

# THE CRIMINAL LAW POLITICS AGAINST THE PROTECTION OF RAPE VICTIMS BASED ON QANUN JINAYAH OF ACEH

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**Submission date:** 08-Mar-2021 06:51AM (UTC-0800)

**Submission ID:** 1527426260

**File name:** Perlindungan\_Korban\_Perkosaan\_Berdasarkan\_Hukum\_Jinayah\_Aceh.rtf (275.04K)

**Word count:** 5133

**Character count:** 27540

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**Abstract**

The state owns an obligation to provide protection to every citizen, including protection for victims of crime. The beginning of Qanun Number 6 of 2014 concerning the *Jinayah law* (Islamic Criminal Law) has brought significant breakthrough to the protection of rape or sexual abuse victims. The focus of this writing is to investigate the criminal law politics towards the protection of sexual abuse victim according to Qanun Jinayah of Aceh. This study used a normative juridical approach. The research specification was descriptive analytical research. Sources of data were obtained from primary legal materials and secondary legal materials. The data was analyzed qualitatively. Based on the results of the research, the politics of criminal law against the protection of sexual abuse victims according to the Qanun *Jinayah* Aceh consists of two kinds; the first is *ta'zir* sanctions or fines in the form of gold against the perpetrators. The second is the payment of restitution to victims of sexual abuse by the perpetrators, the perpetrator's family, or the third party based on a judge's order to the victim or the victim's family to replace the suffer, pain, loss of certain assets, or compensation for certain actions.

Keywords : Protection, Victim, Qanun Jinayah

## INTRODUCTION

The preamble of 1945 Constitution, paragraph 4, emphasizes, " Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice...". Furthermore, Article 28D (1) stated that: "Everyone has the right for recognition, guarantee, protection, fair legal certainty and equal treatment before the law". Based on the above provisions, the state has an obligation to provide protection to every citizen of its country, including protection for victims of crime.

Legal protection for crime victims is not only a national issue, but also an international issue. Therefore, this issue needs serious attention (Dikdik M. Arief Mansur and Elisatris Gultom, 2007: 23) (Dwiati, Ira, 2007). The protection of crime victims has received serious attention from the international community as the establishment of the Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power by the United Nations (UN), as a result of The Seventh United Nation Congress on the Prevention of Crime and the Treatment of Offenders, which took place in Milan, Italy, September 1985. In one of its recommendations, it stated that: The perpetrator or those responsible for an act against the law must give restitution to the victim, the victim's family or guardian in the form of restitution of property rights or compensation for losses suffered by the victim, the cost loss for negligence that has been committed, which is a stipulation of the law as a form of service and fulfillment of rights.

The basis for legal protection for women victims of violence in Indonesia is contained in Law Number 7 of 1984 concerning the Ratification of CEDAW (Convention On The Elimination Of All Forms Of Discrimination Against Women) which stated that all citizens has equal position in law and government, so that all forms of discrimination against women must be eliminated because they are not in accordance with Pancasila and 1945 Constitution. The protection of victims can be seen in the preamble to Law Number 13 of 2006 concerning Protection of Witnesses and Victims which stated: protection for witnesses and victims whose existence is very important in the criminal justice process.

Victim protection is explicitly regulated by Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHP), in the form of compensation. However, the compensation is intended for the suspect, the defendant or the convict because of an error in the arrest. Meanwhile, the regulation of compensation in general is regulated in articles 98 to 101 by way of merging a lawsuit for compensation. However, it is rarely used, even combining a claim for compensation in a criminal case of sexual abuse is very complicated and takes a long time because it has to combine criminal and civil cases. The Criminal Code (KUHP) deals more with suspects than on victims. It seems that the position of the victim in the Criminal Code is not optimal compared to the position of the perpetrator. (Marlina, Azmiati Zulia, 2015: 61). (Rahmi, A., 2019: 149) (Maysarah, A, 2019: 59).

Protection of crime victims in Indonesia is still general in nature, not specifically determined for victims of rape. In the practice of implementing criminal law, victims are positioned as witnesses to victims and sometimes ignore the position of victims as seekers of justice. In the trial process, the victim is represented by law enforcers (Sudarto, 1986: 184). (Rahmi, Atikah, 2019: 140). This reality showed that the current legal provisions regarding the protection of rape victims are not in accordance with the preamble of 1945 Constitution, paragraph 4. However, the forming of Qanun Number 6 of 2014 concerning Hukum Jinayah in Aceh Province has brought significant changes to the protection of rape/sexual abuse victims. The forming of the Qanun Jinayah in Aceh is a step forward towards the protection of victims of rape because the Qanun specifically regulates the protection of the rights of victims of rape. Qanun Jinayah of Aceh has made a new breakthrough, while the National legislation related to compensation for victims of criminal acts, especially rape, has not been clearly regulated, either in the form of restitution or compensation. (Nairazi AZ and Aidil Fan, 2020: 83) (TANIA, AZZAHRA, 2020).

