

## Analysis of ‘Uqubah Jarimah Khalwat in the Qanun of Jinayatlaw in Aceh

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**Abstract:** ‘Uqubah or punishment is a form of retaliation for someone for his/her actions in violation of the provisions of *syara*’ (sharia), which Allah and His Messenger have decreed for the benefit of humans. Jarimah khalwat, was regulated in Aceh Qanun, Number 6, the Year 2014, concerning Jinayat (Indecency) Law. Article 23 of the Aceh Jinayat Law Qanun, stipulated that the ‘uqubah of khalwat jarimah is ta’zir (discretionary punishment), in the form of ten lashes, or a fine of 100 grams of pure gold or a maximum of ten months in prison. The ‘Uqubah (punishment) is too light. This argument is based on the stipulation that the khalwat jarimah is classified in three forms of jarimah ta’zir, the type of violating the rights of God, as a form of immorality, and a violation that have been affirmed in the Qur’an for which no punishment is specified in the Qur’an or hadith. However, the provision of Article 23 of the Aceh Jinayat (Indecency) Law Qanun consists of law renewal because there is an arrangement for the type of ‘uqubah (punishment) of fine, in the form of fine gold, which must be paid to the Baitul Mal (House of Wealth) of Aceh.

**Keywords:** ‘Uqubah, Jarimah Khalwat, The Qanun Jinayat law, Aceh

Date of Submission: 22-11-2019

Date of Acceptance: 06-12-2019

### I. INTRODUCTION

‘Uqubah is a form of retaliation for someone for his/her actions in violation of the provisions of *syara*’ (sharia), which Allah and His Messenger set for the benefit of human. Rahmat Syfi’ie (1998) argued that punishment is what Allah has decreed in the Qur’an, related to the actions of people who are subjected to the law (*mukallaf*) and demanded of its implementation. *Mukallaf* is defined as a person who is subjected to the law, while in the *ushulfiqh* (the source of Islamic law) term, a *mukallaf* is called *mahkumalayhor* legal subject (Rachmat Syafe’I, 1998). Punishment is imposed on *mukallaf* who is proven to have committed *jarimah* or criminal acts, or acts which are prohibited by *syara*’ (Abdul Aziz Dahlan, 2003), and the perpetrators are threatened with the punishment of *hador ta’zir*, both *hudud*, *Qishas/Diyat* and *Ta’zir* (Abdurrahman Al-Jaziry, 1968).

*Jarimah* is an Arabic term, namely *جرية*, the singular form of the word *jarā’im* (جرائم), which literally means bad, bad or sinful deeds, cutting, cutting, shaving, completing and picking (Achmad W. Munawwir and M. Fairuz, 2007, *Wizārah al-Auqāf*, 1995). One form of *jarimah* is *khalwat*, which means a man is with a woman, who is not his *mahram* (unmarriageable kin), and there is no third person with them (Marwān Ibrāhīm al-Qaisī, 2000). Basically, *khalwat* is carried out by men and women who are not *mahramin* in a hidden or closed place. The legal basis for prohibiting *khalwat* is the Word of God in the Quran, Surah An-Nur (24) verse 30.

Translation:

Tell the believing men to reduce [some] of their vision and guard their private parts. That is purer for them. Indeed, Allah is Acquainted with what they do.

As well as in Surah Al-Isrā’ (17) verse 32, as follows.

وَلَا تَقْرُبُوا الزَّوْجَاتِ إِنَّمَا كَانَ فَاكِحَةً وَسَاءَ سَبِيلًا. (القرآن سورة الإسراء: 32).

Translation:

And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.

Al-Marāghī stated that the sentence that says *وَلَا تَقْرُبُوا الزَّوْجَاتِ* means the prohibition of Allah to His servants regarding the matter of approaching *zina* (adultery) (Ahmad Mustafā al-Marāghī, 1946). Al-Sya’rāwī, the element of approaching adultery are *ikhhtilāṭ* and *khalwat*. That means, it is not permissible to perform *khalwat*

because *zina* (adultery) is forbidden, and *khalwat* is one of the acts leading to *zina*(adultery) (MuhammadMutawallī al-Sya'rāwī, 1991). In this verse Allah does not say: "do not commit *zina* (adultery)," it is instructed not to approach *zina* (adultery) instead. The act of approaching adultery includes, but not limited to, looking at, mingling with, getting along intimately, and talking privately with the opposite sex. The intention of not approaching *zina*(adultery) means "do not approach the elements that motivate to commit *zina* (adultery), such as looking at, mixing with women, or other actions (MuhammadMutawallī al-Sya'rāwī, 2006).

*Jarimahkhalwat* is *jarīmahta'zīr*, the type of violating the rights of God, as a form of immorality, and the type of acts that have been confirmed in the Qur'anfor which the punishment is not determined. The punishment for *khalwat* is not regulated specifically as what type of *ta'azīr* (punishment) is appropriate for the offender. The scholars tend not to set the punishment, because the leader has the authority to determine its type. Basically the punishment for the perpetrators of the *jarimahkhalwat* is determined by considering its benefit and not exceeding the sentence of *ḥadd*, that it should not exceed the punishment of a hundred times lashes, as the *ḥadd* is assigned to the perpetrators of *zina*(adultery). The consideration of *ḥadd*of adultery because *khalwat* is a way to commit *zina*(adultery).

