



# Al-Baghyu's Analysis In Jinayah Fiqh On The Meaning Of Treatment In Article 107 Of The Kuhp

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## Abstract

Makar is a crime that threatens the security of the State. Makar in terms of overthrowing the government in the Criminal Code is regulated in Article 107 chapter II. While in the fiqh of jinayah makar is included in Jarimah al-Baghyu, with the background of the problem proposed three formulations of the problem, namely: how is the substance of treason in Article 107 of the Criminal Code, how is the interpretation of Jarimah al-Baghyu? - baghyu in jinayah fiqh, how is the relevance of treason in article 107 of the Criminal Code with Jarimah al-baghyu in jinayah fiqh. The purpose of this research is to find out the substance of treason in article 107, to find out the interpretation of Jarimah al-Baghyu in fiqh jinayah. This study uses a normative juridical research approach. The type of data used in the writing of this research is the type of qualitative data. The data sources used are primary data sources from the book of tasyri al-jina'i written by Abdul Qadir Audah and the Criminal Code by Moeljatno, and secondary data, namely fiqh jinayah books and books related to treason. The data collection technique used is library research. Analysis of the data used is descriptive qualitative analysis. The substance of treason in Article 107 of the Criminal Code is a planned act which intends to overthrow the legitimate government and threaten the security and safety of the State. Analyzed based on the theory of Jarimah Al-Baghyu, the meaning of treason in Article 107 of the Criminal Code includes the notion of resistance to the legitimate ruler (imam) by using force or taking up arms. The relevance between Jarimah Al-Baghyu and the meaning of treason in Article 107 of the Criminal Code is substantive relevance, namely that there is a similarity in meaning in the criteria for crime.

**Keywords:** Fiqh Jinayah; Makar; Al-Baghyu;

## INTRODUCTION

Simply put, the law is divided into two, namely positive law (Indonesian law) and religious law (in this case Islamic law) (Mariana, 2018). The state of Indonesia is a state guided by law

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(rechtsstaat) and not a state of power (machtsstaat), therefore the legal condition must be positioned above all else. Every action must be the same as the rule of law without exception (Audah, 2017). Based on Law No. 10 of 2014 concerning the Establishment of Legislation in Indonesia, the legal hierarchy in Indonesia is the 1945 Constitution of the Republic of Indonesia, Laws, Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, Regional Regulations, and other Regulations. Based on the hierarchy of legal order, the regulation regarding treason is regulated in the Law of the Republic of Indonesia Number 1 of 1946 concerning the Criminal Code.

Makar seen from the Big Indonesian Dictionary is bad sense, deceit or an act with the intention of killing people (Al-Maraghi, 1993). Meanwhile, in Andi Hamzah's Legal Dictionary, treason is a rotten mind; craftiness; Actions (efforts) with the intention of attacking (killing) people. The act (effort) to overthrow the legitimate government (Al-Maraghi, 1993). Makar can also be interpreted as an act to overthrow the legitimate government (coup) (Bouvier, 2022). The term treason or aanslag in Dutch, according to R. Soesilo is an attack, which is generally carried out with acts of violence (Bohlander, 2012). The term treason in the Criminal Code itself begins with a special interpretation which can be started in Article 87, which reads: Makar (aanslag) an act is deemed to have existed, if the intention of the perpetrator of the crime has been proven by the commencement of the act according to the intent of article 53.

The crime of treason in the Criminal Code Terminologically it is contained in Article 87 of the Criminal Code where the act of treason includes two elements, namely the intention and the beginning of the implementation of the intention of treason. In the provisions of Article 87 of the Criminal Code, it is stated that "treason" is actually considered to exist if the intention of the perpetrator of the crime has carried out the act according to the intent of Article 53 of the Criminal Code. So what is included in the meaning of treason (aanslag) is the act of execution, not the act of preparation (Sirulhaq et al., 2018). In this case, the Criminal Code (KUHP) itself recognizes several factors that cause or allow the crime of treason. One of them is article 107 of the second book of chapter II of the Criminal Code which reads:

- a. Makar with the meaning of bringing down the government, is punishable by a maximum imprisonment of fifteen years.
- b. The leaders and organizers of the treason referred to in paragraph 1, are threatened with life imprisonment or a maximum temporary imprisonment of twenty years (Mujianto et al., 2023).