If we looked behind, the forming of Qanun Number 6 of 2014 concerning Hukum Jinayah is a form of criminal policy in Indonesia as a strategy of accommodating the legal needs of Moslems in Aceh which are in accordance with their beliefs; Islamic Sharia. (Muhammad Nur, 2018: 22) (Ulya, Zaki, 2016: 135) (Ikhwan, M., and Muhammad Heikal Daudy, 2019: 180). The term criminal policy comes from the word criminal law policy or criminal law politics. The politics of criminal law in foreign literature is known by several terms; penal policy, criminal policy, criminal law policy or strafrechts politiek, while in Indonesia it is called criminal law policy or criminal law politics (Muladi and Barda Nawawi

Arief, 1996: 24). The politics of criminal law is an effort to determine which direction the implementation of Indonesian criminal law will be in the future by looking at its current enforcement (Mahmud Mulyadi and Feri Antoni Surbakti, 2010: 77) (Irawati, 2019). (Rosman, Edi, Aidil Alfin, and Bustamar, 2019: 15).

Based on the description above, the protection of rape/sexual abuse victims is very important since it is clearly stated in paragraph 4 in the preamble of 1945 Constitution. The focus of this writing is to determine the role of criminal law politics for the protection of rape victims according to Qanun Jinayah of Aceh

## RESEARCH METHOD

This study conducted by using normative juridical method, which is research conducted by examining library materials or secondary data. The research specification in this paper was descriptive analytical research. Descriptive research was implemented to show the comparison or relationship of a set of data with another set of data, and its purpose is to provide an overview, a study, and an explanation. Sources of data in normative legal research was data in the form of primary sources of legal materials and sources of secondary legal materials (Peter Mahmud Marzuki, 2005: 141). (Benuf, Kornelius, and Muhamad Azhar, 2020: 20).

Primary legal materials were legal materials that are authoritative, meaning they have authority. The primary legal materials in this research include; 1945 Constitution, Law Number 8 of 1981 concerning Criminal Procedure Code, Criminal Code, Law Number 13 of 2006 concerning Protection of Witnesses and Victims, and Aceh Qanun Number 6 of 2014 concerning Hukum Jinayah. Secondary legal materials were in the form of all publications about the law that are not official documents. This publication was in the form of legal text books, legal dictionaries, legal journals and comments on court decisions. Data collection techniques were carried out implementing library research to obtain secondary legal material in the form of books, magazines or journals. The entire data was arranged systematically, then analyzed qualitatively. Qualitative analysis is a data analysis method that classifies and selects data obtained from research results according to their quality and correctness and is then linked with theories obtained from literature studies in order to obtain answers towards the legal problems.

## RESEARCH RESULTS AND DISCUSSION

### Criminal Law Politics Against the Protection of Rape Victims Based on Qanun Jinayah of Aceh

#### 1. Protection of victims from the crime of rape

The manifestation of the role of law in society is to provide legal protection to members of the community whose interests are disturbed. Disputes that occur in society must be resolved according to applicable law in order to prevent vigilante behavior. The main objective of law as the protection of human interests is to create a proper peaceful community, so that a balanced life can be created (Sudikno Mertokusumo, 2003: 7). (Harahap, Irwan Safaruddin, 2019: 21). Legal protection can be interpreted as a guarantee or certainty that someone will get what their rights and obligations are, so that they feel safe (Philipus M. Hadjon, 1987: 84). (In Ratna, 2017: 19) (Salim HS & Erlies Septiana Nurbani, 2013: 259). Indonesia as a constitutional state based on Pancasila must provide legal protection to its citizens and in accordance with Pancasila.

The criminal act of rape is regulated in Article 285 of the Criminal Code, which stated that: "Whoever by means of violence or threat of violence forces a woman to have intercourse with him outside of marriage, is threatened for committing rape, with a maximum imprisonment of twelve years". Based on the formulation of Article 285 of the Criminal Code, the victim of a criminal act of rape is a woman, who is forced to have intercourse with another person outside of marriage with violence or threats of violence (Arief Gosita, 1993: 12). (Wilda, Musafir, 2019). (Firdaus, Muhammad Makhdar, 2020). Furthermore, Article 1 numeral 30 Aceh Qanun Number 6 of 2016 affirms that rape is sexual intercourse with another person's *faraj* or anus as a victim with the perpetrator's testicles or other objects used by the perpetrator or against the victim's *faraj* or the victim's mouth with the perpetrator's mouth or against the victim's mouth with the perpetrator's testicles by force or threats against the victim.

