

# The Implementation of Criminal Act of Adultery

## (Comparative Study between Islamic Jurisprudence of Legal School and Qanun Jinayat in Aceh)

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**Abstract**—Besides to regulate Aqidah and worship, the implementation of Islamic Sharia in Aceh is conducted to regulate e Jinayah or criminal. In 2014, the Qanun/District regulation had been established to regulate the jinayah, namely Qanun Number 6 Year 2014, which was the result of revision of Qanun Jinayat ratified and enforced since July 15, 2003. One of the acts prohibited by the Islamic Sharia contained in the Qanun is adultery. Adultery is an intercourse between a man or more with a woman or more without marital ties with the willingness of both parties. Adultery in the Qanun Jinayah Aceh review is an act that is categorized in 'Uqubat Hudud which is punishable by caning and can be added by 'Uqubat Ta'zir by paying a fine or imprisonment. According to the Islamic Jurisprudence of Legal School, adultery includes 'Uqubat Hudud whose form and magnitude has been firmly defined in the Qur'an and Sunnah. Muhsan adultery (married adultery) is punished by way of stoning (thrown by gravel) to death and as for ghair muhsan (unmarried) adulterer is punished by flogging for a hundred times. The Qanun maker predominantly implements Al-Ijtihad Al-Jama'i in establishing a number of Jinayat Law Articles. The Qanun designers have essentially reinterpreted the Fiqh School and modified it by considering the benefits and interests of the Acehnese people's rights. Qanun Jinayat is a response to the wishes of the people of Aceh for the creation of lasting peace, comprehensive justice and dignity. Therefore, 'Uqubat adultery in Aceh Qanun is different from the viewpoint of the Islamic Jurisprudence of Legal School and the existence of law renewal which is the result of ijthad from the Maker of Aceh Qanun (Muqannin).

**Keywords**—Adultery; Islamic Jurisprudence of Legal School; Qanun Jinayah

### I. INTRODUCTION

The influence of uncontrolled sexual lust causes sexual criminal act that is forbidden by religious rule. One of the sexual criminal acts is adultery. An Adultery is a sexual activity that destroys humans' dignity and it is part of the highest sin that can be treated by 'uqubat hudud'. Islamic Syariah says that every act should be in compliance with values that are regulated by the rule maker (Syari'), so there will be a punishment to the perpetrator. Punishment is necessary because any order or prohibition doesn't give any impacts without a sanction.

Aceh as part of The Unitary State of The Republic of Indonesia is a province that has a special privilege and autonomy. One of their authorities is to implement Islamic Syariah. According to article 125 Act number 11 in 2006

about Aceh Government, Jinayat Qanun, (public act) is part of Islamic Syariah that is implemented in Aceh. One of *jarimah* that is regulated in respective of Qanun is about adultery.

The application of Qanun Jinayah in Aceh is the act of whipping for adulterers in which some activists consider to be contrary to national laws as well as the various anti-discrimination conventions against women and anti-torture that have been ratified by the Indonesian government, including strengthening physical punishment that has been banned in Indonesia.

Therefore, it is interesting to conduct the implementation of adultery-act in Aceh Qanun and to compare it with Islamic Jurisprudence of Legal School.

### II. THE ADULTERY IN THE PERSPECTIVE OF ISLAMIC JURISPRUDENCE OF LEGAL SCHOOL

Islamic dogma, strictly prohibits and forbids any sexual intercourse between man and woman outside of legal marriage. It is a disgraceful adultery deed. Allah speaks in Alquran surah al-Isra': 32:

*"And come not near to adultery. Verily, it is a great sin and it is the worst." (QS. 17:32)*

Islamic law considers adultery to be a very cursed deed and is categorized as a criminal act in *jarimah hudud* cluster which is the highest hierarchy in the cluster of *jarimahs*. This *jarimah hudud* cluster threatens the perpetrator with very heavy punishment that in average causes death, or at least causes the loss of a part of the body of the perpetrator of *jarimah*.

The punishment for adultery is emphasized in the Quran and Sunnah. There are three types of punishments for adultery perpetrator, namely caning sentence (*dera* or *jilid*), stoning, and exile. The application of the three types of punishment depends on the status of adultery perpetrator, whether he or she is married or not. Therefore, adultery criminal act is divided into two types; *muhsan* adultery (*zina*) and *ghair muhsan*.

