

DIALECTIC OF CANING PUNISHMENT IN ACEH: CONTESTATION BETWEEN TEXT AND CONTEXT

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Abstract

The field study was conducted to assess how the execution of caning punishment in prison or detention center has been implemented in Aceh based on Qur'an and hadith perspective. Responding to the aim of study, an interpretation and explanation of the verses of Qur'an and hadith was done related to the implementation of the caning punishment, while the field data obtained by interview and documentation. The result of the study indicated that the execution process of caning in prison or detention center does not meet the standards in Qur'an and hadith because the procession is carried out in a closed place (prison) and access to the prison is bounded by standard rules. So the caning punishment process should be carried out in public places that are accessible to the society.

Keywords: *Caning Punishment; Prison or Detention Center, Quranic, Hadith, Sharia Formal Application*

INTRODUCTION

In 2014, the government of Aceh ratified Qanun Number 6 of 2014 concerning *Jinayah* Law, The *qanun* is about the provision for criminal crimes punishable by *jinayah* in Aceh. The criminal crimes are *Khamar*, *Maisir*, seclusion, *Ikhtilath*, *Zina*, Sexual harassment, Rape, *Qadzaf*, *Liwath* and *Musahaqah*, these crimes were threatened with lashes, imprisonment and fines (Abbas 2015). Islam regulates several forms of punishment, namely *'Uqbah Hudud*, *Qishas*, *Diyat* and/or *Ta'zir* and *'Uqbah*. These punishment decided by the judge about the violation of *Jarimah*. One of *'Uqbah* is caning of *jinayah* perpetrators. In Qanun of Aceh, it is regulated in Article number 34 of Aceh Qanun Number 7 year 2013 concerning the *Jinayat* Procedural Law.

The provisions of punishment and *jinayah* in the *qanun* are part of Islamic law which based on Qur'an and hadith, although the polemic about Islam is still being discussed until now in order to attain the application of pure Islamic law in accordance with the holy text (Endri 2018). Collective *ijtihad* is necessary to apply the Islamic laws based on Qur'an and Hadith into the reality about the implementation of *jinayah* law in Aceh, especially about caning which has been abandoned in the modern era. The implementation of caning in Aceh is regulated in detail in Article 262 of the Aceh *Qanun*

Number 7 year 2013 concerning the *Jinayat* Procedural Law. Caning punishment in qanun regulates the criteria of caning location, the executioner and the procedure, the witnesses and the parties that must be involved in the execution of caning punishment.

Regarding to location of caning execution, it is held in the public place, in order to create a deterrent and shameless effect to the perpetrators and educate the society to avoid *jinayah* crimes. The location of caning in Aceh is mostly carried out in mosque courtyard and public fields so the procession is witnessed by the general society. The *Qanun of Jinayat* Law in Aceh state that the procedure of caning is applied from 10 to 200 lashes depend on the type of crime committed (Nurdin 2018).

Qur'an states the location criteria for the implementation of caning law is in Qur'an surah al-Nur verse 2. According to Al-Maraghi, the process of caning must be carried out in front of public and witnessed by a group of people. It is because it will be more rebuke and increase reproach against them for violating the law of *jinayah* that they have committed (Al-Maraghi 1946). Ibn Kathir also said that caning should also be carried out in a public place, because this punishment has a deterrent effect, more precise to corner and hurt someone when beaten because there is reproach and criticism (Al-Damsyiqi 2000).

While the Prophet's hadith as an explanation of the Qur'an does not specifically explain the location of caning or hudud punishment. However, there are several hadiths mention the location of caning execution for adult who are *mukhshan*, that is the prayer room. The execution of the caning for Mai'z al-Aslami has also been carried out in a place called *Hurrah or Baqi'* (Muhammad Al-Syawkani n.d.).

The rules regarding the implementation of caning in public places lasted several years until the Aceh Governor Regulation Number 5 of 2018 on the Implementation of the *Jinayat* Procedural Law. The regulation revised the location of caning execution from an open place to a correctional institution or prison. The contents of the governor regulation did not clearly explain the background of location change, but the Aceh Governor who issued the new regulations stated that the reasons for the change is to avoid the attendance of children 18 years old and under while the caning punishment is being implemented. The phobia of investors so that they will not invest in Aceh and avoid the spread of videos showing the convicts' faces on social media (BBC News Indonesia 2018).