Al-baghyu literally means to leave or violate. (Ibn Jarir at-Tabari, Jami' al-Bayan fi Ta'wil al-Quran, 2000) In terms of Islamic criminal law, Al-baghyu is an effort or movement carried out by a groups with the aim of overthrowing the legitimate government (M. Arief Rachman Adi Pradana, 2021). Al-Baghyu comes from the root word bagha which literally means "to demand something". Jarimah al-baghyu is included in the hudud category. Crimes in this category are grouped as crimes that are punishable by hadd punishment, which is a punishment that is determined by Allah's right. To be able to find the relevance of treason with Jarimah Al-Baghyu, because we must understand in detail what is meant by treason against positive law, namely the Criminal Code, especially in article 107. As a consideration, the author will also try to understand in detail what is referred to as treason. al-baghyu in fiqh jinayah. After that we will be able to see whether the crime of treason in the Criminal Code is related to Jarimah Al-Baghyu in fiqh jinayah.

## **METHODS**

The method used in this paper is descriptive analytical method in the form of article content analysis, namely Article 107 of the Criminal Code. This research method provides a view or description of a situation as clearly as possible without any treatment of the object under study (M Sudrajat Bassar, 1984). This study uses a normative juridical research approach, namely library law research is a method or method used in legal research that is carried out by examining existing library materials. Makar in Article 107 of the Criminal Code. This juridical-normative approach is used because the research that the researcher does is by examining library materials which are secondary data supported by primary data (Syarifin, 2000).

The data is obtained from the results of the study of literature or literature on objects that are in accordance with the formulation of the problem. That is related to:

- a. The substance of treason in Article 107 of the Criminal Code
- b. Interpretation of Jarimah al-Baghyu on jinayah fiqh
- c. The relevance of treason in article 107 of the Criminal Code with Jarimah al-baghyu in fiqh jinayah

The data analysis used in this research is descriptive qualitative, that is, the analysis is carried out by working with data, namely collecting data, organizing data, sorting it into manageable units, managing data to retrieve the required data, analyzing data that has been collected in connection with the research questions posed in the problem formulation then draw conclusions.

## **RESULTS AND DISCUSSION**

Substance of Makar in Article 107 of the Criminal Code concerning Crimes Against State Security. The crime of treason committed with the intention of overthrowing the government by the legislators has been regulated in Article 107 of the Criminal Code, whose formulation in Dutch reads as follows *de aanslag ondernomen met het oogmerk om omwenteling teweeg te brengen, wordt gestraft met gevangenisstraf van ten hoogste vijftien Jaren. leiders en aanleggers van een aanslag als in het eerste lid bedoeld, worden gestraft met levenslange gevangenisstraf of tijdelijke van ten hoogste twintig Jaren.* It means :

Treason committed with the intention of overthrowing the government, shall be punished with a maximum imprisonment of fifteen years.

The leaders and plotters of plots as referred to in paragraph (1) shall be sentenced to life imprisonment or to a maximum term of twenty years imprisonment. From the formulation of the crime regulated in Article 107 of the Criminal Code above, we can see that the crime of treason committed with the intention of overthrowing the government as regulated in Article 107 of the Criminal Code has the following elements:

- a. Subjective elements: *met het oogmerk* or with the intention
- b. Objective elements: 1. *aanslag* or treason. *ondernomen* or done *omwenteling teweeg brengen* or overthrowing the government.

Regarding the first three elements mentioned above, each element with the intention (*met het oogmerk*), the element of treason (*aanslag*), and the element that is carried out (*ondernemen*) is clear enough, so I will not discuss it again. Thus, what has not been discussed until now is only the element of *omwenteling teweeg brengen* or overthrowing the government. What does the

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word *omwenteling teweeg brengen* actually mean? The word *teweeg brengen* itself has the same meaning as *veroorzaken* or causes or causes. Regarding the word *omwenteling* in the formulation of Article 107 of the Criminal Code above, in Article 88 of the Criminal Code, the legislators have given the following explanation:

"What is meant by overthrowing the government is destroying or changing the form of government according to the constitution in a way that is not legal according to the law, procedures for replacing the throne or procedures in the form of Indonesian government that are legal according to law." If the criminal provisions stipulated in Article 107 of the Criminal Code are connected with the authentic interpretation of the legislators regarding the word *omwenteling* in Article 88 bis of the Criminal Code above, it will be seen that what is prohibited in Article 107 of the Criminal Code paragraph (1) is actually an act of treason committed by intent to cause:

- a. Destroy the constitutional form of government.
- b. Illegally changing the form of government according to the constitution.

