
- b. The location of this research is the first-level court-based study of the Syar'iyah Court in Aceh, but will focus on cases that have been resolved at the MeulabohSyar'iyah Court of Aceh Barat District and the Syar'iyahJantho Court of Aceh Besar District.
- c. The sample size was 6 cases
- d. The sample size calculation is estimated to have completed 6 cases each consisting of: Syar'iyahMeolaboh Court 2 cases, Jantho Court 1 case, and Langsa City Court 2 cases, and Tapaktuan Court 1 case, but in this research will focus more on two main cases, those are the cases that have been resolved in the Meulaboh and Jantho Court.The subject and selection method will be carried out by looking at the penalties in the cases that have been completed in each Syar'iyah Court. See how many sentences were sentenced against the perpetrators of these mahram child rapes.

## **III. DISCUSSION**

Mahram rape cases actually have happened in Aceh a lot without denying and covering up, it can indeed be said that the moral crisis for some people in Aceh does need to be highlighted and rebuilt so that there will be no more rape cases, especially in the mahram. There are five cases that the author has confirmed the data and a copy of the verdict from the Syar'iyah Court about the rape of the mahram, in the Aceh Barat district there were twocases, in the Langsadiistrict orcity there were two cases, in Aceh Besar district there was one case, and finally in Banda City Aceh one case. However, in this paper the author only includes two cases, namely cases that have acted in the syar'iyahJantho Aceh Besar court and in the Aceh BaratMeulabohSyar'iyah Court. In both Syar'iyah Court rulings, the same sentence was given to the perpetrators of mahram rape, namely the

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<sup>5</sup> Ibid, p. 137.

<sup>6</sup>JasserAuda, *Grounding Islamic Law through Islamic Maqasid (system approach)*, PT MizanPustaka, Bandung, 2015, pp. 31-33.

Syar'iyahJantho Court with a sentence of 150 months in prison and the Syar'iyahMeulaboh Court with a sentence of 160 months in prison.<sup>7</sup>

The Syar'iyahJantho Court and the MeulabohSyar'iyah Court in West Aceh based on a judge's ruling in the rape of a mahram child, the judge sentenced a very low sentence, the Syar'iyahJantho Court with a 150-month prison sentence (minimum sentence), and the Syar'iyahMeulaboh Court with a sentence of 160 months in prison, the two decisions that have been sentenced are very low and not in accordance with the form of the perpetrators' actions against the victim and also do not meet the elements of justice and the principles of the objectives of Islamic law (MaqashidSyari'ah). Both of these decisions when compared with the results of the Langsa City Court of the Syar'iyah Court with a sentence of 180 months in prison were a little more in agreement between the act and the punishment when viewed from an aspect of justice. The amount of sentences sentenced by the Syar'iyah Meulaboh Court judge is as much as the adult / female rape sentence at the Syar'iyah Court of South Aceh's Footprint, namely with 160 lashes which when converted is equal to 160 months in prison, but what should be is 160 months in prison. for punishment for mahram rape offenders is more severe, because in the janayat qanun has differentiated the article on rape of adults namely Article 48 while rape against mahram is in Article 49 qanun number 6 of 2014 concerning jinayat law, then the number of sentences imposed in these two articles are different, for adult female / female rapists the penalty is 125-175 times caning or imprisonment and for child rapists 150-200 times caning or imprisonment, then why are the articles and sentences distinguished if the judge still punishes the offender (biological father or other mahram) with the same sentence as adult female / female rapists, added even more the punishment should be for the rape of biological children (mahram) to be more severe so that it will show the justice side of the objectives of the law in accordance with Dharuriatul-Khamsah in the Maqashid Syari'ah principle regarding safeguarding offspring, and will also show the justice side of the punishment according to the actions and To whom the crime was committed, then when viewed from the punishment in Decision Number 0004 / JN / 2016 / MS.Ttn, it can be said that for the rapist, adult / female are punished with severe punishment, why for more severe cases namely rapist Mahram children with Decision number 24 / JN / 2018 / MS.Jth sentenced with a lighter sentence or a minimum sentence, the punishment for raping a mahram child should be more severe or could be punished with a maximum sentence or more than the maximum sentence in the qanun jinayat.<sup>8</sup>

When judges that are not appropriate or not ideal are imposed by the judge on the perpetrators, they can show that they are not attained and the inconsistencies of the sentences that are in accordance with the principles in the Maqashid Shariyah in terms of guarding offspring, and even the number of sentences that should not be made in accordance with the qanun should there are also many different sentences between rapists of maharam children (Article 49) and non-mahram child rapists (Article 50), because in the qanun jinayat Article 49 and Article 50 have the same number of sentences of 150-200 months in prison or caning. Then the sentence for Article 49 regarding raping a mahram child should be more severe than Article 50 qanun jinyat because the case is not the same.<sup>9</sup>

#### IV. CONCLUSION

Based on this research it can be concluded that the Qanun Jinayat Aceh has not fulfilled the principles of Islamic maqasid, therefore it has implications for not being protected or achieving the justice expected by the victims in this case children. This is evidenced by the large number of cases of the same verdict by judges in the District Court in the Law Territory of Aceh Province. therefore to overcome this must begin from the revision of Qanun Jinayat so that the punishment of the perpetrators of rape of mahram children is even more severe because the criminal offender is the child's of the father.

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