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## **The Politics of Law on the Fulfillment of Restitution Rights for Rape Victims Based on the Qanun Jinayat in Aceh**

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**Abstract:** This study aims to explore the policy of the politics of law and procedure for the effective fulfillment of restitution rights for rape victims in Aceh. For rape victims, restitution is a form of compensation as part of the fulfillment of human rights and legal protection for the disadvantaged party. Providing compensation for rape victims is crucial as generally, the victims come from vulnerable groups who have been harmed physically, psychologically, and socially. However, the mechanism for obtaining compensation in the form of restitution for rape victims has been an issue in Aceh. In addition, the question arises on how the implementation of restitution is in the decisions of judges who try rape cases based on the Qanun Jinayat. This study used a normative juridical method, analyzed with the theory of legal politics. The study concludes that the regulation of restitution in the Qanun Jinayat as an additional punishment for rapists needs to be further studied to examine whether restitution as an additional punishment can fulfill a sense of justice for the victims. Moreover, the restitution formulation in the Qanun Jinayat Aceh has not made it easy for rape victims to receive compensation from the perpetrators due to the complicated process and requirements for obtaining restitution. However, in the context of legal politics, the Qanun Jinayat can be understood as a government policy to provide legal certainty and justice. Any shortcoming at present means that more room for improvements in its implementation in the future.

**Keywords:** Restitution, Qanun Jinayat, rape victims, politics of law

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**Abstrak:** Penelitian ini bertujuan menemukan kebijakan politik hukum dan prosedur pemenuhan hak restitusi yang efektif bagi korban perkosaan di Aceh. Bagi korban perkosaan, restitusi adalah bentuk ganti kerugian sebagai bagian pemenuhan hak asasi manusia dan perlindungan hukum bagi pihak yang dirugikan. Pemberian ganti kerugian bagi korban perkosaan sangat penting karena pada umumnya korban berasal dari golongan lemah yang telah dirugikan secara fisik, psikologis dan sosial. Mekanisme perolehan ganti rugi dalam bentuk restitusi bagi korban perkosaan menjadi persoalan tersendiri di Aceh. Pertanyaan lain adalah bagaimana implementasi restitusi dalam putusan hakim yang mengadili perkara pemerkosaan berdasarkan Qanun Jinayat. Penelitian ini digunakan menggunakan metode yuridis normatif, dianalisis dengan teori politik hukum. Penelitian tersebut menyimpulkan bahwa pengaturan restitusi dalam Qanun Jinayat sebagai hukuman tambahan bagi pelaku pemerkosaan perlu diteliti, guna melihat bagaimana restitusi sebagai hukuman tambahan mampu memenuhi rasa keadilan terhadap korban. Demikian juga bahwa formulasi restitusi dalam Qanun Jinayat Aceh belum memberikan kemudahan bagi korban perkosaan mendapatkan hak ganti rugi dari pelaku karena rumitnya proses dan syarat memperoleh restitusi tersebut. Meskipun demikian, dalam konteks politik hukum, qanun jinayat dapat dipahami sebagai sebuah kebijakan pemerintah untuk menghadirkan kepastian dan keadilan hukum, jika saat ini masih ada yang kurang maka diperlukan perbaikan secara implementatif di masa yang akan datang.

**Kata Kunci:** Restitusi, Qanun Jinayat, korban perkosaan, politik hukum

## Introduction

Victims, as the party who suffers the most and is greatly harmed by criminal offenses, are typically only involved when testifying as victim witnesses. As a consequence, victims often remain unsatisfied with the criminal charges submitted by the Public Prosecutors and/or the decisions presented by the judges as they are viewed as unfair to the victims' sense of justice. This is because the criminal justice system is designed to prosecute perpetrators of criminal acts, not to serve the interests of victims of criminal acts, as criminal acts are crimes that position the perpetrators as parties who are against the state.<sup>1</sup>

The criminal justice system exists to serve the interests of the state and society instead of the personal interests of individual citizens, as is the nature of criminal law as public law. Hence, any losses, either material or immaterial losses, including physical, psychological, or even social suffering, have become

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<sup>1</sup>Zulfia Hanum Alfi Syahr, et al., "The Role of Indigenous Peoples, Social Workers, and the Syar'iyah Court in Diversion of Children Perpetrators of Jinayah," *Al-Manahij: Jurnal Hukum Islam* 17, No. 1 (2023). Firman Amir, et al., "Implementation of the Legality Principle in the Criminal Justice System of Indonesia," *Journal of Political and Legal Sovereignty* 1, No. 2 (2023), p. 123-129.

misfortunes that must be borne by the victims, especially victims of rape, themselves. As a result, rape victims do not receive proper attention from the state because in the criminal justice system the loss and suffering of victims are not the responsibility of the state. This proposition is in fact contrary to the nature and purpose of law, namely to realize justice for all, legal certainty and benefit. In the reform of criminal law, the losses suffered by victims of crime can be claimed for compensation both from the perpetrators and from the state, as it is one of the rights of victims of crime.<sup>2</sup> This is a form of state accountability that must be fulfilled for violations of human rights suffered by the citizens.

