



Takzir as a Punishment in Islamic Criminal Law

(Study of the Establishment of Punishment in Criminal Acts in Qanun)

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Abstract :

Formalizing the Shari'a of Islam both in the realm of social and social life, in the state and nation are not infrequently debated, both socio-political and religious debates. The debate is in addition to understanding the teachings of religion and its relationship with the nation-state, as well as understanding the existing legal system within the country, especially that the country embraces a positive legal system that is more influenced by western law. The notion of enforcement of Islamic criminal law can not necessarily be carried out properly without any legislation and the establishment of a material Islamic criminal law as a positive law in force. Also, Islamic criminal law is a public law requiring state power both in law making and in law enforcement. In relation to the legislation and the formation of the law (qanun syariat Islam), the most interesting thing is how to determine the shape of the finger and its uqubat both belonging to the category of hudud, qisas and takzir as part of the Islamic Shari'a law enforcement system

Keywords :

Al-Quran; takzir; islamic law; hadith

I. Introduction

In religion, law is revealed for the good of humanity itself, in order to enclose the creed and morals. The arguments that emphasize the obligation to make *Shari'a* (God's law) as law in the sense of legislation, so that we increasingly recognize the position of Islamic law and our obligations as adherents to glorify Islamic law and practice it. Islamic *Shari'a* is a perfect guide as a medium for the mankind in fulfilling its obligations to God. Islamic *Shari'a* which is revealed by Allah is a *Shari'a* that fulfills the justice of the mankind, upholds honesty, provides broad benefit for the legal problems of the community, as well as *Shari'a* h is far from tyranny and certain interests in all laws. As a product of perfect legislation and no one party is able to create or make rules or legislation as complete, as perfect as the Islamic *Shari'a* revealed by Allah SWT, as referred to in the Quran which means "*Your God's sentence (Al-Quran) has been completed as a true and just sentence. No one can change His sentences and He is the All-Hearing, All-Knowing*" (Surah Al-An'am / 6: 115)

Be a benchmark in all work because Islamic law requires a balance between the world and the hereafter, between spiritual needs and physical needs. It is easily practiced, not difficult and not narrow, and also in accordance with the correct logic and human nature. The benefits obtained for those who obey the orders of Allah and the harm that is suffered because of committing immorality or crime and the crime returns to the perpetrators themselves, both as individuals and as community groups. Evil exists in this world together with human existence. The will to do evil is inherent in human life. On the other hand humans want to live in peace, order, peace and justice. It means that it is not disturbed by evil deeds. Human efforts to minimize crime have been carried out, both preventive and repressive. In Islamic teachings discussions about human crime and preventive and repressive efforts are explained in *jinayah fiqh*.

Punishment in *Jinayah* (Islamic Criminal Law) is often said to be a "cruel" punishment. The law of cutting off hands, stoning, *Qisâs*, and volume is often used as the reason behind this impression, even though in reality, this is almost never done in the history of Islamic criminal law, except in cases of adultery and accusing others of adultery during the Prophet's time and periods very few friends. Therefore, the reality of Islamic criminal law is not as simple as its impression. An in-depth discussion of Islamic criminal law will prove this error. Therefore the application of Islamic law on the basis that Islam is what has been inherited from the books of *Fiqh* and that the limits of Allah's law are rigid is an empty cry that only drains time, wealth and energy and mind. (Muhammad Syahrur, 2007: p. 222). In this in-depth discussion, it is seen that not all criminal acts (jarimah) are threatened with *hudud* or *qisâs*, however, in general they are threatened with *takzîr*. Actually, Islamic Criminal Law gives an opportunity for the birth of two different laws in two similar cases, as Islamic Civil Law provides an opportunity for establishing inheritance relations based on social change (Muhammad Syahrur, 2007: p. 222).

Islam prescribes the punishment of *takzîr* as a form of punishment for educative actions against those who commit immoral acts or those who come out of the rules. From that origin, the narration is what was narrated by Abu Dawud, At-Tarmidzi, an-Nasa'i and al-Baihaqi from Bahz bin Hakim from his father from his grandfather that the Holy Prophet had sentenced him to confinement (imprisonment) against false accusations of "*hadîth*" this was considered valid by the Judge (Sayyid Sabiq, 2006: p. 492). However, such a sentence as the Prophet's imprisonment is a preventive measure until the case becomes clear. Imam Bukhari, Imam Muslim, narrated the hadith about the application of volume punishment as a form of *takzîr* punishment, which means "*Has told us' Abdullâh bin Yusuf has told us Al Laits has told me Yazid bin Abu Hubaib from Bûkâir bin Abdullâh from Sulâimân bin Yâsâr from 'Abdurrahmân bin Jâbir bin Abdullâh from Abu Burdâh radli Allâhu' anhu, said; The Prophet sallallahu' alaibi wasallam said: "No binding may exceed ten times other than in the wrong sentence (had) of Allah (set) (Abmad Ali Ibn Asqalani, 1408: p. 182).*"