The policy on changing the location of caning execution to prison has received critics from various parties, both from the DPR and DPD RI legislatures, *ulama*, leaders of organizations and community leaders. The reasons for the refusal were considered to be contrary to Islamic law and the arguments of Qur'an and Hadith, which ordered the implementation of caning to be carried out openly and witnessed by society. Another reason is if caning law is implemented in a closed area, it will not give a deterrent effect and will increase immorality in Aceh so it did not provide benefit to the society. This is as stated by Tgk. Muslim At-Thahir

“Based on Islamic law, caning must be executed in public, witnessed by believers. So it becomes a lesson for the perpetrators and the people who watch it. So they should be embarrassed, in order for them to be deterred.” he said. If it was done in a prison, the witnessed is among the criminals, how would the perpetrators be deterred? In prison there are rapists, perpetrators of sodomy whose cases may be more severe than those who were whipped” (ABC 2018)

Of all districts/cities in Aceh, West Aceh is the first district implement caning in prison while other regencies/cities are still implementing it in public place. This is due to the absence of technical instructions for the implementation of caning in prisons that have been legalized by government. According to Khalidin, the Operator of Investigation Section of the WH (*wilayatul hisbah*) of Aceh, he explained that although the issue of caning location was still pro and contra, West Aceh district had already implemented one case of caning in prison, namely the case of *khamr* which was up to 45 lashes (Khalidin 2021). The latest data from Aceh Jaya and Aceh Singkil have also been implemented the caning punishment in prison.

The opponents of caning being implemented in prisons or detention centers keep claiming that the implementation is contrary to Islamic law, especially Qur'an and hadith, but it is still continues to be executed even though there are no technical instructions for it. The aim of this study is to find out how the implementation of caning law in prisons or Rutan, whether it has fulfill the standard based on Qur'an and hadith. This study explains the verses of the Qur'an Surah Al-Nur verse 2 and several hadiths that explain the location of the implementation of hudud law. Field data regarding the implementation of caning in prisons or detention centers were obtained by interview and documentation.

This paper is expected to provide a midpoint between policy makers in Aceh and those who oppose the implementation of caning in prison. Although the policy is still applied by Aceh government, this paper can provide a point about the standardization of caning location based on Qur'an and Hadith perspective.

The study related to the caning punishment in Aceh, theoretically, normative or empirical studies can be found in journal articles, dissertations or theses. Several articles discussed about caning in prisons or detention centers. Chadijah Rizki Lestari and Basri Efendi's study with the title, *A Critical Review of Governor Regulation Number 5 of 2018 concerning the Implementation of the Jinayah Procedural Law in 2018 (Tinjauan Kritis Terhadap Peraturan Gubernur Nomor 5 Tahun 2018 Tentang Pelaksanaan Hukum Acara Jinayah tahun 2018)*. This study aimed to find the position of Governor Regulation number 5 of 2018 using the theory of law formation or legislation. The results of the study found that the governor rules contradicted to the system of forming laws and regulations in Indonesia. Therefore, the Governor's Regulation has no legal force (Lestari 2018).

A journal article written by Andri Kurniawan with the title *Polemic rejection of Uqubat caning in Aceh Penitentiary* (Implementation of Governor Regulation Number 5 of 2018 concerning Jinayat Law in Banda Aceh). This article aimed to find the obstacles of the implementation of the 'uqubat caning process at the Penitentiary for violators of Islamic Shari'ah in Banda Aceh City (Kurniawan 2020). Journal about Development of the Implementation of caning Law in Aceh by Muhammad Iqbal and Attarikhul Kabir. The purpose of the study was to find out the reasons for moving the location of the caning punishment to a Correctional Institution or Detention Center and Community Response (Iqbal 2020). This study is different from previous study. This study focuses on the assessment of the execution of caning process that has been implemented in prisons or detention centers in Aceh based on Qur'an and the hadith perspective. While previous research used a legal approach and the implementation of Governor Regulation Number 5 of 2018 concerning the Implementation of Jinayah Procedural Law.