The *Zina muhsan* is adultery or sexual intercourse conducted by a married man or a woman with a person other than his or her spouse. Islamic Scholars agree that the punishment for the perpetrator of *muhsan* adultery is death

penalty through stoning, rajam, (thrown by gravel). One of hadith explains that “*One day when Rasulullah SAW was in the mosque, he was visited by a man who confessed that he had done adultery. Firstly, prophet SAW did not believe on the man confession. He then swore for four times to convince prophet SAW. Then Prophet SAW asked him, ‘Are you insane?’ ‘He answered, ‘No, I am normal.’ Then Nabi SAW asked again, ‘Have you ever got married?’ He said, ‘Yes, I ever got married.’ So Nabi SAW instructed other friends to bring the man and to punish him with stoning.*” (HR. Muslim and Abu Dawud).

Someone can be categorized as the adulterer of *muhsan* punishable by the mandatory stoning sentence on condition that (1) The perpetrator is a sane individual and an adult. Therefore, if the perpetrator is insane or a child, they will be punished by takzir sentence. (2) The perpetrator is free person, not a slave. If the perpetrator is ‘*abd* (slave of man) or ‘*amah* (slave of woman), they are not punished by the mandatory stoning sentence, instead they only get caning sentence (*jaldah*). (3) The perpetrator did sexual intercourse through illegal marriage. If he does sexual intercourse through legal marriage he cannot be categorized as *muhsan* adulterer.

While adultery of *gair muhsan* is fornication by man or woman who never done sexual intercourse through legal marriage (still single and virgin). The legal sanction for adulterer of *gair muhsan* is caned for a hundred lashes. Based on the commandment of Allah SWT in Alquran:

*“The fornicatress and the fornicator, then flog each one of them with hundred lashes and let not withhold you pity for them concerning the religion of Allah, if you believe in Allah and the day the last and let witness their punishment by a group of the believers.”* (QS. 24:2)

And the hadith of Rasulullah SAW commands, meaning:

*“Virgin fornicates and single fornicator, suppose to be caned (dera) for a hundred times and exiled for a year”* (HR. Muslim).

There are different opinions of Islamic scholars regarding the exile sanction as the additional sanction, as follows:

- 1) Imam Malik says that exiled sanction is only for a man not for a woman.
- 2) Imam Ahmad ibn Hanbal agrees exiled sanction for a year as the additional penalty to caning sentence.
- 3) Imam Abu Hanifah says the implementation of exiled sanction as additional penalty after getting the judge consideration or wisdom of people who handle the case.
- 4) The opinion of most Islamic scholars such Imam Syafi’i, al-Qurtubi, Atho, Thowus, and all Khulafa’ al-Rasyidin say it is important caning sentence and exiled sanction to the perpetrator of *gair muhsan*.

The adultery can be proven either by confession (*iqrar*) or testimony. According to Syafi’i and Malik, if the proof is obtained through confession and the perpetrator is sane and an adult and sensible in recognizing his act, he can be punished. Abu Hanifah, Ahmad and Syiah Imamah argue the

punishment is not imposed, except the perpetrator repeats his confession for four times. The interesting matter regarding the verification based on a self-confession is the execution of stoning sentence to *muhsan* adulterer in which if he escapes when the punishment is imposed, according to majority of legal scholars, he does not need to be hunted.

Regarding the testimony, Islamic scholars have agreed that the adultery can be determined based on witnesses and the required number is four people, based on commandment of Allah SWT:

*“And those who accuse the chaste women (as an adulterer) then they do not bring in four witnesses, then flog them (who accuse) for eighty lashes, and do not accept for them testimony forever and those they are defiantly disobedient.”* (QS. 24:4)

The Islamic law scholar gives very strict requirement to proof or to have certainty of the fornication through confession and testimony. This is applied since adultery is included in the *hudud* group in which the implementation has to be careful due to the severe punishment. Because of that, the judge has to be careful to handle the case. Any detail of obscenity has to be examined. The judge cannot impose the sentence if he finds any obscenity and doubt in its handling, in line with the rule :*“Avoid punishment of had if finding a doubt.”* And if all proposed evidence lead to the fornication, then the implementation of punishment is seen by public, as the deterrent effect not to follow the same action. Allah SWT commands that means: *“...and let witness their punishment by a group of the believers”* (QS. 24:2).