In this case, it is necessary to explain in advance what is actually meant by the word *regeringsvorm* in the formulation of Article 107 paragraph (1) of the Criminal Code, because in the literature it turns out that there are differences of opinion regarding the meaning of *regeringsvorm* or the form of government with the meaning of *staatsvorm* or the form of the State. Regarding *staatsvorm* or the form of the State, the State of Indonesia is regulated in Chapter I Article I of the 1945 Constitution of the Republic of Indonesia, which stipulates:

The State of Indonesia is a unitary state, in the form of a republic. Sovereignty is in the hands of the people and implemented according to the constitution. The State of Indonesia is a state of law. From the provisions stipulated in Article 1 paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it can be seen that the form of the Indonesian State is a unitary state in the form of a republic and which is democratic in nature. About the word democracy itself, Prof. Dr. P. van Woestijne explains: Literally it means sovereignty is in the hands of the people. In politics it is also used to indicate the form of the State, in which the highest power is in the hands of the people. In ancient times the people held their own power through a people's meeting. In modern times, the representation system is commonly used by people in various countries, where the power that is in the hands of the people is carried out by a people's representative council whose members are elected by the people. According to Lamintang and Theo Lamintang, acts to change the form of the State or *staatsvorm* as referred to above are not criminal acts as intended by the legislators in the formulation of Article 107 paragraph (1) of the Criminal Code because according to the explanation in Article 88 bis of the Criminal Code, legislators The law clearly does not talk about the form of the State or *staatsvorm* but only talks about the *regeringsvorm* or the legal form of Indonesian government according to the constitution.

Meanwhile, Wirdjono Prodjodikoro interprets the word *regeringsvorm* or form of government in article 88 bis as well as the word *staatsvorm* or state form. So that the acts of

changing the form of the State or staatsvorm as above are criminal acts as intended by the legislators in the formulation of Article 107 paragraph (1) of the Criminal Code. According to Lamintang and Theo Lamintang, Wirdjono's action in expanding the meaning of staatsvorm with regeringsvorm is an interpretative extension which is forbidden to be used in criminal law. However, if you refer to the opinion of Lamintang and Theo Lamintang who say that changing the status or form of the State is not a crime and cannot be punished, then this will contradict Article 37 paragraph (5) of the 1945 Constitution which states that the form of the State cannot be changed. Therefore, the writer refers more to the opinion of Wirdjono Prodjodikoro, which means that the word regeringsvorm or form of government in article 88 bis is the same as the word staatsvorm or the form of the state. So that the acts of changing the form of the State or staatsvorm as above are criminal acts as intended by the legislators in the formulation of Article 107 paragraph (1) of the Criminal Code.

So, the term overthrowing the Government (omwenteling), is interpreted by article 88bis as:

- a. Destroy the constitutional form of government.
- b. Illegally changing the form of government according to the constitution.

In the way of overthrowing the first type of government, namely destroying the form of government according to the constitution, it is naturally considered to be always valid. This is what distinguishes it from the way the government overthrows the second type where the words are edited as follows; "change illegally" so that of course it is possible to have a legal form of government which of course does not include the overthrow of the government, for example in the manner specified in the constitution. In terms of destroying the form of government according to the constitution, Wirdjono Prodjodikoro gave an example, for example the form of a republic into a kingdom or concretely, for example, completely abolishing the constitution and replacing it with a new constitution.

In the case of illegally changing the form of government according to the constitution, he gave examples, for example eliminating the existence of ministers or ministries and replacing them with officials such as advisers from the head of state, or initially eliminating the supreme advisory board or financial supervisory body. In this case, it must be carried out illegally, namely in ways that are not in accordance with the provisions of the constitution. Meanwhile, if it is carried out in accordance with the provisions of the law, it cannot be punished as treason. Article 107. The legal way to change the form of government has been regulated in the 1945 Constitution Article 37 paragraphs (1) - (4) which reads: Article 37

Proposals for amendments to articles of the Constitution may be put on the agenda in the session of the People's Consultative Assembly if submitted by at least 1/3 of the total members of the People's Consultative Assembly.

Each proposed amendment to the articles of the Constitution is submitted in writing and clearly indicated the proposed section for amendment along with the reasons. To amend the

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articles of the Constitution, the Session of the People's Consultative Assembly is attended by at least 2/3 of the total members of the People's Consultative Assembly.

Decisions to amend articles of the Constitution are made with the approval of at least fifty percent plus one member from all members of the People's Consultative Assembly. Especially regarding the form of the Unitary State of the Republic of Indonesia, no changes can be made.