The fulfillment of the rights of victims of crime in the Indonesian criminal justice system tends to be neglected and focuses more on the handling and punishment of perpetrators. In light of this issue, a new idea has emerged in the form of additional punishments such as restitution and compensation that concern more to the interests of victims of crime. The emergence of additional punishments is also an effort to anticipate the failure of the prison sentence model as a criminal justice solution in punishing perpetrators, yet ignoring the existence of victims. In fact, victims also have the right to receive restitution in the form of compensation for losses i.e., compensation for the victim's dignity, payment of compensation for suffering, or reimbursement of costs for certain actions.<sup>3</sup>

Restitution, which aligns with the Principle of Restoration to its Original Condition (*restitutio in integrum*), is an effort to restore victims of crime to their original state before the crime, albeit complete restoration may not be feasible for rape victims. This principle emphasizes that the form of restitution to victims should be as complete as possible and cover various aspects that arise from the consequences of the crime. Restitution allows the victims to restore their liberty, legal rights, social status, family life and citizenship, place of residence, employment/livelihood, and property.

Aside from restitution, the form of compensation given to victims can also be in the form of compensation (i.e., compensation provided by the government). In judicial practice, however, the number of rape victims who file for compensation, either in the form of compensation or restitution, is still low. Some of the reasons are because the victims have no knowledge about their rights and the legal procedures that must be taken and/or feel embarrassed to claim compensation, among others.<sup>4</sup>

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<sup>2</sup>Marikas Bertha Suitela and Marlyn Jane Alputila, "Pemberian Hak Restitusi Terhadap Anak Sebagai Korban Tindak Pidana Kekerasan Seksual," *Jurnal Restorative Justice* 7, No. 1 (2023), p. 56-70. Fauzy Marasabessy, "Restitusi Bagi Korban Tindak Pidana: Sebuah Tawaran Mekanisme Baru," *Jurnal Hukum & Pembangunan* 45, no. 1 (2016), p. 53-75.

<sup>3</sup>Alvianto Ransun, "Mekanisme Pemberian Kompensasi Dan Restitusi Bagi Korban Tindak Pidana," *Lex Crimen* 1, No. 1 (2012).

<sup>4</sup>Amsori, "Ganti Kerugian Bagi Korban Perkosaan", Tesis, Faculty of Law, Universitas Indonesia, (2006). <https://lib.ui.ac.id/bo/uibo/detail.jsp?id=88475&lokasi=local>

Restitution has long been practiced in the Indonesian criminal justice system although its implementation is still lacking. Victims still find it very difficult to obtain compensation as a form of accountability for any crime occurred to them, partly due to the complicated process to obtain their rights. The complexity of victims obtaining restitution through the legal process in Indonesia can be seen from the existing regulations. Upon careful examination, it reveals that the provisions on restitution still contain a number of problems. Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Witness and Victim Protection has indeed accommodated several provisions on the restitution mechanism for victims of crime. The legal basis for the regulations governing restitution and compensation consist of Government Regulation No. 43 of 2017 concerning the Implementation of Restitution for Children Victims of Crime and Government Regulation No. 35 of 2020, an Amendment to Government Regulation No. 7 of 2018 on the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims.<sup>5</sup> Based on the aforementioned government regulations, further provisions regarding the technical implementation of the restitution application examination are regulated by the Supreme Court Regulation. Following up on this issue, on February 25, 2022, Supreme Court Regulation Number 1 of 2022 concerning the Procedure for Completing Applications and Providing Restitution and Compensation to Victims of Crime was issued and promulgated in the State Gazette on March 1, 2022.

Supreme Court Regulation No. 1 of 2022 stipulates that law enforcement officers must use the restitution mechanism as regulated in Law No. 31 of 2014. Restitution regulated in this law covers a wider scope than the Criminal Procedure Code (KUHAP) and serves as a strong legal basis for restitution and its fulfillment mechanism. However, Law No. 31 of 2014 also limits the granting of restitution rights to victims of crime. Article 7A paragraph (1) of Law Number 31 of 2014 governs the rights of victims of criminal acts, as follows “Victims of criminal acts are entitled to restitution in the form of (a) compensation for loss of property or income, (b) compensation for loss caused by suffering directly related to the criminal acts, and/or (c) reimbursement of medical and/or psychological care costs.”<sup>6</sup> Further, article 7A paragraph (2) the law states that the criminal act as referred to in paragraph (1) is determined by an LPSK (Lembaga Perlindungan Saksi dan Korban/Witness and Victim Protection Agency) Decree.

