

# Normative Analysis of Incest Sanctions in Mandailing Customary Law from an Islamic Criminal Law Perspective

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## Abstract

*Incestor* incestuous sexual relations are acts that are prohibited by law, including customary law and Islamic law. The prohibition of incest in the legal context is categorized as a crime that damages the basic social order of society. This study aims to explore how sanctions are applied to incest perpetrators in the context of Mandailing customary law and Islamic criminal law. This research adopts a qualitative approach in its research methodology. Data was collected using interview techniques extracted from sources in the field. This study concludes that the legal sanction for perpetrators of incest according to Mandailing customary law is by expelling the perpetrator of the crime of incest from his village. According to Islamic criminal law, the sanction imposed on married perpetrators of incest crimes is the death penalty, and unmarried perpetrators are punished by flogging and exile. Compared to Islamic law, the sanctions for implementing customary law in Mandailing can be considered lighter. It is hoped that this study will provide an overview of the variations in decision-making regarding the crime of incest under different laws. This study is also expected to contribute to the development of legal discourse in society, especially customary law on the one hand and Islamic legal perspectives on the other.

## Keywords

Customary law; Incestuous Sexual Relations; Incest; Islamic Criminal Law

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## 1. INTRODUCTION

*Incest* is an act of violating moral, religious, social, or legal norms. In general, the definition of incest is sexual relations between family members who are related by blood (Eliza, 2022, p. 1). *Incest* is sexual relations carried out by couples who have strong family ties, such as father and child, mother and child, or between biological relatives (Busyro, 2017, p. 1848). Incest is a sexual crime that often occurs in society, especially in families (Irza, 2023, p. 75). Incest includes all acts related to sexual



activity, whether they occur or continue to occur, or are carried out in the form of threats, seduction, inducements, including invitations or incitement to have sexual relations, contact of a sexual nature, for example on the lips, breasts, vagina, anus, showing genitals (exhibitionism), showing sexual intercourse (deviant or not), making pornographic comments, forcing masturbation, hitting the vagina, breasts, placing or inserting objects, fingers and so on into the vagina or anus, sodomy sexual relations, peeping, taking and showing photos of children with or without clothes or having sex and showing pornographic material or children intended for pornographic purposes (Manik, 2002, p. 39). Not only that, incest can also occur for reasons of mutual liking or mutual love (Murdiyanto & Gutomo, 2019, p. 51). There are two types of incest, namely the relationship between parent and children and then the relationship between siblings (Abdullah et al., 2023, p. 128). Usually, cases of incest are very rarely reported for reasons of shame and fear of punishment (Iradah & Diah, 2022, p. 98).

The scope of incest includes relationshipssexual acts in the form of sexual acts carried out by members of blood relatives or can occur between people who live in the same family, for example, half-siblings and full members of the adoptive family (Sukma, 2021, p. 209). This scope also includes sexual relations that occur between family members. Apart from that, this also includes sexual relations up to the level of coitus between family members, such as between older brothers and younger sisters, between fathers and daughters, between uncles and nephews, between grandfathers and grandchildren, between mothers and children which are prohibited by custom and culture (Supratik, 1995, p. 101). Another scope includes the relationship between a man and a woman, whether married or not, the two are closely related, the perpetrator of the act is usually an older family member and the victim is a child (Fuad, 2010, p. 7). Social condition factors that often allow incest to occur are cramped houses with crowded residents, alcoholism, and geographical isolation, making it difficult to find relationships with other people (Zalzabella, 2020, p. 4).

Among other things, incest cases occurred in Kriyan Cirebon between mothers and their sons (Nuronyah, 2022a). Cases of incest also occurred in Aran Pandang Regency between fathers and daughters (Nugraha, 2015). Furthermore, an incest case occurred in Central Tapanuli which was committed between a brother and his sister (Sari & Afifah, 2021). Then a case of incest also occurred in Mandailing Natal Regency, which was committed between an older brother and his younger sister.