*Jarimahkhalwat* was regulated in Aceh Qanun Number 6, of the Year 2014, concerning *JinayatLaw*. The definition of *khalwat* is explained in the General Provisions of Qanun*Jinayat Law* Number 23, namely the act of being in a closed or hidden place between two people of different sex voluntarily, who are not *mahram* and without marriage ties, leading to *zina* (adultery).

The 'uqubah towards the perpetrators of the *khalwatJarimah* is found in Article 23 of the Aceh *JinayatLawQanun*:

(1) Anyone who intentionally commits *jarimahkhalwat*, is threatened with the 'Uqubah*Ta'zirof* at most ten times lashes or a maximum fine of 100 grams of pure gold or a maximum of ten months imprisonment.

Based on the provision of the article above, the 'uqubah that can be imposed by the judge on the perpetrators of the *khalwatjarimah* is the sentence of ten times lashes or a maximum of 100 grams of pure gold or a maximum of ten months in prison. Thus, the 'uqubahthat found in the Aceh *Jinayat Law Qanun* is lighterthan the basic law in *JarimahTa'zir* in Islamic Law. Based on the description above, this study aims to analyze the 'uqubahfor the perpetrators of the *khalwatJarimah* in the *Jinayat Law Qanun* in Aceh.

## II. RESEARCH METHODS

This research is library researchconducted by examining secondary data. The approach used was thestatute approach,an approach using legislation and conception. The main references in this research concerning *jarimahkhalwat*are the Qur-an and Hadith, as well as statutory regulations, specifically the Law Number 11 the Year 2006, and Aceh Qanun Number 6 the Year 2014, concerning *JinayatLaw*,as well as the opinions of ulama. Data analysis was performed through a prescriptive analysis.

## III. ANALYSIS OF 'UQUBAHJARĪMAHKHALWAT IN THE ACEHJINAYAT LAW QANUN

### a. 'Uqubahkhalwat according to the Aceh Jinayat Law Qanun

*Jarimahkhalwat* is a form of criminal acts which is prohibited according to the *Jinayat Law* in Aceh. Article 1 Number 23 ofAceh Qanunof *Jinayat*, stated that *khalwat* is the act of being in a closed or hidden place between two people of different sex voluntarily, who are not *mahram* and without marriage ties, leading to *zina* (adultery). Prohibition of *Khalwat* (seclusion)is intended to protect the community, as early as possible, from committing acts that lead to adultery and damaging the honor. In this article, the Qanun stated that "the scope of the *khalwat*(seclusion) prohibition are all activities, actions and circumstances leading to *zina* (adultery)".

According to the general explanation of Qanun, *khalwat*, any immoral sexual acts that can lead to adultery is usually only conducted in a remote (closed) place, far away (protected)from the sight of others. However, it is also possible that acts of *khalwat* leading to adultery to occur in relatively crowded places, such as in restaurants, hotel's waiting rooms and recreation areas or in the streets, such as in public vehicles or other places.

An act is categorized as*jarimahkhalwat*when it is committed by two *mukallaf*, and not by husband and wife or married couple (RahmatSyafi'ie, 1998). *JarimahKhalwat* occurs when the two *mukallaf* are in a certain place that allows immoral sexual acts or the opportunity to commit*zina*(adultery)(Ahmad Al-Faruqy, 2011)

The prohibition on conducting *jarimahkhalwat*in Aceh is regulated in Aceh Qanun Number 6 the Year 2014, concerning *JinayatLaw*, a prohibition for two people of different gender, who are not *mahram* and without marriage ties, to stay in a closed or hidden place. This prohibition aims to: (1) enforce the Islamic Sharia and the customs applied in society in the province of Aceh; (2) protect the community from various forms of activities or acts that damage the honor; (3) prevent the members of the community, as early as possible, from committing

acts that lead to *zina* (adultery); (4) increase the community participation in preventing and eradicating *khalwat*/obscene acts; and (5) close the opportunity for the moral damage.

Regarding the *jarimahkhalwat* in the Qanun Number 6 the Year 2014, concerning *Jinayat* Law, the act of being in a closed or hidden place between two people of different sex voluntarily, who are not *mahram* and without marriage ties, leading to *zina* (adultery).

The punishment for the perpetrators of *khalwat* in Article 23 of the Aceh *Jinayat* Law Qanun is as follows.

(1) Anyone who intentionally commits *jarimahkhalwat*, is threatened with the 'Uqubah *Ta'zir* of at most ten times lashes or a maximum fine of 100 grams of pure gold or a maximum of ten months imprisonment.

Based on the provision of the article above, the perpetrators of *jarimahkhalwat* can be sentenced to a maximum of ten lashes. This punishment can be added or exchanged with other penalties, such as a fine up to 100 grams of pure gold or a maximum of ten months imprisonment. The scope of the *jarimahkhalwat* is based on the following criteria.