Victims are those who suffer physically and spiritually as a result of the actions of others who seek fulfillment of their own or other people's interests that are contrary to the human rights interests of the injured party (Arif Gosita, 1993: 63). According to Muladi, victims are people who have either individually or collectively suffered losses, including physical or mental, emotional, economic or substantial harm to their fundamental rights,

through acts or commissions that violate criminal law in each country, including the abuse of power (Muladi, 2005: 108).

5 According to Dikdik M. Arief Mansur and Elisatris Gultom, they emphasize that victims of a crime do not always have to be individuals or individuals, but can also be groups of people, communities or legal entities. Even in certain crimes, the victims can come from other forms of life, such as plants, animals or ecosystems (Dikdik M. Arief Mansur and Elisatris Gultom, 2007: 45) (Aprilianda, 2017: 332).

As a party who has suffered physical, mental, economic, social and other losses, the victim must legally be protected through the fulfillment of their rights that have been violated. In general, victims have the right to:

- a. The right to obtain compensation for the suffering she has experienced;
- b. The right to obtain guidance and rehabilitation;
- c. The right to obtain protection from the threat of the perpetrator;
- d. The right to legal assistance;
- e. The right to regain their rights (property);
- f. The right to have access to medical services;
- g. The right to be informed when the perpetrator of a crime is to be released from temporary detention, or if the perpetrator is fugitive from detention;
- h. The right to obtain information about police investigations relating to crimes against victims;
- i. The right to privacy, such as keeping the phone number or identity of other victims' secret (Dikdik M. Arief Mansur and Elisatris Gultom: 53).

14 The importance for victims' protection of the crime of rape cannot be separated from the consequences experienced by the victim after the occurrence of rape, which are:

1. Psychological suffering, such as feeling worthless as a result of losing your virginity (holiness) in the eyes of the community, in the eyes of your husband, future husband (fiance) or other parties related to the victim. Other psychological sufferings can be in the form of anxiety, loss of self-confidence, no longer cheerfulness, avoid the surrounding community, growing hatred (antipathy) towards the opposite sex and excessive suspicion of other parties who mean well to them.

2. Possible pregnancy can occur.
3. Physical suffering, meaning that the result of the rape will cause injury to the victim. Wounds are not only related to torn genitals (female genitals), but it does not rule out the possibility of other organs being injured if the victim first puts up a strong resistance which at the same time encourages the perpetrator to be more violent and cruel in order to defeat the resistance of the victim.
4. Growing a sense of lack of trust in the handling of legal practitioners,
5. Victims who face difficult situations such as no longer feeling valuable in the eyes of the community, their families, husbands and prospective husbands and may fall into the world of prostitution. That is, the place of prostitution is used as a way for revenge on men and seeking appreciation (Abdul Wahid and Muhammad Irfan, 2001: 82-83). (Budi Heryanto, 2020: 276).

It is important for victims to receive recovery as an effort to balance the condition of victims who experience disturbances. According to Muladi, victims of crime need to be protected because: first, society is considered a form of an institutionalized trust system. This belief is integrated through the norms expressed in the institutional structure, such as the police, prosecutors, courts and so on. Second, there are arguments for social contracts and social solidarity because the state can monopolize all social reactions against crimes and prohibit actions of personal act or reaction. Therefore, if there are victims of crime, the state need to pay attention to the needs of victims by improving services and regulating rights. Third, protection of victims, which is usually associated with one of the objectives of punishment, that is conflict resolution. With the resolution of conflicts caused by criminal acts, it will restore balance and bring a sense of peace in society. (Muladi, 1997: 172).

The compensation for victims of rape can be in the form of material or non-material. The form of compensation for material losses is in the form of restitution, as stated in Article 1 numeral 20 Aceh Qanun Number 6 of 2014, Restitution is a certain amount of money or assets, which must be paid by the perpetrator, *Jarimah*, or a third party based on the judge's order to the victim or her family for suffering, loss of certain assets, or reimbursement for certain actions.

Immaterial compensation can be in the form of assistance such as services provided to victims and/or witnesses by LPSK in the form of medical assistance and psycho-social



rehabilitation. For victims of rape, the most important compensation is their psycho-social rehabilitation, because the impact of the crime of rape on the victim makes the victim mentally ill and get a negative stigma from the community. The equally important is material compensation in the form of restitution. This restitution is a reflection of the perpetrator's responsibility for the criminal act he has committed in the form of a penalty of giving compensation to the crime victim.