RESEARCH METHOD

This research is social, cultural and reality that occurs, then this type of study can be classified into descriptive qualitative investigations. This research provides a careful picture of certain individuals or groups of circumstances and symptoms that occur (PIAW

2006). So the data obtained in the form of written or oral words of people and observable behaviour in the form of descriptive (Moleong 2008). The use of theoretical reviews through the literature review of the interpretation of the Qur'an and the Hadith of Law and the punishment of whip, which were combined with empirical investigations through observation and interviews as a study method. This article wants to discuss further about the debate of whip punishment, both applied in the open or it can be done in a limited closed place like a prison? Moreover, the execution of whip punishment in prison has no technical guidance for its implementation. This study aims to find out how the acts of whip law in prisons or detention centres, whether they have met the standardization contained in the Qur'an and Hadith. This study is expected to provide a meeting point between policy holders in Aceh and opponents the whip in prison. Although this policy is still carried out by the Aceh Government, this study can provide a standard about the standardization of a whip location in the perspective of the Qur'an and the Hadith of Law.

RESULTS AND DISCUSSION

Caning punishment in Al-Quran and sunnah

The searching result in Qur'anic dictionary about caning, it was found that Qur'an use the word *jaldah*, which is found in *Surah al-Nur* verses 2 and 4 talk about the punishment for adultery with 100 lashes and those who commit accusing adultery or *qazaf* as much as 80 lashes (Baqi 1364). An explanation of implementation standard is found in the Q.S al-Nūr/ 24:2.

الرَّانِيَّةَ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِئَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ

"The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes. And let not pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last Day. And let a party of believers witness their punishment."

The verse above was revealed to abolish the law in surah al-Nisa 'verse 15 which describes the punishment for adultery at the beginning of Islam with insulting and blowing with sandals. A special punishment is given to women who were found guilty to be locked up in their homes until they die. Then the punishment was abolished by the revelation of the *Surah Al-Nur* verse 2. (Al-Shabuni 1981).

The caning punishment in *Surah Al-Nur* must be done with three standardizations. The first is the number of canings, the second is the executioner of the convicted person and the third is the location for caning execution. The number of lashes varies according to the type of crime committed. Perpetrators of adultery and *qazaf* are determined in *surah Al-Nur* respectively 100 and 80 lashes, while alcohol drinkers are determined based on hadith 80 or 40 lashes. While the punishment takzir 10 times lashes.

Second, the executors or judges and their assistants should applied the punishment to the criminals without any nepotism and compassion.

وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ

Adulterers proven either by witnesses or by oath must be punished by canning as mentioned in paragraph above. This is the purpose of mentioning the word *wala ta'khuz bihima ra'fatun fi dini llah* which means do not be merciful to both of them prevent you from (carrying out) Allah's religion. According to Syahrul, the punishment of 100 lashes against adulterers must be done and it will not change from time to time. Syahrul termed the concept of *hlah al-Mustaqim* or straight position (Mustaqim 2017).

A firm and strict attitude is required in enforcing religious laws so the laws can be completed perfectly (Tafsir Kementerian Agama 1991). The word *ra'fah* used in the verse above means deep affection which cause abandoning, reducing and neglecting punishment (Shihab 2002). The word *ra'fah* does not mean eliminating love in the execution of punishment, but love that causes the judge to abandon punishment for the perpetrators of *jinayah*. Therefore the word that the Qur'an uses is *ra'fah* not *rahmah*, so the caning should not be done very hard and harshly, but with a blow that injures the culprit. The word *rahmah* is more general than *ra'uf* (Al-Damsyiqi 2000).

The attitude of mercy in the execution of caning can be found in the hadith of the Prophet narrated by ibn Majah in *Kitab al-Hudud, bab al-Kabir wa al-Maridh Yujib 'Alaih al-Had*, number 2574 (Majah n.d.).

Third, the location and people who witnessed the punishment procession

وَأَيْشْنَهُ عَذَابُهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ

The caning punishment should be implemented in front of people, because it is more painful and give deterrent effect to the perpetrator. Caning punishment that is done in front of a group of people can also provide reproach and condemnation of the crimes committed. So the meaning of this point is the caning should be implemented in a public place that reachable and can be attended by a group of people (Al-Damsyiqi 2000). Wahbah al-Zuhaily after mentioning the opinion of scholars on this matter, he stated that the *hudud* punishment was carried out in public so that a group of people could attend it (Al-Zuhaily 2008).

Al-Bukhari gives the name of the chapter of hadith in his book *Kitab al-Hudud, Bab Man Amar bi Dharb al-Had fi al-Bayt*, number hadis. 6774. Mentions one hadith that comes from 'Uqbah ibn Harish (Al-Bukhari n.d.). According to al-Ayni, the hadith above explains that the execution of the hudud canning should not be carried out in secret, but must be shown to the general public. Then Al-Ayni mentioned an *athar*, a friend before giving the hadith (Al-'Aini 2001).