Takzîr is a punishment that is not contained in the Qur'anic text or Hadith that explains about its provisions, so that a judge is given the freedom to decide on a sentence against a case. The Qur'an and the Hadith of the Prophet have not explained about every act that is happening now and in the future, both of them only explain about the law of a case that occurred at that time. So that when there is a change in the condition, it needs new *ijtihâd* which may result in a decision that an action is considered wrong that was not previously considered wrong, or punish someone with a more severe sentence or with a lighter sentence (Al-'Asymâwi, 1983: p. 129).

II. Methodology

In this discussion and writing using empirical normative methods, this study views the law (*Qanun*) in its form that determines what is permissible and what is not permitted, is prescriptive in nature, also determines what is wrong and what is right (Achmad Ali and Wiwie Heryani , 2013: pp. 1–6). Empirical studies see law as reality, including social reality, cultural reality, are descriptive in nature. The approach used is the legal approach that is the Law / *Qanun* approach (statute approach), conceptual approach (conceptual approach) and also the case approach (Peter Mahmud Marzuki, 2005: p. 93). Data Sources required from various reference materials that are closely related to the title above, namely the Jinayah Law *Qanun*, books or books of *Tasyri Jinayah* and supplemented with some materials and supporting books that are directly or unrelated with this problem, while the data source implied in the form of legal materials derived from dictionaries, the internet and also encyclopedias. Data sources are collected and processed in the form of literature studies, through the stages of identification and inventory.

III. Discussion

3.1 The form and type of *Takzir's* actions in the System of Determination of *Qanun*.

In criminal law, we recognize two forms of retaliation (*jazā*) for the perpetrators of criminal acts, the first is to provide penalties and the second is in the form of acts of incentive or rehabilitation. In this section, we will focus more on punishment, which is one of the two instruments above. From the above statement, we can know that punishment is one of the instruments in criminal law as a form of retaliation for criminals, because it is a representation of the people's resistance against criminals and their crimes. Therefore, when we agree that the criminals and the crimes they commit are objects of criminal responsibility (*al masūliyah al jinātiyah*) then when someone is proven to have committed a criminal act, this requires the conviction of these perpetrators. That is because criminal acts in the form of violations of the rules and norms that exist in society and which have resulted in anxiety in the community. Require the subject of criminals to be subject to punishment. Because it is something that we cannot accept if the perpetrators of crimes roam the middle of society while spreading damage without any obstruction. This is on the one hand, while on the other hand so that the rule of law as a guideline for people's lives can be upheld and respected by the community, there must be penalties for those who violate these legal norms. For more details, so that we are more familiar with punishment, then we will try to discuss it, especially the discussion relating to matters that are the principle of punishment. So therefore we will discuss it from the start of the definition, characteristics, objectives, and conviction.

Punishment in Islamic law for four kinds of views of its purpose, namely; (Abdul Qadir, 1996: p. 632)

- a) Based on the ties or ties of one law to another.
- b) Based on the judge's power in determining the form and number of sentences.
- c) Based on the obligation to impose penalties.
- d) Based on the place where the sentence was carried out; this penalty concerns the implementation of the physical / body or soul of the offender and also the property of the offender.

Takzir is also part of the form of punishment determined by *Qanun*. Criminal acts that have been determined the type of punishment in the form of *takzir* are acts which other that mentioned in *hudud* and *qisas*. *Takzir* is a sentence imposed on people who violate *Shari'a* in addition to *hudud* and *qisas* / diat, this can be seen in several *Qanun* that have been ratified by the Government of Aceh together with the Aceh Legislative Council (DPR Aceh). as; *Qanun* No. 5/2000; No.10 / 2002; No. 11/2002; No. 12/2003; No. 13/2003; No. 14/2003, and part of it is in *Qanun* No. 6/2014. What has been determined in the *Qanun*, is part of the determination of the punishment in the form of *takzir* or *qisas* or *hudud*. Considering that Aceh as part of the Unitary State of the Republic of Indonesia (NKRI) is not very easy to directly apply Islamic Law as the legal basis in the Aceh region, however the implementation of the *Shari'a* is an indication that Aceh has implemented Islamic *Shari'a* -based laws, as evidenced in the Kingdom of Aceh Darussalam who was once victorious by implementing Islamic *Sharia* law. At present the implementation and enforcement of the law through *Qanun* is still limited to the form of *takzir* punishment, this means that Aceh is not yet fully, especially residents who live in Aceh to be ready in accepting Islamic law. This unpreparedness was then misinterpreted in the form of the implementation of the *Qanun* in the form of punishment (Canning) which was considered to have occurred human rights violations. If the execution of punishment in the form of *hudud* and *qisas* even *takzir* is carried out in the form of a whip (caning with rattan).