- a. The acts are in a closed or hidden place
- b. Two people
- c. Different sexes
- d. Not *mahram*
- e. There is no marriage bond
- f. The willingness of both parties (voluntarily)
- g. The nature of the act leading to *zina* (adultery)

The emphasis on *khalwat* between non-Muslim men and women is also more flexible in its application. With these characteristics, all practices that are considered *khalwat* will be charged by law, even if it is in public places, such as hotels, inns, cafes, etc. (Alyasa 'Abubakar and Halim Marah, 2007).

The Aceh *Jinayat* Qanun gives exceptions about two people who are in a closed place. For example, two people of different sexes are at their workplace, likewise they are resident in the house which can be proven by a family register or the approval of a local official. It is not called *khalwat* when someone is helping others in an emergency situation. This is stated in Articles 12 and 13.

(1): Everyone who is working at the workplace and during work hours cannot be accused of committing *jarimahkhalwat* with fellow workers. Paragraph (2): Every person who becomes a resident of a house, which is proven by a family register or the approval of a local official, cannot be accused of committing *jarimahkhalwat* with fellow residents of the house".

Article 13:

Any person who helps to someone of the opposite sex in an emergency situation cannot be accused to perform *Jarimahkhalwat* or *Ikhtilath*.

Based on these descriptions, it can be concluded that the choice of law taken by the Aceh government through the DPRA (the people's representative council of Aceh), that the *jarimahkhalwat* is punished by *ta'zir* in the form of a sentence of ten lashes or a fine of 100 grams of pure gold or a maximum of ten months imprisonment. This determination is part of the full authority of the Aceh government in dealing with the *jarimahkhalwat* which has disturbed Acehnese people.

## b. The 'Uqubah of Jarimah Khalwat according to Islamic Law

Islamic law encourages marriage, because it is the healthiest and most appropriate way to fulfill the biological needs (sex instinct). Therefore, Islam prohibits promiscuity and stimulating dances, pornographic images and songs, as well as other ways that can increase lust or lead people to sexual crimes that are not justified by religion (Sayyid Sabiq, 1987). All of these can lead to *jarimahkhalwat*, committing seclusion acts in a quiet and closed place without being accompanied by their *mahram* or in an open place doing *Ikhtilath*. Islam strictly forbids *jarimahkhalwat*, which is to maintain self-respect and morals.

*Khalwat* (seclusion) originated from Arabic, which is *خُلُوَة*, derived from the basic word *خَلَا*, which means to be empty, to be peaceful, peaceful, calm, to be alone in a place, together with, being in a quiet place with, or being alone. Meanwhile, the word *خُلُوَة* means a quiet, hidden place, a place of seclusion, a place of hermitage, solitude, or quietly (Achmad W. Munawwir and M. Fairuz, 2007).

The definition of *khalwat* in the book of Mawṣū'ah al-Fiqhiyyah, (Wizārah al-Auqāf), is as follows.

وخلا الرَّجُلُ بصاحبه وإليه ومعه خلواً وخلاء وخلوة : انفرد به واجتمع معه في خلوة.

Translation:

A man is alone with his best friend in a quiet place who joins him in solitude.

Abdul Aziz Dahlan stated that *khalwatis* a man and woman in a quiet and remote place, avoided by the sights of others, so that it is very likely for them to commit immorality (Abdul Aziz Dahlan, 2005). According to MarwānIbrāhīm al-Qaisī, *khalwat* is when a man with a woman who is not his *mahram*, and there is no third person with him (MarwānIbrāhīm al-Qaisī, 2000). Islam forbids the acts of two people of different sexes to be secluded in a closed place. Even the prohibition also applies to two people who have done *khiṭbah* (proposal) and plan to marry. During the marriage proposal period, the two parties are not justified to do *khalwat*(seclusion). Umar Sulaiman al-Asyqar argued that based on the provisions of the Prophet, it is forbidden for a man to do *khalwat*with a woman. He also cited the opinion in the book of al-Mughni, that a fiance should not be secluded with their partner because *khalwatis* is forbidden (Umar Sulaiman al-Asyqar, 2012).

*Jarimahkhalwat* is forbidden in Islam because this action can lead people to *zina* (adultery), intimate relationships outside of a legal marriage. The prohibition of adultery is found in Surah An-Nūr (24) verses 30-31.