The offense of incest is one of the offenses that is well-known in Indonesian customary law (Wotulo, 2017, p. 40). In customary law, incest is the most serious offense and carries severe penalties (Adimaya, 2024, p. 9). Among the Mandailing people, incest has a slightly different meaning, namely, incest is not only marriage between families but also between members of one clan. As a society that implements an exogamous marriage system, where it is prohibited for men to marry women from the same clan, this same-sex marriage is considered a form of incest, especially in patrilineal lineages, such as when a man with the Lubis clan marries a woman with the Lubis surname. The practice of same-sex marriage has been a prohibition passed down from generation to generation before the arrival of Islam to Batak land (Nasution & Hasibuan, 2023, p. 536). If a couple violates this rule, they will face serious sanctions, including ostracism from society, rejection, non-recognition, and a ban on participating in traditional ceremonies. They may face degrading treatment from their community or be expelled from their place of origin (Pohan, 2017, p. 135).

The underlying reason that marriage within one clan is prohibited in Mandailing customs is because of kinship or what is more popularly called *dongan sabutuho* (siblings) (E. Lubis, 2015, p. 83). This comes from a kinship system that is built based on lineage (genealogy), namely from the clan genealogy starting from 'The Batak King' and extending to all tribes that have clans. The traditional unit in the Mandailing Batak tradition is the clan, which is considered a blood bond according to custom. In Mandailing Batak customary rules, *namarito* or brothers between men

and women, especially those from the same clan, are strictly prohibited from marrying each other. According to the belief of the Mandailing Batak people from the time of their ancestors until now, the clan initially had one descendant from one line, namely the father. And it is understood that people who come from the same lineage are brothers. Because people who are brothers are not allowed to marry. That is the basis why incest is strictly prohibited in Mandailing and other Batak communities (Tanjung, 2018, p. 60).

In the Islamic context, incestuous sexual relations are referred to as *zina maharim*, which is an act of adultery between close family members (Luthfiyah, 2021, p. 1). This incestuous adultery is considered a very reprehensible act because it damages the position of the family and religion, and violates the Sharia prohibition against adultery and violations against respected family members (Sunarti, 2021, p. 49). Incest is a marriage bond between two parties who are in a mahram relationship. Therefore, incest is considered haram because it is the same as adultery and must be punished according to the punishment for adultery (Nuroniayah, 2022b, p. 225). In general, Islamic scholars are of the opinion that incest is a crime or violation of *fitrah* where someone imposes their will on lust and denies the sacred bond between a child and his parents so that the existing relationship becomes damaged and flawed (Aziz, 2019, p. 154). Therefore, whether committed within or outside the bonds of marriage, incest is considered haram because it is adultery and must be punished according to the punishment prescribed for adultery.

*Incest is a very bad act, even worse than ordinary adultery. In Islamic law, if a person commits a crime of his own free will, then he must be responsible for his actions (Efendi & Kasih, 2022, p. 95). There are two types of jarimah for those who commit adultery, namely zina ghairu muhsan, adultery committed by an unmarried person and will be punished with 100 lashes and exile for one year. Then Muhsan adultery was committed by a married person and was punished by stoning (Khalisa, 2023, p. 6).*

The prohibition against incest is contained in the Al-Qur'an, namely surah An-Nisa verses 22-23:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ فَاحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا

Meaning: "Do not marry women whom your father has married, except (incidents in the) past. Indeed, this (act) is very vile and hated (by Allah) and the worst of the paths (taken). (QS. An-Nisa: 22).