The above statements suggest that the right to restitution does not apply to all victims of criminal acts. This right only applies to certain victims of criminal acts whose status is “determined by an LPSK Decree”. Therefore, the existence

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<sup>5</sup> Supreme Court Regulation (Perma) No. 1 of 2022 concerning Procedure for Completing Applications and Providing Restitution and Compensation to Victims of Crime

<sup>6</sup> Law, No. 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims

of LPSK becomes highly significant in determining the type of crime victims who can apply for restitution. Law No. 31 of 2014 has, however, curtailed the rights of victims of criminal acts to obtain restitution by making restrictions for certain crimes determined by LPSK.

The fulfillment of restitution rights for victims of criminal acts in Indonesia should not be complicated and convoluted, especially in Aceh whereby Qanun Aceh Number 6 of 2014 concerning *Jinayat* (crime) has taken effect. In principle, the Qanun Jinayat Law regulates three aspects, namely criminal acts (*jarimah*), perpetrators of criminal acts, and criminal sentences (*'uqubat*). The presence of the Qanun Jinayat Law in Aceh is part of the implementation of Islamic Sharia, as a special privilege and authority for the region of Aceh (*lex specialis derogat lex generali*). Nevertheless, the regulation of criminal norms in the Qanun Jinayat in Aceh is still very limited, as it focuses more on regulating crimes related to public morals such as *zina* (adultery), *qazhaf* (false accusation of adultery), sexual harassment, rape, and others.

In this study, the aim is to conduct in-depth exploration of criminal law policy and the efforts to fulfill restitution for rape victims. Restitution for rape victims regulated in Law No. 31 of 2014 and Qanun Aceh No. 6 of 2014 has experienced obstacles in its implementation, and thus, it requires special policies and strategic efforts in fulfilling the rights of victims of rape. The crime of rape is regulated in Articles 48 to 56 of Aceh Qanun No. 6 of 2014 concerning Aceh Qanun Jinayat. Rape refers to sexual penetration of the vagina or anus of another person as a victim by the penis of the perpetrator or any other object used by the perpetrator, or of the vagina or penis of the victim by the mouth of the perpetrator, or of the mouth of the victim by the penis of the perpetrator, by coercion or force or threat against the victim.<sup>7</sup>

Criminal sentences (*'uqubat*) for perpetrators of rape are regulated in Article 48 of the Qanun Jinayat. The *'uqubat* for perpetrators of rape is *ta'zir* (discretionary punishment) in the form of caning of at least 125 times and at most 175 times, or a fine of at least 1,250 grams of pure gold and at most 1,750 grams of pure gold, or imprisonment of at least 125 months and at most 175 months. In fact, to aggravate the perpetrators, the Qanun Jinayat also adds additional punishments in the form of restitution.<sup>8</sup> Further, referring to Qanun Aceh No. 9 of 2019 concerning the Implementation of Handling Violence against Women and Children, it stipulates that the requirements for obtaining restitution must be

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<sup>7</sup> Qanun of Aceh, Number 6 of 2014 concerning Jinayat. Danial Danial, "Criminalization in Islamic Penal Code: A Study of Principles, Criminalization Methods, and Declining Variations," *Jurnal Ilmiah Peuradeun* 11, No. 3 (2023), p. 1005-1026.

<sup>8</sup> Qanun of Aceh, Number 6 of 2014 concerning Jinayat.

requested or demanded by the victim through the Public Prosecutor either before or after a decision is made by the judge.<sup>9</sup>

However, the restitution fulfilment system for rape victims in Aceh through the Qanun Jinayat still does not provide convenience for victims. The complexity of this procedure is the same as that for victims of other criminal offenses regulated through the general criminal law system. The procedure for fulfilling the rights of rape victims in the form of restitution refers to Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who Become Victims of Crime and Government Regulation Number 35 of 2020, an Amendment to Government Regulation Number 7 of 2018 on the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims. The provisions for the implementation of the restitution application examination are regulated in Supreme Court Regulation No. 1 of 2022, the types of crimes of which are determined by the LPSK through the Witness and Victim Protection Law.