قُلْ لِلْمُؤْمِنِينَ بَعْضُهُمْ مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ذَلِكَ أَزْكَى لَهُمْ إِنَّ اللَّهَ خَبِيرٌ بِمَا يَصْنَعُونَ. وَقُلْ لِلْمُؤْمِنَاتِ بَعْضُهُنَّ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلَى خُبُوبِهِنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا لِبُعُولَتِهِنَّ أَوْ آبَائِهِنَّ أَوْ آبَائِ بُعُولَتِهِنَّ أَوْ إِخْوَانِهِنَّ أَوْ بَنِي إِخْوَانِهِنَّ أَوْ بَنِي أَخَوَاتِهِنَّ أَوْ نِسَائِهِنَّ أَوْ مَا مَلَكَتْ أَيْمَانُهُنَّ أَوْ التَّبَاعِينَ غَيْرِ أُولِي الْإِرْبَةِ مِنَ الرِّجَالِ أَوِ الطِّفْلِ الَّذِينَ لَمْ يَظْهَرُوا عَلَى عَوْرَتِ النِّسَاءِ وَلَا يَضْرِبْنَ بِأَرْجُلِهِنَّ لِيُعْلَمَ مَا يُخْفِينَ مِنَ زِينَتِهِنَّ وَتَوْبُوا إِلَى اللَّهِ جَمِيعًا أَيُّهُ الْمُؤْمِنُونَ لَعَلَّكُمْ تُفْلِحُونَ. (القرآن سورة النور: 31-30)

Translation:

Tell the believing men to reduce [some] of their vision and guard their private parts. That is purer for them. Indeed, Allah is Acquainted with what they do. And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and to wrap [a portion of] their headcovers over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.

The command to lower their gaze and guard their private parts (genitals) as mentioned in the verse above means to not committing immoral acts. Al-Qurṭubī argued that the meaning of preserving and guarding the private part (genital) in the above verse means preventing something that is not permissible, and the other meaning is guarding against adultery. (Abī Bakr al-Qurṭubī, 2006). Imām al-Syaukānī interpreted it as a mandatory order for them to guard what is forbidden for them. (As-Syaukānī, 2010)

According to al-Baghawī, the meaning of guarding the private part (genital) in the verse is anything that is not permissible. Anything determined in the Qur'an regarding the obligation to keep the private part (genital) is adultery and other prohibited acts (Ibn Mas'ud al-Baghawī, 2002). This meaning is more appropriate so that all forbidden acts are part of the meaning of guarding the private part (genital) in general, including the practice of *khalwat*.

The prohibition on conducting the *jarimahkhalwat* is written explicitly in the Qur'an in Surah Al-Isrā' verse 32:

وَلَا تَقْرَبُوا الزَّانَا إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا. (القرآن سورة الإسراء: 32).

Translation:

And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.

Based on the provisions of surah al Isrā' verse 32, the acts directly prohibited is adultery and all behaviors leading to the act of adultery, including two opposite sexes, who are not mahram, being secluded between. The actions leading to adultery is *jarimahkhalwat*, so that *khalwat* is the root or path to adultery. Logically, if only approaching adultery is prohibited, then committing adultery is definitely more forbidden (Alyasa 'Abubakar,.) indicating that these are intended for the good of the mankind so that it is in line with the goals of Al-Maqashidsyar'iyyah in Al Kulliyat Al-Khamsa. Thus, *khalwat* is one of the heinous and unlawful acts prohibited in Islamic law.

Al-Marāghī believed that the sentence mentioning *لَا تَقْرَبُوا الزَّانَا* means the prohibition of Allah to His servants regarding approaching *zina* (adultery) (Ahmad Mustafā al-Marāghī). According to al-Sya'rāwī, the element of approaching adultery are *khiṭbah* and *khalwat*. This means that it is not permissible to perform *khalwat* because adultery is forbidden, and *khalwat* is one of the elements for committing adultery

(MuḥammadMutawallī al-Sya'rāwī). Al-Sya'rāwī also mentioned that in this verse Allah does not say: "do not commit adultery", instead He instructs not to approach adultery. There are many examples of approaching the acts of adultery, such as looking at the opposite sex, mingling with him/her, getting along intimately, and talking privately with him/her. The meanings of not approaching adultery "do not approach the elements that motivate you to commit adultery, such as looking, mixing with women, or other actions" (MuḥammadMutawallī al-Sya'rāwī.)

MuḥammadAbūZahrah said that Allah does not state: "do not commit adultery", but "do not approach adultery", including the prohibition of adultery and anything leading to it. He also stated that approaching adultery means opening the way (*zarī'ah*) to adultery itself (MuḥammadAbūZahrah, 1987). So, there are many elements approaching adultery, one of which is *khalwat*. *Khalwat* in this case is an action that can lead to adultery, therefore it is prohibited in Islam. In relation to this, Ibn Qayyim (1975), stated:

وحرّم الخلوّة بالمرأة الأجنبية و السفر بها و النظر إليها لغير حاجة حسما للمادة و سدا للذريعة.

Translation:

And it is forbidden to conduct *khalwat* (seclusion) with a woman who is not your mahram, travel with her, and look at her without necessity, to minimize the cause and eliminate the means of evil.

The meaning of badness, as mentioned above, is *szina* (adultery). Therefore, referring to the verse of Qur'an above, it can be seen that the prohibition of Allah (Glory to Him, the exalted) of approaching the acts of adultery consists of a general meaning. It can be in the form of seeing women, or in *khalwat* with women who are not *mahram*.

Rasulullah SAW has shown the social boundaries between men and women who are not *mahram* (Alyasa 'Abubakar, Marah Halim.)

