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

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ABSTRACT

A country must protect its citizens, including the rape victims. Unfortunately, the protection is not clearly regulated in the form of restitution and compensation in the Criminal Code (KUHP) and Law Procedures Code (KUHAP). The issuance of Qanun Number 6 the Year 2014 about Jinayah Law has contributed significant changes and progress to the protection of rape victims. The study focused on how the politics of criminal law protects rape victims based on the Qanun of Jinayah law in Aceh. The research applied the normative juridical method, specifically analytical descriptive research. The data sources were primary and secondary legal sources. The data analysis was conducted qualitatively. The result indicated that there are two types of protection in the politics of criminal law on the protection of rape victims based on the Qanun of Jinayah law. First, the ta’zir penalty or fines in the form of gold to the perpetrators. Second, the payment of uqubat restitution from the perpetrators to the rape victims, a maximum of 750 grams of pure gold.

Key Words: rape victim; the protection; the qanun of jinayah; the politic of criminal.

INTRODUCTION

The fourth paragraph of the Preamble of 1945 Constitution explained that “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...”.

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The above provision asserted that the state must protect its citizens, including protecting the crime victims. The protection of the crime victims is not only National but also an international issue. Thus, this problem needs serious concern (Mansur & Gultom, 2007). The protection to the crime victims gains serious attention from International Community through the Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power by the United Nations. One of the recommendations is that the perpetrators or those responsible for an unlawful act must restitution to the victims, family's victims, or the guardian. The victims are those who suffer physically and spiritually as a result of others’ actions in fulfilling their own or other interests that are contrary to the human rights interest of the harmed party.

The protection to the crime victims in Indonesia is based on the Constitution Number 7 the Year 1984 about the legalization of the Convention on the Elimination of All Forms of Discrimination against Women-CEDAW. The protection to the victims is regulated explicitly in the KUHAP in the form of compensation by merging the civil and criminal law. This provision is difficult to be implemented; even the merger of the compensation lawsuit in the rape crime case is very complicated and time-consuming since it has to merge criminal and civil cases. Accordingly, the protection of the victims, including the rape victims, is not clearly regulated in the national Constitution both in the form of restitution and compensation (Nairazi & Aidil, 2020; Tania, 2020).

The protection of the rape victims through the criminal justice process and certain social service facilities is an absolute part of the criminal law policy. To achieve equality and general welfare, the rights of rape victims must be protected as it is an inseparable part of human rights concerning social security (Syaufi & Haiti, 2018; Poernomo, 1998; Sudarto, 1979).

Therefore, protecting the rape victims needs rational efforts from society, namely the politics of criminal law. Barda Nawawi Arief claimed that implementing the politics of criminal law means carrying out an election to achieve the proper results of criminal law that fulfill the justice and efficiency (Arief, 2002; Priyatno, 2009). Sudarto asserted that implementing the politics of law
criminal means creating the criminal law which suits the condition and situation to a certain time and future (Sudarto. 1983). The criminal law should not be oriented to the human deed (daad strafrecht) as it might become inhumane and prioritize retaliation. In contrast, the criminal law should not concern with the perpetrators only (daderstrafrecht) because the implementation of criminal law will ease them instead of considering various interests: the community, country, and victims, specifically the rape victims (Rothe & Mullins, 2010; Wuntu & Wiwoho, 2020). The criminal law aimed to protect and maintain various interests, namely the community, the country, the perpetrators, and the victims. Thus, the criminal system formulation should consider the interest of the victims to create justice equality so the rights of rape victims can be protected (Jati, Khalid, & Endri, 2021; Syaufi, Ahmad, & Haiti, 2018).

The issuance of Qanun Number 6 the Year 2014 about Jinayah Law has contributed significant protection to the rape victims. Qanun Jinayah Aceh has created a breakthrough, particularly the presence of the qanun that regulates the protection of the rights of rape victims.

Based on the explanation, the protection of the rape victims is extremely important, as stated in the fourth paragraph of the Preamble of the 1945 Constitution. Therefore, this study problem focused on how the politics of criminal law protects rape victims based on the Qanun of Jinayah law in Aceh.

**RESEARCH METHODS**

The method used in this research is normative legal research. Primary legal materials are authoritative legal materials (Tripa, 2019; Sulaiman, 2018). The primary legal materials in this study include the 1945 Constitution, Law Number 8 of 1981 concerning the Criminal Procedure Code, the Criminal Code, Law Number 13 of 2006 concerning the Protection of Witnesses and Victims, Aceh Qanun Number 6 of 2014 concerning Jinayah Law. Secondary legal materials are all publications on the law that are not official documents.
DISCUSSIONS AND ANALYSIS OF RESULTS

1) Protection of Rape Victims in Indonesia

The role of law in society is to provide legal protection to community members whose interests are disturbed. Crimes that occur in society must be resolved according to applicable law to prevent vigilante behavior. The law's main purpose as the protection of human interests is to create an orderly social order so that a balanced life can be realized. Legal protection can be interpreted as a guarantee or certainty that someone will get what has become his/her rights and obligations so that person feels safe. Legal protection is a protection given to legal subjects according to the rule of law, both preventive and repressive, written or unwritten, to enforce legal regulations. Legal subjects are part of legal protection, meaning everything that can obtain rights and obligations from the law consists of humans (rechtpersoon) (Salim & Nurbani, 2013).