In *Qanun*, the type of punishment included as material punishment is more in the form of *takzir* punishment, so that the punishment given will fulfill the material *Qanun* and Customs as a whole. The application of the contents of the *Qanun* through the application of punishment as a form of reaction to the actions of prohibited acts to fulfill a sense of justice for the community. From that the punishment contained in the *Qanun* consists of; (a) Caning. This punishment is carried out by beating the condemned (violator of the *Shari'a* after getting a permanent verdict from the *Syar'iyah* Court), at least 12 times and at most 200 lashes. 200 lashes is a combination of *hudud* punishment which is added with *takzir* punishment if the act done is a repetition of *jarimah* *hudud*. Flogging in the *Qanun* is the main form of punishment that must be carried out when a person who commits *Jarimah* has been determined by the *Shari'a* Court (Mohd. Din, 2009: p. 143). (b) Penalty for fines. Penalty is one type of criminal that has long been accepted in the legal system of the peoples of the world. Although the settings and how to apply it varies according to conditions and development. The penalty is a minimum of 40 grams of pure gold (equivalent to 13.3 grams of gold) and a maximum of 1,750 grams of gold (equivalent to 583.3 grams of gold). (c) Imprisonment. Is a form of punishment that is to eliminate the right of freedom of a person by entering in a prison. Prison sentences of at least 12 months and a maximum of 200 months.

Overall implementation, application and enforcement of Islamic *Shari'a* law in Aceh is related to aspects contained in various aspects of life in Aceh, the implementation of Indigenous life and culture integrated with Islamic *Shari'a* is contained in local regulation No. 7/2000 and *Qanun* No. 12/2004; The fields of *aqidah*, worship and symbols of Islam are contained in *Qanun* No. 11 of 2000; The prohibition on drinking *khamar* or drinking intoxicating drinks is contained in *Qanun* No. 12 of 2003; The prohibition of gambling or gambling is contained in *Qanun* No. 13 of 2003; The prohibition on *khawat* or *nasty* is contained in *Qanun* 14 of 2003; Management and organization of *zakat* are contained in *Qanun* No. 7/2004 and Governor's Letter No. 4451.12 / 1227370/2002; Cultivating the prosperity of the Mosque and *menunasah* can be found in Governor Instruction No. 05 / INSTR / 2000; The necessity of reading the Al-Quran and understanding local customs for elementary school students is contained in Governor's Instructions No. 02 / INSTR / 1990; The implementation of alms salary / services for all employees / employees in the Government environment is contained in the Governor's Instructions No. 02 / INSTR / 200; The prohibition of gambling, aftermath, betting and the like is contained in Governor's Instruction No. 04 / INSTR / 2002; Arrangement of association / seclusion between men and women contained in the Governor's Instructions No. 05 / INSTR / 2002 and the implementation of congregational prayers in the office / agency / agency / agency / government service environment is contained in the Governor's Instructions No. 06 / INSTR / 2002 (Headar Nashir, 2013: p. 350), and many others that make the legal basis in carrying out various activities that lead to actions that are contrary to the law.

From what has been designed in the *Qanun*, several types and forms of prohibited acts (violation of Sharia) both in the category of *hudud* and *takzir* punishment, then it looks like what is arranged in the *Qanun*, which in principle is an acceleration of what is obligatory the judiciary to determine the punishment for the act through an appropriate and correct legal process. Among the types of violations as contained in the *Jinayat Qanun* include;

- 1) Violation of acts of *maisir* (gambling).
- 2) Violation of *khawat*.
- 3) Violation of *Ikhtilath's* actions;
- 4) The act of sexual harassment;
- 5) Violations of acts in the form of *linwath*;
- 6) Violations of rape;

- 7) Violations of acts that have been regulated in *Qanun* Number 11 Year 2002 Concerning the Implementation of Islamic *shari'a* in the areas of *Aqidah*, Worship and Symbols of Islam.