وروى ابن سعد عن عمر رضى الله تعالى عنه, في قصة ولد أبي شحمة لما شرب بمصر فحده عمرو بن العاص في البيت أن عمر أنكر عليه وأحضره الى المدينة وضربه الحد جهرا

"Ibn Sa'ad from 'Umar RA. narrated about the story of Abi Syahmah's son who was punished by the hudud law for drinking alcohol by Amru ibn 'Ash in a house in Egypt, then 'Umar denied on this punishment by taking him to Medina and lashing him openly".

Ibn Hajar also gave the same opinion as Ayni who stated that the hudud punishment was not valid if it was carried out in secret, many scholars and experts said that the hudud punishment must be carried out in public place. Whereas a father's punishment to a child may be carried out in secret, but it is not a hudud punishment. (Al-'Asqalani n.d.)

Mosque is a place that is prohibited by the Prophet in implementing the hudud punishment, as the hadith narrated by Abu Dawud *Kitab Al-Hudud*, Number Hadis 4491 (Al-Sajsatani n.d.). The prohibition of carrying out hudud in mosques because it is contrary to the function and use of the mosque as a place of prayer and remembrance. The implementation of the hudud law in mosque can littering the mosque with blood or najis that comes out accidentally from the convict, and make the mosque an uncomfortable and scary place. (Abadi 1969)

In addition to the location, the execution of punishment can also be witnessed by a group of people or open to the public. The scholars do not give a quantitative limit to the exact number, but among the scholars said it is enough for one person or three people. Among others, there are qiyas with testimonies in adultery, namely four people and there are even opinions of up to ten people. The main point is that the punishment becomes a very valuable lesson for the convict and also the people who witness it, so the jinayah, both severe and light, can be avoided. The gathering of many people is also a moment to pray for the perpetrators to repent and hoping the mercy of God on them.

The Implementation Of Caning Punishment In Prison

Criminal crimes punishable by caning in the *Qanun* of Aceh are *Khamar*, *Maisir*, *khalwat*, *Ikhtilath*, *Zina*, Sexual harassment, Rape, *Qadzaf*, *Liwath* and *Musahaqah*. The punishment for the perpetrators of these crimes is subject to hudud punishment, namely *khamr*, adultery and *qadzaf*. Whereas, takzir punishment used for other criminal crimes. In addition to caning, perpetrators of sexual crimes such as sexual harassment and rape are also given fines and imprisonment.

Techniques and procedures for the implementation of caning in Aceh developed from time to time. The initial technical implementation is regulated in Aceh Governor Regulation No. 10 of 2005 concerning the Technical Guidelines for the Implementation of the 'Uqubat Whip. After evaluation and assessment from experts, the regulation was updated with the issuance of *Qanun* Number 7 of 2013 concerning *Jinayat* Procedural Law and *Qanun* Number 6 of 2014 concerning *Jinayat* Law. After the two qanuns were ratified, the procedures and techniques for the implementation of the caning were systematic, regular and progressed a lot.

Among the technical implementations found in the society 262 *Qanun* Number 7 of 2013 are: the execution of the caning punishment is carried out in a public space that can be witnessed by everyone except children under 18 years old. The people who witnessed must be twelve meters away from the convict who was whipped. The place for the execution of caning should be at least 3 x 3 meters, above which the prosecutors, judges and doctors.

Caning is a type of physical punishment based on the law by whipping the body from the shoulders to the hips, it is not permissible to whip the head, face, neck, chest and genitals. While the whip tool is made of rattan with a size of 0.75 to 1 centimeter with a length of one meter, there is no handle at the base and the ends are not branched. The prisoners who will be lashed will use the clothes provided by the officers and caned in a standing position for the men with a pole, while the women are in a sitting position on their knees.

The officers who implement the caning is from *wilayatul hisbah* (WH) officers accompanied by prosecutors, judges and doctors. The whipping person is only allowed to swing the whip in a position where the tip of the hand does not exceed the shoulder. If a whipper cannot complete the task, then the task is transferred to another whipper. The whipping process can be stopped if there is a recommendation from a doctor regarding the health of the convict or the convict escapes before the caning process is complete. The termination of the unfinished lashing procession can be continued after a rescheduling by the prosecutor.