To this end, this study seeks to discuss the fulfilment of restitution for rape victims based on the Qanun Jinayat in Aceh from the perspective of the politics of law. This study employed a normative juridical method through the legal political approach.<sup>10</sup> The politics of law is used as an analytical tool to examine the Qanun Jinayat in Aceh, a state policy that has the authority to implement special autonomy and Islamic sharia.

### Theory of Sentencing Policy

The policy of punishment theoretically has certain schools of thought. For example, the utilitarian school believes that the principle of the law is to create utility or happiness for society. Adherents of the utilitarian school incorporate practical moral teachings in the form of the utility of law in achieving happiness for as many people as possible. Bentham argues that the existence of the state and law is only to realize true benefit for the majority of the people. John Rawls later developed a new theory that became known as the greatest happiness of the greatest number.

The essence of utility theory is to present the benefit of the law in the form of efforts to create greater pleasure and happiness for a greater number of citizens. The proponent of this theory is Jeremy Bentham; however, this theory has been heavily criticized by Utrecht. Utrecht responds to this theory by putting forward three critiques: 1) Utility theory does not give place to consider fairly things that

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<sup>9</sup> Qanun of Aceh, Number 9 of 2019 concerning the Implementation of Handling Violence against Women and Children

<sup>10</sup> Jonaedi Efendi and Prasetijo Riyadi, *Metode Penelitian Hukum: Normatif dan Empiris*, Jakarta: Kencana, 2023. Moh. Mahfud MD, *Politik Hukum di Indonesia*, Jakarta: Rajawali Press, 2014.

are not concrete; 2) This theory only pays attention to things that are useful and therefore its content is general; and 3) Utility theory is highly individualistic.<sup>11</sup>

According to Utrecht, law shall be able to guarantee legal certainty in human relations. Utrecht's view is based on the assumption that law aims to protect the interests of every human being, so that they are not disturbed and do not collide with larger interests.<sup>12</sup> This theory argues that the purpose of law is to protect humans, both actively and passively. Actively, it means making efforts to create a humane social condition in a process that takes place naturally; while passively, it means trying to prevent arbitrary actions and abuse of rights. This theory seems to try to combine the weaknesses of legal justice and legal certainty. The Protection Theory, from the active perspective, shows a theory of the usefulness of law; whereas from the passive perspective, it reflects a theory of legal justice.

The new policy of the modern criminal law paradigm is shifting from retributive to collective, restorative, and rehabilitative justice. Corrective justice seeks correction of the offender's wrongdoing, the consequence of which is the offender must be punished. Restorative justice seeks to ensure that the victim's role and position are not neglected in the criminal justice process. Rehabilitative justice aims to prevent the offender from re-offending and to restore the rights of both the victim and the offender. Therefore, victim protection should be in line with the new policy of modern criminal law that emphasizes restorative justice.<sup>13</sup>

In line with the principle of restorative justice, Mardjono has advocated for this since 1985 in a seminar with the theme of the relevance of victimology. In his view, the rights of victims must be a concern for all parties in Indonesia. The state must provide facilities to support victims in attaining their rights, whether in official, semi-official, or private places. The state must prioritize the rights of victims according to the victims' own perspectives, and not from the perspective of law enforcement nor "offender-centered". The victims' requests to address the problems that have caused their suffering in the ways they prefer shall be given primary attention.<sup>14</sup>

In the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States,

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<sup>11</sup>Elien Utrecht, *Pengantar dalam Hukum Indonesia*, Jakarta: Ikhtiar, 1983.

<sup>12</sup>Elien Utrecht, *Pengantar dalam Hukum Indonesia*, Jakarta: Ikhtiar, 1983. Surojo Wignyodipuro, *Pengantar Ilmu Hukum*, Jakarta: Gunung Agung, 1983.

<sup>13</sup>Ruslan Abdul Gani and Retno Kusuma Wardani, "Restorative Justice For Settlement of Minor Maltreatment in The Legal Area of The Merangin Police, Jambi Province," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 23, No.1 (2023), p. 93-107.

<sup>14</sup>Mardjono Reksodiputro, *Sistem Peradilan Pidana* (Depok: Rajawali Pres, 2020).

including those laws proscribing criminal abuse of power.<sup>15</sup> C. de Rover confirms that in international law, the definition of victim is no longer limited to the person who has suffered, but also extended to the victim's close relatives or dependents, as well as people who have suffered losses that intervene in the victim's interests.<sup>16</sup>

Articles 8-11 of the Victims Declaration outline the standards for restitution payments to victims. Article 8 states that, "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights." Article 9 states that, "Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions." Article 10 states that "In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community." Article 11 states that, "Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."<sup>17</sup>

In general, perpetrators of crimes are required to return all property or payment for losses or damages suffered, reimbursement of costs incurred as a result of victimization, provision of services, and restoration of rights. However, in cases where compensation cannot be obtained from the offender or other sources, the state is obliged to provide such compensation, and the establishment of a special fund for this purpose is recommended.<sup>18</sup>

Furthermore, to fulfill all restitution rights of victims, in accordance with Article 4 of the Victims Declaration, the state is ordered that victims have the

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<sup>15</sup> "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly Resolution 40/34 of 29 November 1985," <https://www.ohchr.org>, n.d., <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>.