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ الَّتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهُتِ نِسَابِكُمْ وَرَبَابِكُمُ الَّتِي فِي حُجُورِكُمْ مِّن نِّسَابِكُمُ الَّتِي دَخَلْتُم بِهِنَّ فَإِن لَّمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَابِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَن تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَّحِيمًا

Meaning: It is forbidden for you (to marry) your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brothers' daughters, your brothers' daughters your daughters, the mothers who breastfeed you, your breast-feeding sisters, the mothers of your wives (in-laws), the daughters of your wives (stepchildren) who are in your care from the wives you have mixed with, but if you have not mixed with your wives (and you have divorced), it is not sinful for you (to marry her), (and it is forbidden for you) the wives of your biological children (daughters-in-law), and (it is also forbidden) to gather (in marriage) two sisters who are sisters, except (incidents in the) past. Indeed, Allah is Forgiving, Most Merciful."(QS. An-Nisa: 23)

Then there is a hadith about the prohibition and punishment for perpetrators of incest which was narrated by Ibnu Majah, which means: From Ibn Abbas ra "Indeed, Rasulullah SAW. Said: Whoever commits adultery with his mahram, kill him." (HR. Ibnu Majah). Then in the hadith conveyed by al Bara' bin 'Azib, he said "When I was going around looking for a lost camel, suddenly I passed a group of horsemen or infantry troops (war horsemen) who were carrying flags. These people invited me to go with them because of their closeness to the Prophet SAW. Then the people rushed to a dome house and forcibly took out a man who then immediately slashed his neck,

so I asked why they did this and then they said that the man had married his father's wife (an ignorant marriage and the perpetrator was considered an apostate) " (HR. Abu Daud).

The above hadith clearly prohibits incest and provides punishment in the form of death for those who commit adultery with a mahram, whether married or unmarried. However, scholars have different opinions regarding the punishment for perpetrators of incest, including:

- a. Maliki, Syafi'i, and Imam Al-Basri are of the opinion that the punishment for perpetrators of incest is hudud.
- b. Hanafi said the punishment for perpetrators of incest is ta'zir.
- c. Imam Ahmad and Imam Ishak Rahawaih are of the opinion that the punishment for perpetrators of incest is to be killed and have their property confiscated (Husamuddin & Liana, 2021, p. 81).

Many previous studies have addressed the topic of incest. Sunarti reviews the crime of incest by comparing Islamic criminal law or *Jinayah* with Indonesian criminal law. Hendrikus Haipon and Maria Yasinta Due, discuss the prohibition of inbreeding in terms of Law No. 16 of 2019 concerning Marriage amendments to Law No. 1 of 1974 (Haipon & Yasinta, 2022, p. 117). Wiene Surya Putra et al, examine consanguineous marriage or incest from the perspective of Islam and national law. Next, Siti Nur Wafiq Azizah and Hideo Douzat Wibowo analyzed incest from the victimology aspect (Azizah & Wibowo, 2023, p. 106). Vifi Swarianata et al discuss the criminalization of incest (incestuous sexual relations) from the perspective of criminal law reform (Swarianata, 2016, p. 1). Putu Rismayanti Ria Andriani examines the crime of incest from a pluralist perspective. Husamuddin and Eva Liana studied the resolution of incest in the jurisprudence of *jinayah* (studies in Gampong Lawe Sawah, East Kluet District, South Aceh District). However, there has not been much study of incest from the aspect of customary law, especially studies of Mandailing customary law. This study attempts to fill the gap in studies of the customary law

aspect by examining and analyzing incest from the aspects of customary law and Islamic law. This study will explore the legal sanctions stipulated by Mandailing Natal customary law for perpetrators of incest. Then how does Islamic criminal law review the legal sanctions stipulated by Mandailing customary law by comparing the sanctions and legal application of customary law and Islamic law?

It is hoped that this study can contribute to the development of discourse and study of Islamic law and customary law related to incest. This study is also expected to enrich more complete studies from various perspectives related to Islamic criminal law.

## 2. METHODS

The type of research used is qualitative research. Through field research, this research explores empirical data from participants in the community. This research is humanistic in nature, which makes humans the main subjects in social and even (Safaruddin, 2023, p. 9684). Qualitative research aims to understand events or phenomena more holistically, not just parts of the event (Fadli, 2021, p. 36). Thus, qualitative research tends to be open (Ardianto, 2004, p. 238), not only fulfills the researcher's desire to get an overview/explanation but also helps to get a deeper explanation. Another reason for using a qualitative approach is the researchers' insight that this method can be used to discover and understand what is hidden behind phenomena that are sometimes difficult to understand satisfactorily (Sukiati, 2016, p. 87).