1. The Prophet forbids a woman from dealing with a man who is not her *mahram* without being accompanied by her *mahram*.
2. The Prophet forbids *khalwat* with an engaged woman, even though Islam allows men to look at the women they ask to convince and strengthen their hearts to marriage.
3. The Prophet forbids a man from entering a woman's house who is not with her *mahram* or anyone else.
4. The Prophet forbids women from traveling without being accompanied by their *mahram*.

Rasulullah SAW in a ḥadith said:

لَا يَخْلُوَنَّ جُلَيْمًا مَرَأَةً إِلَّا لَأَوْ مَعَهَا ذُو مَحْرَمٍ

Translation:

A man should not seclude himself with a woman except that there be with her someone who is of unmarried kin (mahram). (Narrated by Bukhari & Muslim)

The ḥadith narrated by Bukhari, from Qutaibah bin Sa'id (Imām al-Ḥāfiẓ Abī 'Abdillāh Muḥammad bin Ismā'il al-Bukhārī, 1998), the Prophet PBUH said:

حَدَّثَنَا قُتَيْبَةُ بْنُ سَعِيدٍ حَدَّثَنَا سُفْيَانُ عَنْ عَمْرِو بْنِ أَبِي مُعَيْبٍ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا أَنَّهُ سَمِعَ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ لَا يَخْلُوَنَّ رَجُلٌ بِامْرَأَةٍ وَلَا تُسَافِرَنَّ امْرَأَةٌ إِلَّا لَأَوْ مَعَهَا مُحْرَمٌ فَقَالَ يَا رَسُولَ اللَّهِ كَتَبْتَنِي فِي غَزْوَةِ كَذَا وَكَذَا وَخَرَجْتُ امْرَأَتِي حَاجَةً قَالَ أَذْهَبَ فَحُجَّ مَعَ امْرَأَتِكَ. (رواه البخاري)

Translation:

Qutaibah bin Sa'id has told us, Sufyan from 'Amru from Abu Ma'bad, from Ibn 'Abbas stated, "I heard the Prophet (God bless him and grant him peace) give a sermon. He said, 'A man should not seclude himself with a woman except that there be with her someone who is of unmarried kin (mahram).'" [Bukhari, Muslim]. Then there was a man who rose and said: O Messenger of Allah, I have registered myself to join a battle while my wife goes to perform the Hajj. "So He said:" Perform Hajj together with your wife" (narrated by Bukhari)

Commenting on the ḥadith, Ibn Qayyim argued that the Messenger of Allah (PBUH) forbade to conduct *khalwat* with anyone who are not mahram (Ibn Qayyim al-Jauziyyah, 1423 H). The prohibition applies even in the cases of reading the Qur'an, travelling, performing hajj, or visiting the grave of parents. These are to eliminate the ways leading to slander.

The ḥadith narrated by Muslim, from Abū Bakr bin Abī Shafi'ib (Imām al-Ḥāfiẓ Abū al-Ḥusain Muslim al-Ḥajjaj al-Qusairī al-Nisābūrī, 1998), the Prophet PBUH said:

حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ وَزُهَيْرُ بْنُ حَرْبٍ كِلَاهُمَا عَنْ سُفْيَانَ قَالَ أَبُو بَكْرٍ حَدَّثَنَا سُفْيَانُ بْنُ عُيَيْنَةَ حَدَّثَنَا عَمْرُو بْنُ دِينَارٍ عَنْ أَبِي مَعْبُدٍ قَالَ سَمِعْتُ ابْنَ عَبَّاسٍ يَقُولُ سَمِعْتُ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَخُطُبُ يَقُولُ لَا يَخْلُونَ رَجُلٌ بِامْرَأَةٍ إِلَّا وَمَعَهَا ذُو مَحْرَمٍ وَلَا تُسَافِرُ الْمَرْأَةُ إِلَّا مَعَ ذِي مَحْرَمٍ فَقَامَ رَجُلٌ فَقَالَ يَا رَسُولَ اللَّهِ إِنَّ امْرَأَتِي خَرَجَتْ حَاجَةً وَإِنِّي اكْتَنَبْتُ فِي غُرُورٍ كَذَا وَكَذَا قَالَ أَنْطَلِقُ فَحُجَّ مَعَ امْرَأَتِكَ وَحَدَّثَنَا أَبُو الرَّبِيعِ الزُّهْرَانِيُّ حَدَّثَنَا حَمَّادٌ عَنْ عَمْرُو بْنِ هَذَا الْإِسْنَادِ نَحْوَهُ وَحَدَّثَنَا ابْنُ أَبِي عَمَرَ حَدَّثَنَا هِشَامُ يَعْنِي ابْنَ سُلَيْمَانَ الْمُخْزُومِيَّ عَنْ ابْنِ جُرَيْجٍ بِهِذَا الْإِسْنَادِ نَحْوَهُ وَلَمْ يَذْكَرْ لَا يَخْلُونَ رَجُلٌ بِامْرَأَةٍ إِلَّا وَمَعَهَا ذُو مَحْرَمٍ. (رواه مسلم)

Translation:

Abu Bakr bin Abu Syaibah and Zuhair bin Harb had told us, both from Sufyan, Abu Bakr said "Sufyan bin Uyainah had told us, from Amru bin Dinar from Abu Ma'bad, he said "I heard the Prophet (God bless him and grant him peace) give a sermon. He said, 'A man should not seclude himself with a woman except that there be with her someone who is of unmarriageable kin (mahram)". Then there was a man who rose and said: O Messenger of Allah, I have registered myself to join a battle while my wife goes to perform the Hajj. "So He said:" Perform Hajj together with your wife". And Abu Rabi 'Az Zahrani told us, Hammad told us from Amru with this example. And Ibn Abu Umar told us Hisham bin Sulaiman Al Makhzumi from Ibn Juraij with this example. He said "A man should not seclude himself with a woman except that there be with her someone who is of unmarriageable kin (mahram). (narrated by Bukhari).

Imām al-Nawawī explained that the hadith has an exception, namely when a woman is accompanied by her *mahram*, she can avoid of doing *khalwat*. The words "وَمَعَهَا ذُو مَحْرَمٍ" means "a woman is with her *mahram*", this mean that she can be with her children, brothers, sisters or mother (Syarf al-Nawawī).

Based on the hadith, *jarimahkhalwat* is forbidden in Islam. The terms used in both hadiths are *يَخْلُونَ*, which means close proximity or secluded situation. Rasulullah PBUH clearly prohibits the activity of *khalwat* without a *mahram*. Referring to the proposition, it is concluded that Islam ban a man who does *khalwat* with his non-*mahram* female in a secluded or closed place. The ulama agree "it is forbidden to do *khalwat* with a woman *ajnabiah* (a foreigner), however, it is allowed to do it with his *mahram*" (Syarf al-Nawawī).

*Jarimahta'zir* is one of the forms of 'uqubah in Islamic law. Therefore, *jarimahkhalwat* is included in *jarimahta'zir*. The criminal act of *ta'zir* is not specifically explained the limitation of the type of acts and its law. The word *ta'zir* means avoiding and helping. According to fiqh expert, *ta'zir* is the punishment that is surrendered to the judge, both instructed to Allah right or to the human right (Abdus Sami' Ahmad Imam, 2006).

In other meaning, *ta'zir* is punishment or sin which has no *hadd* or amercement (Abdul Aziz Mabruk al-Ahmadi, 2016). Based on this definition, the form of criminal act of *ta'zir* mentioned neither in number nor in the type of the punishment. In short, all actions violating Allah and human rights will have the punishments that are decided by the judge or government.

From the descriptions, the type of criminal acts in Islamic law includes the criminal act on the soul or other than the soul that become the scope of *qisās-diyat* punishment, the criminal acts for which the kinds of punishment have been decided are *hudūd*, namely the seven crimes mentioned, and the criminal acts that the punishments are not assertively determined in Quran and Hadith named as *ta'zir*. Based on the basic provision in Islamic law related to the *jarimah hudud* and *qishas*, the punishments which have been set in *jarimah hudud* for the *jarimah* that are completed, are forbidden to apply for experimental *jarimah* (Ahmad Wardi Muslich). The regulation is based on the hadith of Imam al Baihaqi from Nu'man ibn Basyir, Rasulullah PBUH said that those who do the *hadd* punishments in *jarimah hudud*, he becomes the transgressor (Jalaluddin As-Sayuthi).

*Jarimahkhalwat* is not included in the criminal act of *hudūd* and *qisās-diyat* because they have been mentioned clearly in the proposition of Islamic law. Therefore, *hudūd* and *qisās-diyat* are categorized as *ta'zir* punishment. In this issue, the leader has the authorities to determine the type and size of the sanctions. *Jarimahkhalwat* is *jarimahta'zir*, it is the punishment of immorality acts or mistakes (not included *hadd* and *kaffarah*) that are not specified because the authorities are given to the judge and government. Based on these terms and conditions, *ta'zir* does not have certain provision, either the type or the criterion of the punishments for the immorality perpetrators for *ta'zir* is also a preventive and educational punishment (Chairul Fahmi).

Ahmad Wardi Muslich asserted that *jarimahta'zir* consists of three perspectives, namely the perspective of the right prohibited, the characteristics and the legal basis (Ahmad Wardi Muslich, Mahrus Munajat, 2009).

1. Based on the rights prohibited, *jarimahta'zir* is divided into two types. First, related to the Allah rights. Second, concerning the human rights. Due to the division, *jarimahkhalwat* is included into *jarimahta'zir* that relates to Allah rights because *khalwat* is categorized as immorality (*ma'siyah*).
2. Based on the characteristics, *jarimahta'zir* is classified into three types. First, committing immorality acts. Second, threatening the public interest. Third, committing the violations. Based on these classifications, *jarimahkhalwat* is classified as immorality *jarimah*.