3.2 Provisions for the punishment of *takzir* on criminal offenses in the *Qanun*.

The *takzir* punishment is determined according to the level of the crime based on the things that are known by the judge on the *takzir's rahmah*, both the condition of the person to be sentenced, the fact of the crime that has occurred and the place of the crime so that the sentence to be imposed must be based on the achievement of the objective of the punishment namely prevention. Thus this *takzir* punishment is a jurisdiction that must be filled by using the knowledge, intelligence and thinking ability of judges to perform jihad and determine their own forms of punishment in accordance with socio-cultural conditions within the framework of the instructions of the texts and *shari'a* principles. The characteristics of *takzir* law shows that criminal capacity has a level of elasticity and flexibility that is able to deal with the development of society and changes in situations and conditions so that the *shari'ah* is suitable to be applied in accordance with its conceptuality. Therefore, there are two characteristics of *takzir* punishment for the present, namely (1) as an answer to the problems of contemporary society; the concept of *takzir* law is the area of law that Allah SWT deliberately gives freedom to humans to determine for themselves what actions need to be determined as prohibited acts and what penalties are appropriate to be imposed by those prohibited acts. For the legal needs of modern society where life has developed so rapidly along with the advancement of science and technology, of course the legal needs are also developing following the development of society, where it is not enough just about the provisions of *hudud* and *qisas* / *diyat*, but there needs to be a measure of law in other fields of life which is very very broad and many in accordance with the legal needs of society itself. (2) The authority of the Government to stipulate *takzir* for the purpose of upholding the *amar ma'rif nabi mungkar*. The punishment of *takzir* which is the authority of *walayul amri* (government / ruler) is expected so that the government can regulate the community. In this case Ibn Taymiyyah argued: "It must be known that the authority of leadership including religious obligations and even religion and the world will not stand except with him, because in fact the benefit of humanity will not be realized except by gathering (social), because they need each other.

The punishment of *takzir* is different from the punishment of *hadd* (*hudud*) in terms of 3 (three) aspects; first, the punishment of *takzir* differs according to different levels of people, for people who have a seat will not be the same punishment with people who are low ranking; secondly, asking for clemency in relation to his sentence *takzir* is permissible whereas in *hadd* punishment is not permitted; third, in *takzir* punishment if there is injury then the priest must pay compensation (Salim, Abd. Rasyid, 2007: p. 135). This opinion is different from the opinion in the circles of Imam Abu Hanifa and Imam Malik, who consider the punishment of *takzir* and the sentence of educating relatively to have the same purpose but different in explaining it.

In Islamic law, the system of applying legal sanctions is carried out through two types of sanctions, namely (1) definitive punishment from Allah and the Apostle and sanctions imposed by humans through governmental authorities who are entitled to determine their laws such as executive, legislative and judicial bodies (Justice). Both types of sanctions imply the community to obey and obey the provisions of the law in force. In many cases law enforcement demands the role of the state. The law does not work if it is not enforced by the State. On the other hand a country will be disorderly if the law is not enforced.

With regard to the deeds set out in the *Jinayat Qanun* regarding jinayat, the determination of the sanctions (uqubat) does not adhere to the principle of alternative or optional *uqubat*, because sanctions are definitive based on the arguments of the quran or hadith. While the deeds of *rahmah takzir* adhere to the principle of alternative uqubat punishment, namely caning, fines and imprisonment, even takzir punishment in other forms other than the three types. Based on the foregoing, *qanun jinayat* in the case of establishing *hudud uqubat* for adultery is whipped 100 times, for khamar drink is whipped 40 times, while for the same *Jarimah* deed there is a repetition then *takzir* punishment is stipulated as an additional punishment based on *qanun* for whipping judge's decision.

The following is a description of the amount of the punishment for each form of his tomb as stated in *Qanun* Number 6 of 2014 concerning *Jinayat*.