#### A. Adultery According to Aceh Jinayat Qanun

Adultery according to Aceh Qanun Number 6 in 2014 about Jinayat law is regulated in the fifth chapter, from article of 33 to 46. The articles explain about the sanction to fornicator/fornicatress and the matters relating to the confession of fornication. *Jarimah* and ‘*Uqubat* of Zina according to Aceh Jinayat Qanun as follows:

TABLE 1

Criminal Act/ Type of Jarimah Zina	Sanction/’Uqubat		
	Caning	Fine Gram Pure Gold	Number of month in prison
Article 33, verse (1) conduct Jarimah Zina for purpose??	100	-	-
Article 33, verse (2) Repeating Jarimah Zina	100	+ 120	+ 12
Article 33, verse (3). Every person and / or business entity provides facility of promote Jarimah zina	100	1000	100
Article 34, The adultery with children	100	1000	100
Article 35, Jarimah Zina with Mahram	100	+ 100	10
Article 38, verse (3) Oath of fornication	100	-	-

Based on the table above, the determination of *Jarimah* and *'Uqubat* in article 33 verse (1) sources on syari'at as stated in the Quran and Hadith, written in Islamic jurisprudence of legal school that is categorized in *'Uqubat Hudud*. However, article 33 verse (2), *'Uqubat* for repeating *Jarimah Zina* will be imposed by *Hudud* added by *'Uqubat Ta'zir* in form of fine and in prison that can be chosen by the judge to the guilty *Jarimah* perpetrator. Article 33 verse (3) and article 34, article 35, article 38 the regulation of *Jarimah* with 'its *Uqubat* as the result of the opinion of Aceh Qanun drafter (*Muqannin*).

There are some differences and revisions made by *muqannin* in the regulation of *Jarimah 'Uqubat zina* in Aceh Qanun compared to what is implemented in the Islamic jurisprudence of legal school such as in the status of fornicator/fornicatress. The perspective of Islamic jurisprudence of legal school separates *muhsan* fornicator who is punished by and *ghairu muhsan* hundred lashes. Aceh Jinayat Qanun does not differentiate whether the perpetrator has got married or not and the punishment is the same for hundred lashes and does not apply stoning sentence. Nevertheless, for the fornicator who repeats the fornication besides flog for hundred lashes, it can be added by *'Uqubat Ta'zir* fine and in prison. It is so for the adult who fornicates with children, besides getting *'Uqubat Ta'zir* caning punishment it can be added by *'Uqubat Ta'zir* caning most widely hundred lashes or fining most widely a thousand gram of pure gold or most longest a hundred months in prison. Aceh Jinayat Qanun does not only punish every fornicator but also business entity that provides facility or promotes *jarimah* adultery for purpose is punished by *'Uqubat Ta'zir*.

In relation to caning, the essence of the punishment is not the pain, but the shame that the punishment is carried out in public in the hope that the offender is deterred. Danial in his paper published in the Journal of Islamic Law Studies, Al-Manahij, states that among the more effective aspects of protecting human rights is a form of caning. In application, it is considered effective both sociologically, economically, psychologically, and theologically. The punishment took place in a short time and afterwards the convict could return with his family, live life as it should and fulfill the basic rights for their wives and children. Therefore, the whipping sentence is more humane than the prison and other forms of punishment known in the Indonesian book of criminal law (KUHP).

In this context, according to the author, Qanun drafter dominantly has implemented *Al-Ijtihad Al-Jama'i* in regulating some articles of Jinayat rule. The implementation of this *ijtihad* surely can be applied considering the situation of modern society that has moral degradation due to less family internal care, less of social control and the influence of social and electronic media that always display free sex behavior causes loose of morality in the relationship of opponent sex. The regulation of *Jarimah* and *'Uqubat* adultery that is different from Islamic jurisprudence of legal school purely for the benefit of Aceh society.