The location of this research is Sayur Maincat Village, Kotanopan District, Mandailing Natal Regency. With participants who committed incest in a family in Sayur Maincat Village. The author chose this location based on a number of specific considerations such as accessibility, research needs, and the potential for data and information relevant to the research topic.

The data sources used include primary data sources and secondary data sources. The main data source for this research is the results of field data, including the

results of interviews with respondents, interviews with traditional leaders, traditional clerics, village officials, Hatobangon and relatives of perpetrators of incest or the people of Kotanopan District and also documentation regarding the data. which is in Kotanopan District. Secondary data in this research consists of documents that are relevant to the discussion. Secondary data sources include books, academic journals, and other documents.

### Research Participants

Participants were selected based on communications and recommendations from the head of Sayur Maincat Village with considerations such as how much knowledge the participant had about the incest case that occurred, how close the participant was to the perpetrator, and the participant's involvement in resolving incest in Sayur Maincat Village.

No	Name	L/P	Age	Position	Information
1	Abdurrahman	L	30 years	village secretary	–
2	Ahmad Sobirin	L	53 Years	Hatobangon	–
3	Hendriko	L	28 years	Village Secretary Staff	–
4	Yudi Yamansyah	L	42 Years	Traditional Figures	–
5	M. Safril	L	21 years	Public	–

Data collection techniques in this research are based on interviews and documentation studies. Interviews are the most frequently used form of data collection (Rachmawati, 2007, p. 35). Interviews were carried out by gathering sources in one room and then interviewing them one by one. The questions asked of participants were questions related to incest cases that occurred in the area. Meanwhile, the data analysis techniques used in this research are content analysis and descriptive analysis. In this case the researcher analyzed and described the data obtained from interviews with Kotanopan District respondents to formulate



conclusions. The documents analyzed are referred to as recorded or documented forms of symbolic representation. This method aims to directly search, identify, manage, and analyze documents or data to understand their meaning and significance (Bungnin, 2007, p. 203).

Based on the researcher's direct experience in this research process, there were several limitations experienced, such as the number of respondents being only 5 people, limited research time, energy, and ability of researchers, then the lack of ability of respondents to understand statements and answer questions so there is a possibility that the results will be poor accurate.

### 3. FINDINGS AND DISCUSSION

#### ***Incest what happened in Maincat Vegetable Village***

The incest case in the Mandailing Natal area occurred in Sayur Maincat Village, Kotanopan District in August 2023. The perpetrators of the incest were two brothers, namely AZ (female) and AK (male). AZ is the younger sibling of his older brother AK. AZ is 21 years old while his brother AK is 26 years old and both are still single.

One day EM (the perpetrator's neighbor) will ask the perpetrator for betel nuts at the house. After EM called several times, AZ answered and told EM to take the Areca nuts himself in AK's briefcase which was in the kitchen. EM went in and took the betel nut to the kitchen, AZ was still in the room. When EM came out of the kitchen, EM saw AZ coming out of the room at the same time as her brother AK. EM was surprised and asked AZ what they were doing in the room. AZ didn't answer Ema's question and only said that his brother was crazy. Hearing this answer, EM then went home. After a few days, EM was still curious about what happened at his neighbor's house, he then called AZ to his house and asked him about what they were doing in the room with his brother AK. AZ, who could no longer stand his brother's treatment, told EM about all his brother's actions. AZ said that he had been sexually assaulted by his brother and that this had been going on for several months. (Hendriko, 2024). After that EM told the incident to his other neighbors. Then the news spread to other residents and reached the village head and traditional leaders in the village.

Incest is strictly prohibited in customary law. Based on Islamic law which prohibits incest, the law is the same as customary law. (Hendriko, 2024). The factors causing incest in Sayur Maincat Village are the internet and current technological sophistication. Based on the information, AK often watches obscene things on the internet. This habit influenced his sexual desires so he took it out on his

younger brother. It is not known for certain the impact of AK's actions on AZ because the two of them fled with their family secretly before the community expelled them and there has been no confirmation until now.