NO	TYPES OF JARIMAH	KINDS OF JARIMAH	TYPE OF PUNISHMENT		ARTICLE
			HUDUD	TAKZIR	
01	Khamar	Intentionally	Whip 40 times	Whip 40 times or A fine of 400 grams of pure gold or a prison of 40 months	Article 15, 16, 17
		Producing / storing / stockpiling and selling		Whip 60 times or 600 grams of fine gold fine or 60 months imprisonment	
		Buy / transport / gift		Whip 20 times or fine of 200 grams of pure gold or jail 20 months	
02	Maisir (Perjudian)	Accidentally (with a bet of 2 grams of pure gold)		Whip 12 times or fine 120 grams of pure gold or 12 months imprisonment	Artice 18, 19, 20, 21, 22
		Deliberately (betting more than 2 grams of pure gold)		Whip 30 times or fine 300 grams of pure gold or 30-month prison	
		Organize / provide facilities and include children		Whip 45 times or fine 450 grams of pure gold or Jail 45 months	
03	Khalwat	Intentionally		Whip 10 times or fine 100 grams of pure gold or 10 months imprisonment	Article 23 dan 24
		Organize / provide facilities		Whip 15 times or fine of 150 grams of pure gold or jail 15 months	
04	Ikhtilath (bercumbu/bemesraan/berpelukan/berciuman bukan suami-istri)	Intentionally		Whip 30 times or fine 300 grams of pure gold or 30-month prison	Article 25, 26, 27, 28, 29, 30 31, 32
		Organizing facilities and also involving children		Whip 45 times or fine 450 grams of pure gold or Jail 45 months	
		Making Confessions to Conduct Ikhtilath Accusing People of Conducting Ikhtilath		Whip 45 times or fine 450 grams of pure gold or Jail 45 months	

				Whip 30 times or fine 300 grams of pure gold or 30-month prison	
05	Zina	Intentionally	Whip 100 times		Article 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45
		Repeat deeds	Whip 100 times	A fine of 120 grams of pure gold or a 12-month prison	
		Providing facilities		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	
		Doing with Children, also with mahram		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	
06	Pelecehan Seksual	Intentionally		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	Article 46, 47
		Doing with Children		Whip 90 times or fine 900 grams of pure gold or Prison 90 months	
07	Pemerkosaan	Intentionally		Whip 125 times or Fine 1,250 - 1,750 grams of pure gold or Jail 125 - 175 months	Article 48, 49, 50, 51, 52, 53, 54, 55, 56
		Deliberately with people who have a mahram relationship		Whip 150-200 times or a fine of 1,500-2,000 grams of pure gold or Jail 150-200 months	
		Doing with Children		Whip 150-200 times or a fine of 1,500-2,000 grams of pure gold or Jail 150-200 months	
08	Qadzaf	Intentionally	Whip 80 times		Article 57, 58, 59, 60, 61, 62
		Repeat deeds		400 grams of pure gold restitution	
09	Liwath	Intentionally		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	Article 63
		Repeat deeds		Whip 100 times or a fine of 120 grams of pure gold or 12 months imprisonment	
		Doing with Children		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	
10	Musahaqah	Intentionally		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months	Article 64
		Repeat deeds		Whip 120 times or fine 1200 grams of pure gold or 12 months imprisonment	

	Doing with Children		Whip 100 times or fine of 1000 grams of pure gold or Jail 100 months
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What is encouraging to regard an act as *Jarimah* is because it can be detrimental to the community's rules or beliefs or detrimental to the life structure of other community members. An immoral act is threatened with punishment by someone who does it so that it becomes a warning to other people so that they do not commit a tomb, because restrictions or orders are not enough. In summary, the basis for prohibiting an act is the maintenance of the community's interests.

IV. Conclusion

In the *Qanun* punishment is called the term *uqubat*. *Uqubat* is a punishment determined by a judge for a violator of the *rahmah qisas* - diat, *hudud* and *takzir*. Criminal acts (violation of *Shari'a*) are determined as types of actions that can be punished with *Hadd* and *Takzir* penalties, acts that are punished with *Hadd* or *Hudud* penalties are penalties that have obtained legal certainty both in number and type of actions and it has been determined by Al -Quran and *Hadith*. However, actions which are not mentioned in the Al-Quraan and *Hadith* or contain doubt, then these actions are punished by the punishment of *Takzir*. The state of the action is included in the *Qanun* as an action which is categorized by the act of *takzir*.

The *takzir* punishment is determined according to the level of the crime based on the things that are known by the judge on the *takmahir's rahmah*, both the condition of the person to be sentenced, the fact of the crime that has occurred and the place of the crime so that the sentence to be imposed must be based on the achievement of the objective of the punishment namely prevention. Thus this *takzir* punishment is a jurisdiction that must be filled by using the knowledge, intelligence and thinking ability of judges to perform jihad and determine their own forms of punishment in accordance with socio-cultural conditions within the framework of the instructions of the texts and *shari'a* principles. All concepts and theories regarding criminal that have existed and developed from the classical to the modern one including criminological and victimological theories as long as they do not conflict with the basic principles of *shari'a*, can be considered and accommodated as discourse that can be discussed to enrich the concept of criminal *takzir*. The characteristics of *takzir* law indicate a criminal capacity that has a level of elasticity and flexibility that is able to deal with the development of society and change the situation and conditions so that the *shari'a* is suitable to be applied in accordance with its contextuality.

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