<sup>16</sup> C. de Rover, *To Serve & To Protect Acuan Universal Penegakan HAM*, (Jakarta: Rajawali Pres, 2000).

<sup>17</sup> "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly Resolution 40/34 of 29 November 1985."

<sup>18</sup> C. de Rover, *To Serve & To Protect Acuan Universal Penegakan HAM*, p. 210.



right to access and mechanism for a speedy trial and compensation.<sup>19</sup> Point 4 of the Victims Declaration states that, “Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”<sup>20</sup>

### Restitution in Islamic Law

According to Islamic law, compensation for rape victims is an inseparable part of the corporal punishment that must be borne by the perpetrator, and thus, the judge decides this at the same time as the decision on corporal punishment without the need for a request from the victim.<sup>21</sup> Victims are also entitled to restitution.<sup>22</sup> On the other hand, if a rape victim gives birth to a child, then the child also becomes a burden on her life, which she should not bear.<sup>23</sup> Therefore, in terms of fulfilling the rights of rape victims, restitution should be directly determined by the judge without waiting for a request from the victims. In Islamic law, restitution for rape perpetrators is inherent and inseparable from the main punishment. Islamic law describes that compensation for rape victims is an inseparable part of the physical punishment that must be borne by the perpetrator, and thus, it is also decided by the judge together with the decision of physical punishment without the need for a request from the victim. By attaching to the main punishment, it will be convenient for the judge to decide on one verdict without waiting for the prosecutor’s request on restitution.

Referring to the Child Protection Law, one of the rights of children is the right to receive restitution. The granting of restitution rights to children as victims of criminal acts is based on the laws and regulations in force in Indonesia. The mechanism for requesting restitution for children who are victims of criminal acts can be based on PP No. 7 of 2018 and/or PP No. 43 of 2017. Providing restitution can also be based on a court decision or court order. In a comparison of the three decisions, the judge imposes additional penalties to pay restitution. A comparison

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<sup>19</sup> C. de Rover, *To Serve & To Protect Acuan Universal Penegakan HAM*, p. 210.

<sup>20</sup> “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly Resolution 40/34 of 29 November 1985.”

<sup>21</sup> Nouvan Moulia and Putri Kemala Sari, “Beban Restitusi Pelaku Pemerkosaan Menurut Perspektif Fikih Dan Qanun Jinayat,” *Ius Civile: Refleksi Penegakan Hukum dan Keadilan* 5, no. 1 (2021).

<sup>22</sup> Muhammad Iqbal Juliansyahzen, “The Contemporary Maqāṣid Sharia Perspective on Sexual Violence Provisions in the Indonesian Law Number 12 Year 2022,” *Al-Manahij: Jurnal Kajian Hukum Islam*, (2022), p. 269–86.

<sup>23</sup> Mursyid Djawas et al., “The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law),” *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, no. 1 (2022), p. 139–55.

of these decisions shows that the judge in his/her considerations do not consider immaterial losses for the victims.<sup>24</sup>

Nevertheless, in Indonesian criminal justice system, the state's attention is more focused on the perpetrators of crimes while the victims receive less attention. The existence of Law Number 13 of 2006 concerning Witness and Victim Protection and Law Number 31 of 2014, an Amendment to Law Number 13 of 2006 on Witness and Victim Protection, along with their implementing regulations, has ignited hope for protection of victims of crime. Moreover, these laws contain provisions on restitution as the right of the victim given by the perpetrator. However, there are a number of shortcomings in the laws. The renewal should refer to the values that apply in society. Indonesian legal system consists of Western law, customary law and Islamic law, and the majority of the Indonesian population is Muslim; hence, it is very appropriate if the values of Islamic law can be become a reference for the current Indonesian legal reform.<sup>25</sup>

In addition, based on the focus of this study, children who are victims of sexual abuse also have the right to receive restitution. The implementation of restitution for child victims of crime has been regulated in Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who Become Victims of Crime. Still, despite the implementation of restitution for child victims being regulated in the legislations, restitution is still rarely carried out. Hence, there is a gap between what should be done based on theory and concept and what exactly happens in society as a legal reality.<sup>26</sup>