The formulation of article 107 of the Criminal Code that treason with the intention of overthrowing the government does not have to be done with violence (armed), but it is enough with all actions that are not in accordance with the applicable laws and regulations. The use of the word *omwenteling* which is translated as overthrowing the government can indeed cause misunderstandings as if treason is an act of violence to overthrow the government, even though someone's actions can be seen as treason with the intention of overthrowing the government, namely if the person's actions have exceeded the limits of the government. the limit of a preparatory action by taking action that can be seen as a beginning of the implementation of its intention to overthrow the government (Asshiddiqie, 2006). Interpretation of Jarimah Al-Baghyu in Fiqh Jinayah. Based on the division of jarimah in jinayah fiqh, the act of al-baghyu or rebellion is part of the jarimah hudud, because the types and sanctions have been regulated explicitly in the Qur'an and Hadith. The legal basis regarding Jarimah al-Baghyu is regulated in the Qur'an Surah Al-Hujurat verse 9:

"And if there are two groups of the believers fight, then make peace between them. If one of the two groups persecutes another group, then fight the group that persecutes that group so that the group returns to Allah's commandment, if the group has returned (to Allah's commandment), then make peace between the two with justice and act justly. Verily, Allah loves those who act justly."

According to the author, this verse is closely related to the jarimah al-baghyu (rebellion), as evidenced by the sentence contained in the verse, namely "fain baghat". According to Ahmad Musthafa Al-Maraghi, baghat is to attack and persecute. He means that what is meant by attacking and persecuting (baghat) is if you do not want to accept Allah's law and attack what Allah has made justice among His creatures, while others are willing to accept it. Meanwhile, according to Ibn Jarir at-Tabari defines al-Baghyu with *زيادته وتجاوز حده* (demands more and exceeds the limit). As for Ibn Jarir at-Tabari's view of Surah Al-Hujurat verse 9 is that if there are two groups that are at war with each other, then the first step that must be taken is to reconcile the two, by calling them to the law from the Book of Allah. Allah, and the two groups should be willing to accept the legal provisions contained in the Book of Allah. Ibn Jarir is of the view that fighting the Bughat group also includes avoiding their treason so that the act of eradicating, fighting them is carried out in order to prevent their treason against others. Ibn Jarir based his opinion on the narrations presented in his commentary, especially regarding the cause of the revelation of Surah al-Hujurat verse 9. ( *تَالْعَتْدِي ت وَأْتَب، الْجَابَةَ ل إِحْكَم هَلَال* ) that is, those who transgress and refuse to accept what is laid down in God's law.

Meanwhile, al-Qurtubi interprets the word baghat with (التطاول الفساد) namely arrogant attitude and destructive actions. On the other hand, al-Qurtubi also defines it as an act of injustice committed by a person to another person, exceeding the limit, and demanding more than his rights. More broadly, according to al-Qurtubi al-Bughat is overstepping the boundaries, being arrogant and leaving obligations, or feeling too sick when hungry and thirsty. Furthermore, al-Qurtubi quotes the words of Ibn 'Abbas in defining the meaning of al-Baghyu's sentence in the verse above with,

اد ل لة لة ليهم أكثر هو ا لطلبوا الكثير ا هم لو

Meaning: "Their al-Baghyu action means their guidance of a position after they have had a (previous) position. And it is said, (meaning) the desire that if they are given something much, they want more of it."

From the three interpretations put forward by the commentators above, it can be concluded that what is called jarimah al-baghyu is if: Attack and mistreat That is if you don't want to accept God's law and go through what God has made justice among His creatures, while others want to accept it.

Demanding more and exceeding limits

They are those who transgress and refuse to accept what is laid down in God's law.

Relevance of treason in Article 107 of the Criminal Code with Jarimah Al-Baghyu in Fiqh Jinayah. The relevance of the crime of treason in Article 107 of the Criminal Code with Jarimah al-baghyu in the fiqh of jinayah, will be seen from the elements contained in the crime of treason contained in Article 107 of the Criminal Code with the elements contained in Jarimah al-Baghyu in the fiqh of jinayah. . Here are the elements: Elements of treason in Article 107 of the Criminal Code. Makar with the intention of overthrowing the government (destroying or illegally changing the form of government according to the constitution).

Elements of Jarimah al-Baghyu

Disobedience to the head of state against with force/weapons the intention to violate the law. After looking at the elements in Article 107 of the Criminal Code regarding crimes against state security (treason) with the elements of jarimah al-baghyu in fiqh jinayah, there are differences in terms of the elements. The crime of treason in article 107 of the Criminal Code does not have the element of "fighting with force/weapons" as is the element of Jarimah al-Baghyu. The crime of treason in Article 107 of the Criminal Code only has an element with the intention of overthrowing the government, which means that in this article a person or group of people can be convicted if they overthrow the government even if they do not use force/weapons. Whereas in jarimah al-baghyu in fiqh jinayah, a person or group of people can only be convicted and said to be al-baghyu if they use force/weapons.