### B. The Implementation of Adultery Criminal Act in Aceh

The implementation of adultery criminal act bases on Aceh Jinayat Qanun starts implementing a year after signing

in October 2014. Based on report recapitulation of decided Jinayat case, not yet decided, and has been executed at Syar'iyah court Aceh region in 2016, the case of adultery as follows:

TABLE 2

Syar'iyah Court	Number of Case	Type of Punishment	Name of Defendant (Not the real name)
		Caning/ Fine / Confinement	
Takengon	02/JN/2016/MS-Tkn (25-04-2016)	100 lashes (Canning)	1. Dewi
			2. Isam Executed
Meulaboh	16/JN/2016/MS.Mbo (28-12-2016)		Fandi (Appeal (not yet BHT))
	19/JN/2016/MS.Mbo (15-12-2016)		Rahmad (Punishment is returned to the family)
	20/JN/2016/MS.Mbo (15-12-2016)		Sandi (appeal(Not yet BHT))
Blangkejeren	18/JN/2016/MS-Bkj (18-08-2016)	100 lashes (Canning)	Nuri (Executed)
	19/JN/2016/MS-Bkj (18-08-2016)	100 lashes (Canning)	Arif (Executed)
	20/JN/2016/MS-Bkj (30-08-2016)	60 lashes (Canning)	Sari (Adultery facility) (Executed)

Note: Other districts such: Banda Aceh, Sigli, Langsa, Kutacane, Tapaktuan, Biereun, Jantho, Lhoksukon, Sabang, Meureudu, Idi, Kuala Simpang, Calang, Singkil, Sinabang and Simpang Tiga Redelong do not have adultery case. (Data source is from Aceh Syar'iyah Court)

From data above it can be known that the punishment is applied differently from one to another. The different punishment that is imposed depends on the category of fornicator whether children, an adult, and the relationship both of fornicator/fornicatress. Aceh Qanun also imposes *'Uqubat Zina* for every person or business entity that provides the facility or promote *Jarimah Zina* for a purpose such what has been happened in Blangkejeren on Sari's case (not real name).

Data of *Monitoring Institute for Criminal Justice Reform* (ICJR) in 2016, Aceh Syar'iyah court at least has decided 221 decisions of jinayat case since January to September. 5 (five) biggest areas that decide the most Jinayat case, are 1) Banda Aceh, for 40 cases. 2) Kualasimpang, for 29 cases. 3) Kutacane, for 24 cases. 4) Blangkejeren and Jantho, for 21 cases. 5) Langsa, for 17 cases. Based on those data and compared to 2015 with 548 Jinayat cases, so since the implementation of revised Jinayat Qanun, the case of Jinayat decreases included *Jarimah* adultery Aceh.

Based on interview to one of officers of Wilayatul Hisbah, he says that since the enforcement of Aceh Jinayat Qanun the wickedness is lesser. However, there are some obstacles on the enforcement of *'uqubat* adultery in the field. The obstacles

are follows: *first*, political factor, for example the fornicator is the family of influential person. *Second*, facility and infrastructure for proofing the evidence, such as inadequate facility for DNA test. *Third*, minimal investigator and uncertain period moves the duty. For instance, although by definition the new investigator only can move after five years, but in practice he can be moved less than 5 years. This influences case handling. And the most influent obstacle is the budget constrain in which one caning sentence is implemented spends 80 millions rupiah. The big amount of budget spent influences to the implementation of punishment.

### III. CONCLUSIONS

Jinayat Qanun is the manifestation of Islamic syariat that is implemented in Aceh. The position of Jinayat Qanun, regardless pro, and contra, still applies based on specific autonomy and be recognized in the Indonesian legal hierarchy that equals to local regulation (Perda). The substance of this qanun is to keep the dignity of human being, to protect Aceh society not to do wickedness to Allah.

Aceh Jinayat Qanun about adultery sources from Alquran and hadith and it also the result of *al-Ijtihad al-Jama'i* as the effort of the legal decision that is implemented by some scholars of Islam, intellectual and specialist to a special problem with meeting until being summarized a legal decision. Therefore, there is differentiation between certain articles and Islamic jurisprudence of legal school. And since Jinayat Qanun Number 6 in 2014 is implemented, there is a decline of Jinayah case about Adultery of Jarimah in Aceh.

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