### **Criminal Law Policy in the Qanun Jinayat of Aceh**

Penal policy<sup>27</sup> can be defined as a rational effort to deter crime by means of criminal law. The term penal policy has the same meaning as the terms criminal law policy and criminal law politics (*strafrechtspolitik*). Therefore, the use of these three terms in the field of thought has the same meaning.<sup>28</sup>

Criminalization is a policy that establishes an act that was previously not a criminal offense (not punishable) into a criminal offense (punishable). In

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<sup>24</sup> Faza Shaqila, et al., "Hak Restitusi Terhadap Anak Korban Tindak Pidana dan Implementasinya Dalam Putusan Hakim," *Neoclassical Legal Review Journal of Law and Contemporary Issues* 2, No. 2 (2023), p. 11-18.

<sup>25</sup> Herman Sujarwo, "Pembaharuan Restitusi Kepada Korban Tindak Pidana Dalam Undang-Undang Perlindungan Saksi Dan Korban Berdasarkan Nilai-Nilai Hukum Islam," *Manarul Qur'an: Jurnal Ilmiah Studi Islam* 20, No. 1 (2020), p. 57-68.

<sup>26</sup> Cindy Dewu, et al., "Pelaksanaan Restitusi Terhadap Anak Korban Kekerasan Seksual," *Jurnal Risalah Kenotariatan* 5, No. 1 (2024).

<sup>27</sup> Koesparmono Irsan, "Arah Politik Hukum Pidana Dalam Rencana Undang-Undang Hukum Pidana," *Jurnal Keamanan Nasional* 1, no. 1 (2015), p. 79-104.

<sup>28</sup> Salman Luthan, *Kebijakan Kriminalisasi di Bidang Keuangan* (Yogyakarta: FH UII Press, 2014).

essence, criminalization is part of criminal policy as it utilizes criminal law (penal), and thus, it is included in criminal law policy (penal policy).<sup>29</sup>

Penal policy is not merely a work of legislative technique that can be carried out in a juridical-normative and systematic-dogmatic manner, but it also requires a juridical-factual approach that can take the form of sociological, historical, and comparative approaches. In addition, penal policy also requires a comprehensive approach from various other social disciplines and an integral approach that is in line with social policy or national development policy.<sup>30</sup>

The use of legal measures, including criminal law, as one of the efforts to overcome social problems is included in the field of law enforcement policy. As it aims to achieve the welfare of society in general, the law enforcement policy also falls within the field of social policy, namely all rational efforts to achieve the welfare of society. Since this issue falls within the realm of policy, the use of criminal law is not actually a necessity. There is no absoluteness in the field of policy because, in essence, in regard to policy matters people are faced with the problems of policy assessment and selection from various alternatives.<sup>31</sup>

The efforts to combat crime through the creation of criminal law are essentially also an integral part of efforts to protect society (social welfare). Therefore, it is also reasonable that criminal law policy or politics is also an integral part of social policy. Social policy can be interpreted as all rational efforts to achieve social welfare which simultaneously include social protection. Hence, the understanding of “social policy” also includes “social welfare policy” and “social defense policy”.<sup>32</sup>

Criminal law policy or criminal law politics in Indonesia also becomes a reference and basis for the Aceh Government in formulating criminal law policy in Aceh. This is based on the juridical logic that the Qanun Jinayat is a regional legal product that applies in Aceh and is part of the framework of the national legal system. The formation of the Qanun Jinayat and the Qanun on Jinayat Procedure Law is based on Law No. 44 of 1999 and Law No. 11 of 2006 concerning the Governance of Aceh.<sup>33</sup> These two laws provide Aceh with special privileges and specificities in implementing Islamic sharia within the framework of the unitary state of the Republic of Indonesia.

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<sup>29</sup> Barda Nawawi Arief, *Tindak Pidana Mayantara Perkembangan Kajian Cyber Crime di Indonesia*, Jakarta: Raja Grafindo Persada, 2006, p. 20.

<sup>30</sup> Muladi, *Proyeksi Hukum Pidana Materil Indonesia Pada Masa Depan, Pidato Pengukuhan Guru Besar* (Semarang: Universitas Diponegoro, 1991).

<sup>31</sup> Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara* (Semarang: Badan Penerbit Universitas Diponegoro, 1994).

<sup>32</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Kencana Prenada Media Group, 2008).

<sup>33</sup> Ira Nurliza et al., *Formulation of Criminal Sanctions against Alcohol Drinkers in the Jinayah Qanun in Aceh*, *Syariah: Jurnal Hukum dan Pemikiran* 22, No. 2 (2022).