Next, the village head, village officials, traditional leaders, and relatives of AZ's family held a deliberation to discuss the problem and determine how they would handle the case of incest that had occurred. Based on deliberations, AZ and AK were expelled from Sayur Maincat village in order to protect the village's good name and keep the village away from disasters which the community believed would occur if incest was allowed to occur in the village. (Sobirin, 2024).

The process of law enforcement against perpetrators of incest in Sayur Maincat Village, Mandailing Natal, is carried out through deliberations between the community, traditional leaders, and the families of the perpetrators. The procedure is that cases are discussed based on other people's complaints and the perpetrator's confession. Then, as a result of deliberations between the parties and traditional leaders, it was agreed that the punishment for the perpetrators would be for both of them to be expelled from the village. Interestingly, not only the incest perpetrator leave the village, but even all family members left the village. The two brothers were sent away separately.

The sentence was imposed based on the results of deliberations between village officials and the perpetrator's relatives. The period for expulsion has not yet been determined by the community and it has not been discussed whether the perpetrator can still return to Sayur Maincat Village.

### ***Incest Law Perspective of Mandailing Customary Law and Islamic Criminal Law***

In Islamic criminal law, the prohibition against incest has been clearly explained in the Al-Qur'an surah An-Nisa verses 22-23, as explained above. Inbreeding is a biological relationship between relatives who are impossible to marry, either by lineage or through sexual intercourse (Putra, 2022, p. 170). Consanguineous marriage is a marriage that is considered haram without a time limit, it cannot be carried out either now or in the future (Anshori, 2019, p. 4). This is included in the legal classification which is considered an absolute prohibition and is even considered very inappropriate in society. In Islam doing Zihar, namely comparing the wife's body with the mother's body during sexual intercourse, is an act that is considered a sin and is prohibited. Some scholars even argue that these actions can be grounds for divorce if explained clearly (S. D. Lubis, 2023, p. 63). From here, we can understand how much Islam values the role of mothers and the importance of maintaining the purity of blood relations, so we are prohibited from imagining or carrying out actions that violate these limits (Sufrizal & Anzaikhan, n.d., p. 144).

In providing sanctions against perpetrators of incest, there are three different opinions of scholars. First, the opinion that the perpetrator of the crime of incest falls into the category of jarimah

hudud. Therefore, for those who believe that incest falls into the category of jarimah hudud, then the act of incest can be categorized as an act of Zina. Therefore, based on this opinion, the sanctions or punishment for perpetrators of incest are the same as the sanctions and punishment for perpetrators of adultery. The punishment is stoning for married incest perpetrators and 100 lashes and exile for one year for unmarried incest perpetrators.

In Surah An-Nur verse 2, it is clearly stated regarding the application of punishment for perpetrators of adultery. This verse states that the perpetrator of adultery, whether male or female, must be punished with one hundred lashes, and no mercy should hinder the implementation of Allah's law. This, as emphasized in the verse, is part of obedience to Allah's religion, and must be carried out by believers (RI, 2019). This verse emphasizes that in imposing hudud punishment on the perpetrator of adultery, there should be no room for pity or doubt. The prohibition on giving mercy or reducing the sentence is also conveyed. Apart from that, it is important to carry out had punishment openly in public, especially in front of a group of believers (Tambunan & Harahap, 2023, p. 7689). Those who fall into this first opinion are Maliki, Syafi'i, and Imam Al-Basri.

Second Opinion, says that the act of incest is included in the category of ta'zir. In the Big Indonesian Dictionary, ta'zir is written with the word ta'zir which means a sentence imposed based on the judge's discretion because it is not found in the Qur'an and hadith (RI, 1995). Etymologically, ta'zir means to reject and prevent. Meanwhile, according to Syara', ta'zir is al-ta'dib (educating) against perpetrators who commit sinful crimes that have no hadad and no kafarat. Wahbah Az-Zuhayli defines jarimah ta'zir as 'uqubah (punishment) prescribed for immoral acts or violations that do not have had provisions and are not kafarat (Al-Zuhayli, 1989, p. 5274).