According to Philipus M. Hadjon, Indonesia, as a state based on Pancasila, must provide legal protection to its citizens in accordance with Pancasila. Therefore, legal protection based on Pancasila means legal recognition and protection of human dignity based on the values of divinity, humanity, unity, deliberation, and social justice. These values give birth to the recognition and protection of human rights in a unitary state that upholds the spirit of kinship in achieving mutual prosperity (Hadjon, 1987).

Victims are those who suffer physically and spiritually due to the actions of others who seek the fulfillment of their interests or those of others that are contrary to the human rights interests of the injured party. According to Muladi, victims are people who, individually or collectively, have suffered harm, including physical or mental harm, emotional, economic, or substantial disruption to their fundamental rights, through acts or commissions that violate criminal law in each country, including abuse of power (Muladi, 2005).

Victims need to get recovered. According to Muladi, victims of crime need to be protected because, first, society is seen as a form of a system of institutionalized trust. This belief is integrated
through the norms expressed in the institutional structure, such as the police, prosecutors, courts, and others. Second, there are arguments for the social contract and social solidarity because the state can be said to be a monopoly on all social reactions to crime and prohibits private actions. Therefore, if there are victims of crime, the state must pay attention to the needs of victims by improving services and regulating rights. Third, the protection of victims is usually associated with one of the objectives of punishment, namely conflict resolution. Resolving conflicts caused by criminal acts will restore balance and bring a sense of peace to society (Muladi, 1997).

As a party who has suffered physical, mental, economic, social, and other losses, the Victim must be legally protected through the fulfillment of his or her rights that have been violated. In general, victims have the right to: (a) The right to obtain compensation for suffering; (b) The right to obtain guidance and rehabilitation; (c) The right to obtain protection from the threat of perpetrators; (d) The right to obtain legal aid; (e) The right to reclaim his right (property); (f) The right to have access to medical services; (g) The right to be notified when a criminal is to be released from temporary detention, or when a fugitive from prison; (h) The right to obtain information about police investigations related to crimes that were experienced; (i) The right to personal freedom/personal confidentiality, such as keeping the telephone number or identity of other victims secret (Mansur & Gultom, 2007).

The need for protection for victims of the crime of rape cannot be separated from the consequences experienced by victims after the incident. These consequences include: (1) Psychological suffering, such as embarrassment during the encounters with the people close to them because they have lost their virginity. Other psychological sufferings can be in the form of anxiety, loss of self-confidence, no longer cheerful, reluctance to meet with other people, growing hatred (antipathy) towards the opposite sex, and excessive suspicion of other parties who actually have good intentions; (2) Pregnancy; (3) Physical suffering, the rape will cause injury to the Victim. Wounds are not only related to the torn vital organs, but it is also possible that other body organs
will be injured if the Victim first puts up a hard fight, which at the same time encourages the perpetrator to act more violently; (4) Growing a sense of lack of trust in the handling of legal practitioners; (5) Victims who are faced with difficult situations such as the loss of confidence may involve themselves in prostitution. With prostitution, they can take revenge on men and seek recognition (Wahid & Irfan, 2001; Heryanto, 2020).

The crime of rape is regulated in Article 285 of the Criminal Code, which states that: "Whoever by means of violence or threat of violence forces a woman to have intercourse with him out of marriage, is threatened with committing rape with a maximum imprisonment of twelve years." Based on Article 285 of the Criminal Code, the Victim of the crime of rape is a woman, by means of violence or threat of violence, is forced to have sex with other people out of marriage. Based on the provisions of Article 285 of the Criminal Code, the protection of rape victims is only through imposing criminal sanctions on the perpetrator, so the Victim is considered protected. In criminal law theory, it is a repressive form of protection.

Suppose an act that is the basis of an indictment in examining a criminal case by a district court causes loss to another person. In that case, the presiding judge may prescribe to combine the case of damages to the criminal case at the request of that person. The compensation mechanism regulated in the Criminal Code requires an application from the Victim to file a merger of compensation cases in criminal cases. Technically, the application for restitution is filed through the public prosecutor before reading the criminal charge. If the judge decides to grant the restitution claim, it automatically has permanent legal force if the criminal verdict also has permanent legal force.