3. Based on a legal basis, *jarīmahta'zīr* is divided into three types. First, *jarīmahta'zīr* which comes from *jarīmahḥudūdorqīṣās*; however, the requirements are not fulfilled, or predicted to have *syubhat* in it. Second, *jarīmahta'zīr* that is mentioned in the *nashsyarak*, however the law has not been determined, such as usury, bribery, or reducing the scale measurement. The third, *jarīmahta'zīr* both the type and the sanctions are not explained in the *nashsyara' (the Qur'an and Hadīth)* (Mustafa Hasan dan Beni Ahmad Saebani). In this division, *jarimahkhalwat* is included in *jarīmahta'zīr*, which is the type mentioned in the *nashsyara'*. This is interpreted from the general meaning of the Qur'an in Surah Al-Isrā'verse32 that prohibits approaching *zina*. Accordingly, *khalwat* is included in this kind of prohibition.

Based on these explanations, *jarīmahkhalwat* is classified into three types of *jarīmahta'zīr*, the type of violating the rights of God, as a form of immorality, and a violation that have been affirmed in the Qur'an for which no punishment is specified in the Qur'an or hadith. Concerning the type of punishment for the *khalwat* perpetrators, the kind of appropriate *ta'zīr* is not specified.

The determination of the legal type of *khalwat* perpetrators punishment refers to the four general punishment concepts, as described by IbnuQayyim al-Jauziyah, (IbnuQayyim al-Jauziyah,2006) as follows.

1. *Ta'zīr* punishment is applied by considering the benefit and concerning the physical condition of the convicted person. In this issue, the officials who have the authorities on deciding the *ta'zīr* punishment should be able to actualize it.
2. *Ta'zīr* punishment sentenced should not exceed the *hadd* punishment. Some views of syafi'i followers stated that *ta'zīr* punishment of gazing at a non-mahram woman and intimate interaction with the opposite sex that breaks the regulated rules should not exceed the *hadd* punishment of *zina*.
3. *Ta'zīr* punishment can be applied below the minimum limit of *hadd* punishment. According to Syafi'i, Ahmad and Abu Hanifah's opinions, the *ta'zīr* punishment that can be applied to the perpetrators are 40 Or 80 lashes.
4. The maximum *ta'zīr* punishment does not exceed ten lashes. The determination is based on the opinions of mazhab Ahmad and others.

Based on the description, '*uqubah* of the *jarimahkhalwat* perpetrator is given by considering the benefit and should be below the *hadd* punishment, namely, it should not exceed 100 lashes as the *zina* punishment. The consideration is referred to *ḥaddzinab* because *khalwat* is such an opening for the opportunities for *zina*. The leader may sentence the *khalwat* perpetrators 99 or 80 lashes, or lower because of the benefit consideration.

Based on the Article 23 of Aceh *Jinayah* law Qanun, the '*uqubah* of *jarīmahkhalwat* is *ta'zīr* punishment, namely ten lashes or the fine of 100 grams pure gold or jailed for ten months, is too light. It refers to the determination that *jarīmahkhalwat*, that is included to the three types of *jarīmahta'zīr*: the violation of Allah right, the act of immorality and the act that clearly mentioned in the Quran for which the type of punishment is not specified. However, the provision of Article 23 contains a law renewal because it consists of an agreement of '*uqubah* in the form of pure gold to be deposited to an Islamic financial institution, Baitul Mal Aceh.

#### IV. CONCLUSION

*'Uqubah* of the *jarimahkhalwat* perpetrator should not exceed the *hadd* punishment for the *zina* perpetrator, namely, it should not exceed 100 lashes and should be based on benefit consideration. Therefore, the provision in the Article 23 of Aceh *Jinayah* law Qanun determining the '*uqubah* of *jarīmahkhalwat* is *ta'zīr* punishment, namely ten lashes or the fine of 100 grams pure gold or jailed for ten months, is too light. It refers to the determination that *jarīmahkhalwat*, that is included to the three types of *jarīmahta'zīr*: the violation of Allah right, the act of immorality and the act that clearly mentioned in the Quran for which the type of punishment is not specified. However, the provision of Article 23 contains a law renewal because it consists of an agreement of '*uqubah* in the form of pure gold to be deposited to an Islamic financial institution, Baitul Mal Aceh.

#### V. RECOMMENDATION

It is expected that stakeholders will consider to exacerbate '*uqubah* (punishment) of *jarimahkhalwat* because this crime has violated the three forms of *jarīmahta'zīr*, the type of violating the rights of God, as a form of immorality, and a violation that have been affirmed in the Qur'an for which no punishment is specified in the Qur'an or hadith.