Based on this opinion, the punishment for perpetrators of incest is ta'zir, so the punishment is left to the state or judge to determine. In Indonesia, the law governing incest cases can be found in Article 294 paragraph (1) of the Criminal Code. However, this article only refers to obscene acts. However, in society, cases of incest often involve sexual relations between uncles, grandfathers, or siblings. However, the Criminal Code does not specifically regulate how to handle these cases if they are carried out by consenting adults. The Hanafi opinion states this.

A third opinion believes that the punishment for perpetrators of incest is being killed and having their property confiscated. Regarding the death penalty, there are several different opinions regarding how to carry out the death penalty. In a hadith narrated by the friend Bara bin Azib radhiyallahu 'anhu as explained above, the punishment for perpetrators of incest is execution. It was once reported to Al-Hajjaj that about a man who committed sexual violence against his own sister, then the Prophet Muhammad SAW suggested asking his friends about this matter. One of his companions, Abdullah bin Mutharrif, quoted the Prophet as saying that anyone who violates the honor of the believers must

be punished by having their midsection cut off. Ibnul Qayyim interpreted this hadith as proof of the punishment for killing in this way. In fact, if a person has sexual relations with a person who is not halal for him according to Sharia law, then the punishment is the death penalty. This includes cases such as sexual relations with one's own mother or daughter, or in cases of sexual relations with someone who is not permitted according to religious rules. Basically, the death penalty is imposed for such offenses, as is the case with homosexual offenders. In this hadith, the Prophet Muhammad Saw. expressed the agreement of Muslims that perpetrators of adultery with their mahram must be punished. However, differences of opinion arise in how to carry out this punishment, whether with the death penalty or other punishment in accordance with the law for perpetrators of adultery. This shows that Islamic law emphasizes the importance of respecting the boundaries set out in religion, including in matters relating to honor and sexual relations.

The hadith of Ibn Abi Khaitamah in his date narrates that the Messenger of Allah. sent someone to punish a man who had sexual relations with his father's wife. The perpetrator's neck was beheaded and 1/5 of the loot was taken. This hadith was declared authentic by Yahya bin Ma'in. Al-Hakim also narrated this hadith in *Al-Mustadrak* and commented that the sanad is valid, even though it is not contained in Bukhari and Muslim. Adz-dzahabi commented that this opinion was incorrect. Another hadith which states "Whoever commits adultery with his mahram, kill him" was narrated by Ibn Majah, but Al-Bani stated this hadith as weak in *Dhaiful Jami'*. Al-Hakim also stated the validity of this hadith and commented that the sanad is valid, even though it is not found in Muslim history. This opinion is supported by Imam Ahmad and Imam Ishak Rahawaih (Husamuddin & Liana, 2021, p. 81).

With the opinion that the punishment for perpetrators of incest is being expelled from their hometown. It seems that there are no sanctions for incest perpetrators in Sayur Maincat Village in these three categories.

#### **4. CONCLUSION**

The customary sanction for perpetrators of incest or adultery with a mahram is expulsion from their hometown and this is considered the most severe sanction for the perpetrator's actions. The community believes that customary sanctions can be used as a form of resolution in resolving cases that occur in society. Meanwhile, in Islam, the perpetrator of incestuous adultery, namely sexual relations between family members that are prohibited, is considered a jarimah (major crime). The perpetrator will be punished according to Hudud law. For married perpetrators of incestuous adultery, the punishment is death, while for those who are not married, the punishment is flogging.

Based on the explanation above, the author takes the decision that there are clearly differences in sanctions for incest perpetrators in applicable customary law, the punishment given is not as severe as

the act committed by the perpetrator and is not in accordance with the provisions of Islamic law where the punishment is very painful. It is hoped that when giving consideration in making decisions to perpetrators of crimes of incest, society can consider combining or combining the sanctions of customary law with Islamic law.

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