## **2. Criminal Law Politics on the Protection of Rape Victims According to Qanun Number 3 of 2014**

The efforts and policies to make criminal law regulations cannot be separated from the goal of overcoming crime. So the policy or politics of criminal law is also a part of criminal politics. In other words, when we see from the point of view of criminal politics, criminal law politics is identical to the definition of crime prevention policy with criminal law. Crime prevention efforts with criminal law are also part of law enforcement (especially criminal law). Therefore, it is said that political or criminal law policies are also part of law enforcement policies.

The politics of criminal law are all rational efforts by society to tackle crime. Sudarto emphasized that implementing criminal law politics means an effort to realize criminal laws and regulations that are in accordance with the circumstances at one time and for the future (Dwidja Priyatno, 2009: 150) (Chainur Ar-Rasyid, 1999).

The politics of criminal law for the protection of rape victim as stipulated in the Qanun Hukum Jinayah include:

### **a. Ta'zir sanctions or fines in the form of gold against the perpetrators**

Ta'zir sanctions is a jarimah (criminal offense) that is threatened with ta'zir punishment. The meaning of ta'zir according to language is ta'dib which means giving lessons or teaching. Ta'zir is also defined as ar-raaddu wal man'u which means to reject and prevent. Meanwhile, the definition of ta'zir according to Al-Mawardi is the education punishment for sins (criminal acts) whose punishment has not been determined by syara' (Ahmad Wardi Mukhlis, 2000: xii). (Andiko, Toha, 2017). Ta'zîr is a punishment that has not been determined by the syara and is left to the ulul amri to determine it. Ta'zîr punishments were numerous, ranging from the lightest punishment to the heaviest punishment. The judge is

given the authority to choose between these punishments which are suitable with the conditions of the jarimah and the crime actor.

Based on this definition, it can be seen that ta'zir is a punishment that has not been determined by the syara' (islamic sharia) and the authority to determine it is handed over to the ulil amri or the judge (Saron, Agus, 2018). Besides that, from this definition it can be seen that the characteristics of Jarimah ta'zir are as follows:

1. The punishment is not certain and unlimited, meaning that the punishment has not been determined by the syara' and there is a minimum and a maximum.
2. The determination of the sentence is the right of ulil amri/judge.

Topo Santoso explained that the basis and determination of the punishment (ta'zir) is based on ijma' (consensus) with regard to the right of the state to punish all inappropriate acts, which cause physical, social, political, financial or moral harm or damage to individuals or society as a whole. The purpose of granting the right to determine Jarimah ta'zir to the judge is so that they can regulate society and maintain their interests and be able to deal with sudden situations as well as possible (Muhammad Nur, 2020, 48). (Ahmad Rope'i, 2020: 5). (Iqbal Mursyid, 2019).

The form of ta'zir punishment is as follows:

- a. Ta'zir punishments that affect the physical, such as the death penalty and jilid (flogging).
- b. Punishments related to someone's freedom, such as imprisonment and exile.
- c. Ta'zir penalties relating to property, such as fines, confiscation of property, and destruction of goods.
- d. Other punishments determined by ulul amri for the benefit of the public (A. Djazuli, 2000: 185). (Azhari Akmal, 2017).

*Ta'zir* criminal act is divided into three parts: (A. Djazuli: 13). (Darsi, 2018: 64). (Asri Yani, 2020).

- a. Hudud or qishas/diyat actions that are subhat or do not meet the requirements, but are already immoral. For example, attempted theft, attempted murder, theft among families, and theft of electricity.

- b. Criminal acts are determined by the Qur'an and Hadith, but the sanctions are not determined. For example, insults, false witnesses, not carrying out a mandate, and insulting religion.
- c. Criminal acts determined by *Ulul Amri* for the public benefit.

<sup>26</sup>  
Based on the provisions of Article 48 of Aceh Qanun Number 6 of 2014, the ta'zir penalty for the perpetrator of *Jarimah Rape* is punished with '*Uqubat Ta'zir*' of lashing at least 125 (one hundred twenty five) times, a maximum of 175 (one hundred seventy five) times or a fine of at least 1,250 (one thousand two hundred and fifty) grams of pure gold, a maximum of 1,750 (one thousand seven hundred and fifty) grams of pure gold or an imprisonment of at least 125 (one hundred and twenty five) months, a maximum of 175 (one hundred seventy five) month.