The formulation of article 107 of the Criminal Code in fiqh jinayah would be more appropriate if it was said or included in the category of "dissident" instead of "rebels" or al-baghyu because it does not have the element of "fighting with force/weapons" An act of disobedience is

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considered a rebellion, it is required that there must be the use and mobilization of force. If it is not followed by force so that it is not considered as a rebellion, such as the example of Sayyidina Ali's refusal to pledge allegiance to Abu Bakr, the disobedience of the Khawarij group from Sayyidina Ali (Piao et al., 2012). They are not considered as acts of rebellion because there is no power that arises from the disobedience, therefore if only ideas and attitudes describe disobedience then it cannot be called rebellion.

According to Imam Malik, Imam Shafi'i, Imam Ahmad, the rebellion started from the actual use of power. If they do not use force, the disobedience is not considered a rebellion, and they are treated as just people (innocent) and only categorized as ta'zir. Dissidents cannot be categorized as jarimah hudud because there are elements that are not fulfilled. So even in the case of sanctions, hudud sanctions, namely being fought, can only be imposed with ta'zir sanctions, which can be lighter, depending on the judge's considerations. The exclusion of the element "against with force/weapons" in the formulation of Article 107 of the Criminal Code may be an effort to form the law to be more vigilant in maintaining the security of the State, because as a consequence of article 107 of the Criminal Code, a person can be convicted of treason if he tries to overthrow the government in a way that is not legal according to the constitution, even if not by using force/weapons.

### **CONCLUSION**

From the discussion on the review of Islamic law against the crime of treason in Article 107 of the Criminal Code above, several conclusions can be drawn, namely the elements of the criminal act of treason in Article 107 of the Criminal Code in which there are two elements, namely subjective elements and objective elements. Article 107 has a subjective element: with an objective and objective element: treason, which is carried out and overthrows the government. Regarding the elements of the crime of treason above, the author is of the opinion that the elements that were inherent in the perpetrators who aimed to commit crimes against the security of the President and Vice President, attacked the security and territorial integrity of the country and According to Islamic criminal law, criminal acts Makar is called al-baghyu (rebellion). Islamic law does not explain in more detail about the object of the crime of rebellion (al-baghyu), for example crimes against the security of the head of state, security of the territorial integrity of the state and security of the form of government. In terms of differences, in Islamic law the perpetrator is given sanctions if the crime committed has been completed, in other words, al-Baghyu's actions have been completed. Whereas in positive law, the perpetrators of treason can be given sanctions whether the crimes they have committed have not been completed or have been completed. Whereas in terms of similarities, both the perpetrators of al-baghyu and treason, both can be sentenced to death.

### **REFERENCES**

- Al-Maraghi, A. M. (1993). *Tafsir Al-Maragi*, Semarang: PT. Karya Toha Putra.
- Audah, K. A. (2017). Metal Contamination Status in the Soil-Water-Rice System near Coal-Fired Power Plants. *Jurnal Ilmiah Pertanian*.
- Bohlander, M. (2012). *Principles of German criminal procedure*. Bloomsbury Publishing.



- Bouvier, J. (2022). *A Law Dictionary: Vol. I. BoD–Books on Demand*.
- M. Arief Rachman Adi Pradana, M. R. F. A. (2021). Hubungan Antara Paritas dengan Kejadian Perdarahan PostPartum. 10, 326–331.
- Mariana, M. (2018). Perlindungan Hukum Islam Terhadap Istri Yang Dituduh Melakukan Zina Oleh Suami. *Syntax Literate; Jurnal Ilmiah Indonesia*, 3(2), 70–81.
- Mujianto, M., Hartoyo, H., Nurmalina, R., & Yusuf, E. Z. (2023). The Unraveling Loyalty Model of Traditional Retail to Suppliers for Business Sustainability in the Digital Transformation Era: Insight from MSMEs in Indonesia. *Sustainability*, 15(3), 2827.
- Piao, L., Zhang, M., Datta, J., Xie, X., Su, T., Li, H., Teknos, T. N., & Pan, Q. (2012). Lipid-based nanoparticle delivery of Pre-miR-107 inhibits the tumorigenicity of head and neck squamous cell carcinoma. *Molecular Therapy*, 20(6), 1261–1269.
- Sirulhaq, A., Sukri, M., Jafar, S., & Burhanuddin, M. (2018). Questioning “The Great Indonesian Dictionary”(KBBI). *International Conference on Language Phenomena in Multimodal Communication (KLUA 2018)*, 162–165.
- Syarifin, P. (2000). *Criminal Law in Indonesia*. Pustaka Setia, Bandung.

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