#### REFERENCES

- [1]. Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam*, Jakarta: Ichtar Baru van Hoeve, 2005
- [2]. Abdul Aziz Mabruk al-Ahmadi, *FikihMuyassar*, (terj: Izzudin Karimi), Cet. 3, Jakarta: DarulHaq, 2016

- [3]. Abdurrahman Al-Jaziry, Al-Fiqhu 'Ala MazahibilAr-Ba'ah, Juzu' IV, Maktabah At-Tijariyah Al-Kubra, Mesir,
- [4]. Abdus Sami' Ahmad Imam, PengantarStudiPerbandinganMazhab, (terj: Yasir Maqosid), Jakarta: Pustaka al-Kautsar, 2016
- [5]. Abī Bakr al-Qurṭubī, al-Jāmi' al-Aḥkām al-Qur'ān, Juz 15, Bairut: Mu'assasah al-Risalah, 2006
- [6]. Achmad W. Munawwir dan M. Fairuz, Kamus al-Munawwir, Surabaya: PustakaProgressif, 200
- [7]. AḥmadMustafā al-Marāghī, Tafsīr al-Marāghī, Juz 15, Tp: SyirkahMaktabah, 1946
- [8]. Alyasa' Abubakar, Marah Halim, HukumPidana Islam di Provinsi NAD, Banda Aceh DinasSyariat Islam ProvinsiNanggroe Aceh Darussalam, 2007
- [9]. Faiz Bakhsh, "Compatability Between International Humanitarian Law And Islamic Law Or War (Jihad)," PETITA: Jurnal Kajian IlmuHukum dan Syariah, Vol 4 No 1 (2019): 75-85
- [10]. Ibn Mas'ūd al-Baghawī, Tafsīr al-BaghawīMa'ālim al-Tanzīr, Bairut: Dar Ibn Hazm, 2002
- [11]. Ibn Qayyim al-Jauziyyah, I'lām al-Muwāqī'in 'an Rabb al-'Ālamīn, Juz 5, Arab Saudi: Dār Ibn al-Jauzī, 1423
- [12]. -----, Ighāshah al-LahfānfiMaṣāyid al-Syaiṭān, Juz 1, (Bairut: Dar al-Ma'rifah, 1975
- [13]. -----, Hukum Acara Peradilan Islam, (terj: Adnan Qohar&Anshoruddin), Yogyakarta: PustakaPelajar, 2006
- [14]. Imām al-ḤāfiẓAbī 'AbdillāhMuḥammad bin Ismā'il al-Bukhārī, Ṣaḥīḥ al-Bukhārī, Riyadh: Bait al-Afkār al-DauliyyahLinnasyr, 1998
- [15]. Imām al-ḤāfiẓAbū al-Ḥusain Muslim al-Ḥajjaj al-Qusairī al-Nisābūrī, Ṣaḥīḥ Muslim, Riyadh: Bait al-Afkār al-Dauliyyah, 1998
- [16]. Imām al-Syaukānī, Fath al-Qadīr, Juz 4, Kuwait: Dar al-Nawadir, 2010
- [17]. MahrusMunajat, HukumPidana Islam di Indonesia, Yogyakarta: Teras, 2009
- [18]. MarwānIbrāhīm al-Qaisī, al-Mar'ah al-Muslimah bainalIjtihādāt al-Fuqahā' waMumārasāt al-Muslimīn, Riyadh: Dar al-Fadhilah, 2000
- [19]. MuḥammadAbūZahrah, Zahrah al-Tafāsīr, Bairut: Dar al-Fikr al-Arabi, 1987
- [20]. MuḥammadMutawallī al-Sya'rāwī, Dosa-DosaBesar, (terj: Abdul Hayyie al-Kattani dan FithriahWardie), Cet. 2, Jakarta: GemaInsani Press, 2006
- [21]. MuḥammadMutawallī al-Sya'rāwī, Tafsīr al-Sya'rāwī, Kairo: Idarah al-Kutb al-Maktubat, 1991
- [22]. Muhammad Siddiq Armia, 'Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience' (2018) 26(2) Intellectual Discourse 903-930.
- [23]. -----, 'Implementing Islamic Constitutionalism: How Islamic Is Indonesia Constitution?' (2018) 15(2) Al 'Adalah Journal 437-450.
- [24]. RachmatSyafe'i, IlmuUshulFiqh, Pustaka Setia, Bandung: 1998
- [25]. RatnoLukito, "Shariah And The Politics Of Pluralism In Indonesia: Understanding State's Rational Approach To Adat And Islamic Law," PETITA: Jurnal Kajian IlmuHukum dan Syariah, Vol 4 No 1 (2019): 14-30.
- [26]. Sayyid Sabiq, FiqhSunnah, jilid 9, diterjemahkan oleh Moh. NabhanHusein, Bandung: Al-Ma'arif, 1987
- [27]. Syarf al-Nawawī, al-MinhājfiSyarḥṢaḥīḥ Muslim bin al-Ḥajjāj, Riyadh: Bait al-Afkār al-Dauliyyah, t.t
- [28]. Umar Sulaiman al-Asyqar, PernikahanSyar'i: Menjaga Harkat dan MartabatManusia, (terj: Iman Firdausi), Solo: Tinta Media, 2012
- [29]. Wizārah al-Auqāf, Mausu'ah al-Fiqhiyyah, Juz 16, Kuwait: Wizārah al-Auqāf, 1995.

Nurdin. " Analysis of 'Uqubah Jarimah Khalwat in the Qanun of Jinayatlaw in Aceh." IOSR Journal of Humanities and Social Science (IOSR-JHSS). vol. 24 no. 12, 2019, pp 62-69.