The provisions for fines in the form of gold for the perpetrators of rape as stipulated in the Aceh Qanun Jinayah are a step forward taken by qanun drafters in efforts to protect victims of rape. The fines paid by the perpetrators then became state assets that were deposited in Baitul Mal.

#### **b. The Payment of Restitution**

The presence of Aceh Qanun Number 6 of 2014 concerning the Law of Jinayah regulates restitution for victims of rape. In Article 1 number 20 Qanun Jinayah determines that Restitution is a certain amount of money or assets, which must be paid by the perpetrator of *Jarimah*, his family, or a third party based on a judge's order to the victim or his family for suffering, loss of certain assets, or compensation for certain actions.

Restitution is an additional *uqubat ta'zir* which is regulated in Qanun Jinayah. Additional ta'zir as regulated in Article 4 Paragraph (5) consists of:

- a. coaching by the state;
- b. restitution by parents/guardians;
- c. return back to the parents/guardian;
- d. termination of marriage;
- e. revocation of license and revocation of rights;
- f. confiscation of certain goods;
- g. social work.

Qanun Jinayah only specifies the granting of restitution to victims who have experienced rape and in the case of *qadhzaf* (adultery accuser), not for other *jarimah* (criminal offense). This provision is specifically regulated in Article 51 of Qanun Jinayah, which stipulates that:

1. In the event of a victim's request, everyone who is subjected to Uqubat as referred to in Article 48 and Article 49 may be subject to Uqubat Restitution for a maximum of 750 (seven hundred and fifty) grams of pure gold.
2. Judges in determining the amount of Uqubat Restitution as referred to in paragraph (1) need to consider the financial capacity of the convicted person.

As for the uqubat that is meant by Article 48 of the Aceh Qanun Jinayah is rape. Article 48 provides that:

“Anyone who deliberately commits Jarimah (rape) is threatened with 'uqubat ta'zir of lashing at least 125 (one hundred twenty five) times, a maximum of 175 (one hundred seventy five) times or a minimum fine 1,250 (one thousand two hundred and fifty) grams of pure gold, a maximum of 1750 (one thousand seven hundred and fifty) grams of pure gold or the shortest prison 125 (one hundred twenty five) months, at most 175 (one hundred seventy five) month.

Meanwhile, the uqubat referred to by Article 49 of the Aceh Qanun Jinayah is rape in the form of incest. Article 49 determines that:

“Anyone who deliberately rape a person who has a mahram relationship is threatened with 'uqubat ta'zir whipping at least 150 (one hundred and fifty) times, a maximum of 200 (two hundred) times or a fine of at least 1,500 (one thousand five hundred) grams of pure gold, at most 2000 (two thousand) grams of pure gold or imprisonment for a minimum of 150 (one hundred and fifty) months, a maximum of 200 (two hundred) months”.

Protection of rape victim in the form of restitution as regulated in Qanun Jinayah is an extraordinary legal breakthrough made by qanun drafter. The existence of Qanun Jinayah in Aceh is a reform of criminal law in Indonesia because a good law must reflect the laws that live in the community itself (Kamarusdiana, 2016: 161). (Anajeng Esri Edhi, 2018: 41).

(Isdiyanto, Ilham, 2018: 69). This policy is a real form of concern for victims of rape who have been experiencing severe suffering during the criminal justice process. Victims of the crime of rape must attend court hearings at their own expense to become witnesses. In giving testimony, the victim must repeat the story of her bitter experience and reconstruct the rape incident. She is confronted with the perpetrator who raped her and the person she disgusted. In addition, she must face the perpetrator's defense or attorney who attempted to eliminate the offender's guilt.

Restitution for rape victims has also been in accordance with the <sup>2</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power by the United Nations (UN), as a result of The Seventh United Nation Congress on the Prevention of Crime and the Treatment of Offenders, which took place in Milan, Italy, September 1985. According to Nairazi AZ and Aidil Fan, Qanun Jinayah Aceh has made a new breakthrough, while the National legislation related to compensation for victims of crime, especially rape, has not been clearly regulated, either in the form of restitution or compensation. On the other hand, restitution is a reflection of the perpetrator's responsibility for the criminal act he has committed in the form of a penalty of giving compensation to the crime victim.

## **CONCLUSION**

The politics of criminal law for the protection of rape victims according to the *Qanun Jinayah* of Aceh consists of two types: *ta'zir* sanctions or fines in the form of gold against the perpetrators and restitution payments to victims of rape, in the form of a certain amount of money or assets, which obligatory for *Jarimah* perpetrator, her family, or a third party paid based on a judge's order to the victim or her family for suffering, loss of certain assets, or compensation for certain actions.

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