The compensation referred to in this Criminal Procedure Code is compensation in the context of civil and the definition of compensation, in this case, is only limited to the costs that have been incurred accompanied by evidence of expenditure. Thus, immaterial losses are not included in the scope of losses that can be prosecuted through the procedure for combining this
case, even though it can be proven that these costs are used for interests related to the impact of the crime.

Protection of victims of crime in the form of restitution is regulated in Law Number 13 of 2006 concerning Protection of Witnesses and Victims. Article 21 stipulates that the application for restitution can be made before or after the perpetrator is found guilty based on a court decision that has obtained permanent legal force.

Furthermore, Article 28 stipulates: If the application for restitution is filed based on a court decision that has obtained permanent legal force and the perpetrator of the crime is found guilty, LPSK submits the application along with its decisions and considerations as referred to in Article 27 to the competent court.

LPSK in this restitution mechanism only has the authority to provide recommendations to law enforcement regarding whether or not the Victim deserves restitution and is also related to calculating the amount of restitution requested by the Victim. Furthermore, it is up to law enforcement to decide whether the restitution is granted or rejected. If the judge refuses the restitution based on the judge's consideration and based on the facts of the trial, the LPSK is not given the authority to take legal action. Meanwhile, concerning court decisions granting victim restitution, LPSK also does not have the authority to forcefully execute restitution against perpetrators who do not have good intentions to pay restitution.

2) Politics of Criminal Law Against the Protection of Rape Victims According to Qanun Number 6 of 2014

Efforts and policies to make good criminal law regulations basically cannot be separated from the purpose of crime prevention. Therefore, to protect rape victims, rational efforts are needed from the community, namely the politics of criminal law. The politics of criminal law means holding elections to achieve the best results of criminal legislation to fulfill the requirements of justice and
efficiency. Implementing criminal law politics means efforts to realize criminal laws and regulations according to the circumstances and situations at a time and for the future.

The ratification of Qanun Number 6 of 2014 on Criminal Law is a step forward towards the protection of rape victims. The qanun on Jinayah law is an attempt to implement Islamic law in Aceh. It embodies the wishes of the people of Aceh based on the condition of the Aceh people today.

The politics of criminal law on the protection of rape victims contained in the Criminal Law Code include:

**a. Ta'zir or fines in the form of gold for perpetrators of rape**

Ta'zir sanction is *jarima* which is threatened with *ta'zir* punishment. *Ta'zir* means *ta'dib*, translated as to teach or to educate. Ta'zir is also interpreted as *ar-raaddu wal man'u*, which means to refuse and prevent. While the understanding of *ta'zir* according to Al-Mawardi is an educational punishment for sins (criminal acts) whose punishment has not been determined by *syara* (Wardi, 2000; Andiko, 2017; Sarono, 2018). *Ta'zîr* is a punishment that has not been determined by *syara* and is left to the *ulul amri* to determine it. Ta'zîr punishments are numerous, ranging from the lightest to the heaviest punishments. Judges are given the authority to choose between these punishments in accordance with the circumstances of the *jarîmah* and the person who committed it. The characteristics of *Jarîmah Ta'zîr* are as follows: (1) The punishment is not certain and unlimited, meaning that the punishment has not been determined by *syara* and there is a minimum and a maximum limit; (2) The determination of the punishment is the right of the ruler (*ulil amril/judge*).

Topo Santoso (Santoso, 2020) explained that the basis and determination of *ta'zir* are based on *ijma* (consensus) relating to the state's right to punish all inappropriate acts, which cause physical, social, political, financial, or moral loss or damage to individuals or society as a whole. The purpose of granting the right to determine the *jarîmah ta'zîr* to the authorities is to
regulate society and maintain its interests and be able to deal with sudden situations as well as possible (Nur, 2020; Mursyid, 2019).

The forms of ta’zir punishment are as follows: (1) Ta’zir punishment related to the body, such as the death penalty and jilid (hitting); (2) Punishments related to a person’s independence, such as imprisonment and exile; (3) Property-related ta’zir punishments, such as fines, confiscation of property, and destruction of goods; (4) Other punishments determined by ulul amri for the sake of the people (Djazuli, 2000). According to Djazuli, the crime of ta’zir is divided into three kinds (Yani, 2020): (a) The act of hudud or qishas/diyat is subhat or does not meet the requirements but is already immorality. Examples are attempted theft, attempted murder, theft in the family, and stealing electricity power; (b) The Qur'an and Hadith determine criminal acts, but no sanctions are specified. For example, insults, false witnesses, not carrying out the mandate, and insulting religion; (c) A criminal act determined by Ulul Amri for the public good.

Based on the provisions of Article 48 of Aceh Qanun Number 6 of 2014, the perpetrator of rape is threatened with 'Uquba ta'zir of lashes at least 125 times and a maximum of 175 or a minimum fine of 1,250 grams of pure gold, a maximum of 1,750 grams of pure gold or imprisonment for a minimum of 125 months and a maximum of 175 months.