The Qanun Jinayat regulates restitution as a form of *ta'zir* punishment for perpetrators of rape. The procedures for granting restitution are further regulated in Qanun Aceh Number 7 of 2013 concerning the Qanun on Jinayat Procedure Law. The Qanun on Jinayat Procedure Law does not use the term “restitution”, but rather the term “compensation”. In criminal law studies, these two terms have different meanings.<sup>34</sup> The difference in the use of the term restitution in the Qanun on Jinayat Law and the term compensation in the Qanun on Jinayat Procedure Law has been explained by the Regulation of the Supreme Court of the Republic of Indonesia No. 1 of 2022 concerning Procedure for Completing Applications and Providing Restitution and Compensation to Victims of Crime. This Regulation emphasizes that the compensation regulated in the Aceh Qanun Number 7 of 2013 on Jinayat Procedure Law is equated with restitution.<sup>35</sup>

The determination of the amount of restitution imposed on the perpetrators of rape is based on the consideration of the financial capacity of the convict or the convict's family. This provision is a reference for judges in imposing restitution sentences as regulated in Article 51 paragraph (2) of the Qanun on Jinayat Procedure Law and Articles 76 paragraph (5) and 77 paragraph (5) of the Qanun on the Implementation of Handling Violence against Women and Children. Article 76 paragraph (5) regulates restitution submitted before a judge's verdict is handed down, whereas Article 77 paragraph (5) regulates restitution submitted after a judge's verdict is handed down. Both of these restitution application schemes still require the consideration of the financial capacity of the rapists or their family, and not on the consideration of the amount of loss or the severity of the suffering experienced by the victims.<sup>36</sup>

The formulation of fulfilling the rights of rape victims in the form of restitution as regulated in Article 51 of Qanun Jinayat still adopts provisions in the Criminal Procedure Code (KUHAP). Restitution as the right of victims must have a “victim's request”; and if the victim does not ask for restitution, then the judge will act *passive* and cannot give restitution to the rape victims. However, the problem is that not all victims understand and know that rape victims have rights in the form of restitution.

The concept of restitution formulation that has existed in Aceh Qanun Jinayat and Islamic law is even more dominant than the concept of restitution in Indonesian criminal law. The concept of restitution to be applied in Aceh is different from the complicated scheme of restitution fulfillment in Indonesia; thus, making rape victims easily obtain their rights, since the Aceh Qanun is a very special regulation in Indonesia. The core of the specificity of Aceh Qanun

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<sup>34</sup> Qanun of Aceh, Number 7 of 2013 concerning Qanun Jinayat Procedural Law

<sup>35</sup> Supreme Court Regulation No. 1 of 2022 concerning Procedure for Completing Applications and Providing Restitution and Compensation to Victims of Crime

<sup>36</sup> Qanun of Aceh, Number 9 of 2019 concerning the Implementation of Handling Violence against Women and Children.

Jinayat is that it allows the full inclusion of Islamic law rules into the Qanun Jinayat.<sup>37</sup>

Therefore, one of the policies of the Aceh Government in implementing Islamic Sharia is the formation of the Qanun Jinayat. The purpose of the formation of the Qanun Jinayat is to manifest the welfare of the Acehnese people. This welfare can be realized by presenting the Qanun Jinayat to provide guarantee and protection for religion, soul, reason, offspring, honor and property. One form of guarantee and protection in the Qanun Jinayat is the realization of restitution for victims of rape.

### **Formulation of Restitution in the Qanun Jinayat**

The formulation of restitution in the Qanun Jinayat is positioned as an additional punishment separate from the principal punishment. An additional punishment is a complement to the principal punishment and is not standalone. The judge can impose the principal punishment without an additional punishment, but not the other way around. The separation between principal and additional punishments in the Qanun Jinayat is largely influenced by national criminal law. However, in Islamic law, there is no such separation between principal and additional punishments. Both the principal punishment and the additional punishment are considered *'uqubat*.

The separation between principal and additional criminal sentences in the Qanun Jinayat can create legal uncertainty for victims in obtaining compensation. This becomes even more complicated with the rule that restitution can only be filed by the prosecutor if there is a request from the victim. Additionally, the judge, when determining the amount of *'uqubat* restitution, must consider the financial ability of the convict. In this context, the focus of the criminal law policy paradigm established by the Aceh Government is in determining and implementing restitution as an additional punishment for rape victims in the Qanun Jinayat.

The amount of restitution that can be claimed by victims in the Aceh Qanun Jinayat Law is regulated in Article 51 paragraph (1), which only mentions the maximum amount of 750 (seven hundred fifty) grams of pure gold, and no mention of the minimum amount that can be submitted by the victim or that can be granted by the judge.