The provision of financial penalties in the form of gold to rape perpetrators regulated in Aceh Jinayah Law is a step forward in the protection of rape victims. Gold was chosen to determine the fine uqubat because it is more suitable with the hadith of the Prophet PBUH and because its value is considered more stable. Therefore, there is no gap between the fine uqubat with other uqubats due to inflation. A fine sanction is a form of protection for victims oriented towards the rehabilitation of the victim. The perpetrator is held criminally responsible for compensating the Victim's losses.

b. The Obligation to Pay Restitution

The presence of Aceh Qanun Number 6 of 2014 concerning Jinayah Law has regulated restitution for rape victims. Article 1 number 20 of the Jinayah Law stipulates that restitution is a
certain amount of money or property, 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 reimbursement of costs for certain actions.

Restitution is an additional *uqubat ta’zir* that is regulated in the Criminal Code. Additional *ta’zir* as regulated in Article 4 Paragraph (5) consists of: (a) Guidance by the state; (b) restitution by parents/guardians; (c) return to parents/guardians; (d) termination of marriage; (e) revocation of permits and revocation of rights; (f) confiscation of certain goods; (g) social work.

The Jinayah Law Qanun only specializes in giving restitution to rape victims and in the case of *qadhzaf*. Article 51 of the Jinayah Law stipulates that: In the event of a victim's request, Everyone who is subject to *Uqubat* as referred to in Article 48 and Article 49 may be subject to *Uqubat Restitution* a maximum of 750 (seven hundred and fifty) grams of pure gold.

Uqubat referred to by Article 48 of the Qanun of the Aceh Jinayah Law is rape. Article 48 stipulates that: “Anyone who intentionally commits rape is threatened with *uqubat ta’zir* of whipping at least 125 times, maximum 175 times or a fine of at least 1,250 grams of pure gold, maximum 1750 grams of pure gold or minimum imprisonment of 125 months, maximum 175 months”.

The *uqubat* referred to by Article 49 of the Aceh Jinayah Law is rape in the form of incest. Article 49 stipulates that: “Anyone who intentionally commits rape against a person who has a *mahram* relationship is threatened with *uqubat ta’zir* of whipping at least 150 times, maximum 200 times or a fine of at least 1,500 grams of pure gold, a maximum of 2000 grams of pure gold or imprisonment for a minimum of 150 months and a maximum of 200 months.”

The protection of rape victims in the form of restitution as regulated in the *jinayah qanun* is an extraordinary legal breakthrough. The existence of the *jinayah qanun* in Aceh is a renewal of criminal law in Indonesia because good law must, of course, reflect the law that lives in the community itself (Kamarusdiana, 2016; Isdiyanto, 2018). This policy is a tangible form of concern
for rape victims in the criminal justice process. Most victims of the rape crime must appear in court at their own expense to be witnesses. When giving testimony, they must repeat the story about their bitter experience and reconstruct the incident.

Furthermore, they are confronted with the perpetrator who had raped them. In addition, they must face a defense or lawyer from the perpetrator's side who tries to eliminate the perpetrator's guilt. So the type of loss suffered by the Victim is not only in the form of material, such as the costs incurred for healing physical wounds, but also immaterial losses, such as loss of mental balance, loss of enthusiasm for life, and self-confidence due to anxiety and fear (Krisantya, 2016). Likewise, the recovery of rape victims covers both physically and psychologically, such as torn hymen and prolonged trauma (Sari, 2014).

The state's involvement in overcoming the burden of rape victims is not only because the state has public service facilities but also that the state is obliged to maintain safety and improve the welfare of its citizens. Rape cases can be considered as the failure of the state to provide good protection to its citizens.

The protection of rape victims in the form of restitution is conceptually a new legal policy where there is a merger of criminal law and civil law, as is the concept of qishash and diyat in Islamic criminal law. Its implementation depends on the will of the Victim, who is the aggrieved party. From this perspective, new restitution is imposed not only because of criminal considerations but also for the victim's sake. The implementation itself is the right of the Victim. If in the trial the Victim wants it, and it may also be possible that other basic crimes do not need to be applied if the Victim wants the perpetrator to be sentenced to a basic sentence of compensation. Thus the foundation for the protection of rape victims is based on the philosophy of restorative justice where reparations or recovery due to criminal acts can be realized, and relations between parties can be maintained after the judicial process.
CONCLUSIONS

The politics of criminal law in the Aceh Jinayah Law on the protection of rape victims consists of two kinds. First, ta’zir or fines in the form of gold, and second is the payment of Uqubat Restitution by the perpetrator to the rape victim with a maximum of 750 grams of pure gold.

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