This is certainly not a legal policy formulation that has a perspective of justice for rape victims. A criminal sanction should not only require the perpetrator to be responsible to the state, but also to the victim. Criminal sanctions should also be able to become a legal instrument for personal loss recovery of victims who have experienced loss and suffering, such as in sexual assaults like

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<sup>37</sup> Syarifah Rahmatillah, "Rekontruksi Pemenuhan Restitusi Melalui Qanun Jinayat di Aceh Bagi Korban Perkosaan," *Serambi Tarbawi* 10, No. 2 (2022), p. 139-152.

rape, despite criminal law being public law. In this case, the *'uqubat* of gold restitution imposed on the perpetrator of rape for the victim in the Aceh Qanun Jinayat Law should be properly formulated to be able to help rehabilitate the loss and suffering of the rape victims. Hence, the purpose of applying additional restitution penalties can fulfill the expected purpose of punishment i.e., to fulfill a sense of justice for the victim. This includes the provision on the requirement of "the victim's request" for restitution in Article 51 paragraph (1), which should be replaced with a requirement for the Public Prosecutor to automatically include a restitution claim against the perpetrator of rape without the need for a request from the victim.

A well-formulated and balanced criminal law policy that takes into account the interests of the perpetrators, victims, society, and the state is deemed necessary to fulfill the sense of justice and the benefit of the law for all parties involved, including and not excluding the victims. The presence of Islamic-based law in Aceh is highly expected by the Acehnese people to offer a better legal solution compared to the Indonesian national law that has been practiced to date and has yet to provide a sense of justice with the value of legal benefit, other than certainty. Islamic-based law through the Aceh Qanun Jinayat and the Aceh Qanun Jinayat Procedure Law is a great hope that help present a legal value of *rahmatan lil 'alamin* (a mercy for all creation) for any party involved. The handling of restitution fulfillment for rape victims in Aceh up to present still shows inequality, as victims find it difficult to gain their rights, i.e., restitution. Even though restitution has been stipulated, there has been no restitution carried out from 2014 to 2022.<sup>38</sup>

The data and analysis on the restitution issue showed that the restitution fulfillment system for rape victims in Aceh through the Qanun Jinayat Law is still quite complicated. The difficulty for victims to obtain their restitution right is the same as that for other crime victims in Indonesia whose restitution rights are handled by the KUHAP and the Witness and Victim Protection Law.

Restitution in the formulation of criminal legislation, including in this case the Qanun Jinayat, should not become an additional punishment and separated from the principal punishment for the perpetrators of rape. The separation between the principal and additional criminal sentences has created legal uncertainty for victims in obtaining compensation. This is further escalated by the rules that restitution can only be filed by the prosecutor if there is a request from the victim and that the judge shall consider the financial ability of the convict in determining the amount of *'uqubat* restitution, regardless the loss and suffering of the victim.

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<sup>38</sup> Elda Maisy Rahmi, et al., "Pelaksanaan *'uqubat* Restitusi Terhadap Korban Perkosaan," *Kanun Jurnal Ilmu Hukum* 21, no. 2 (2019), p. 227–40.

The enactment of the Qanun Jinayat in this context is a legal policy and government policy in order to protect women as victims, which is the goal of Islamic law.<sup>39</sup> Therefore, as with most legal and regulatory problems, the problem usually lies not in the substance of the law, but in its implementation in society, which also involves law enforcement agencies.

## Conclusion

The concept of restitution in the Aceh Qanun Jinayat Law has been heavily influenced and dominated by the restitution system in Indonesian criminal law. The fulfillment of restitution right for rape victims in Aceh does not have to be submitted by the victim to the judge through the public prosecutor; however, the judge can directly include the restitution sentence to the perpetrator in the decision. In Islamic law, fines are essentially an integral part of the principal punishment. If the perpetrator is unable to pay restitution to the victim, then the restitution is borne by the victim's family as the people responsible (*ahliyah*) for the victim, and the state is obliged to provide compensation to the victim to restore the victim's physical and psychological conditions. In this case, the Aceh Government also has an obligation to provide compensation to the victim, if the perpetrator is unable to fulfill the restitution, as a form of the state's responsibility based on the constitutional mandate. This study thus recommends that the concept of restitution in the Qanun Jinayat be reformulated to be more applicable. Rape victims can obtain their rights more quickly, considering that the Qanun Jinayat is a special regulation that only applies in Aceh as part of the implementation of Islamic Sharia in Aceh. However, in the context of the politics of law, the Qanun Jinayat shall be understood as a government policy to provide legal certainty and justice. Any shortcoming in the current policy means more improvements are necessary for its future implementation.

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