In 2018, the technical implementation of caning in *Qanun* Number 7 of 2013 concerning the *Jinayat* Procedural Law was changed through the Aceh Governor's Regulation (*Pergub*) number 5 of 2018 concerning the Implementation of *Jinayat* Procedural Law. The regulation determined the place that can be witnessed by public based on *qanun* the place is a Correctional Institution (*Lapas*) or Detention Center (*Rutan*) in other terms is a prison. The reason for the transfer is to protect the human rights of the convict themselves. The execution of caning in a public place was attended by many spectators and they documented it in the form of pictures or videos and spread it on social media. The euphoric attitude of the community can affect psychological soul of the convict and his family.

The implementation of caning in prison cannot be carried out optimally, because the conditions and facilities in prisons do not support it, such as the absence of a large open space that supports the caning procession, which can be carried out in accordance with the *Pergub* that has been ratified, and the technical instructions for its implementation have not been ratified. However, several regions in Aceh have already started to implement it. The data collected shows that three regions have carried out canings in prisons, namely West Aceh, Aceh Jaya and Seumelu.

The first district to carry out caning in prison was West Aceh in the case of *khamar*. The convict was punished by the West Aceh Sharia Court with a punishment of 50 lashes, after being deducted from a prison term of 129 days, the defendant received a punishment of 45 lashes. The caning was carried out in the Class II B Meulaboh Prison on Tuesday 15 May 2018. According to the Head office of Nagan Raya District Attorney, as quoted by BBC News Indonesia, he stated that the caning law in prison is open for public. The people are welcome to witness the whipping procession and the reporter or journalist are also welcome to cover it, but minors are still prohibited. (BBC News Indonesia 2018).

Furthermore, Aceh Jaya in the case of online gambling of the High Domino which was lashed 10 times at the Class III Calang Prison on Wednesday 30 June 2021 (Bintang 2021). The caning at Lapas III Sinabang was also carried out against 6 criminals for gambling and seclusion (Muliyasno 2021). The three cases are only *khamr* which is categorized as a hudud punishment, while gambling and seclusion are included in takzir. The implementation of caning in prison in these areas is to implement Governor's Regulation Number 5 of 2018 concerning the Implementation of the *Jinayat* Procedural Law and the fulfillment of all operational standards of its implementation decided by the Prosecutor.

Prison or detention center is a place where detention and training of criminals is carried out, not an open public space that can be accessed by all individuals, but prison or detention center are equipped with a measurable and structured security system. So the prison or detention center can be said to be a closed place that cannot be accessed by others except the officers and their own occupants.

This can be seen from the implementation of caning in prisons in Aceh Jaya. The caning was only attended by the committee involved and responsible for the execution of the caning, the caning procession was also witnessed by prison officials and prison inmates. The implementation process was not announced to the surrounding community and the public only knew about the caning procession after it was completed from mass media. The same situation also occurred in the prison in Sinabang, where the caning procession was carried out behind closed doors and witnessed only by the prison inmates.

Announcing the implementation of caning to the public is not found in the technical instructions for the implementation of the caning law in public places. According

to Zamzami, there is no obligation for the prosecutor and *wilayatul hisbah* to announce the caning procession to the public a few days before the procession is carried out. However, the information was announced directly using loudspeakers when the caning procession was about to be executed (Zamazami 2021).

According to community leaders, the implementation of caning in prison or detention center does not have values that are obtained by the community due to the lack of public access to the location, so that this is considered contrary to the word of God which states that the punishment of caning must be witnessed by believers. The society generally refuse to entering prison or detention center just to see the caning procession, this is because there are many requirements imposed by prison guard that make people do not want to witness the caning procession in prison (Chalidin 2021).

The implementation of caning in prison and in open spaces has several significant differences, including: The implementation of caning in prison can limit the public who want to witness with the terms and conditions that apply in prison. This is different from open places such as mosque courtyards or fields where the general public can access them. People who witness caning in prison must prepare a special time to visit prison and searching the information on the time of the execution because it is not publicly published so that it is difficult for the community. While the executor in an open public place, the society can easily attend without the need for scheduling. Spectators who witness caning in prison are limited because the open space in prison is limited.

The Qur'an and hadith do not provide specific recommendations regarding the place of execution of hudud punishment or the law of caning, but the arguments of the Qur'an and hadith only provide criteria for how the caning punishment should be implemented. Therefore, there is no prohibition against using prison or detention center as locations for caning, but the question is whether the prison or detention center meets the criteria for implementing the punishment or not.

Prison is a place where prisoners are trained, while detention centers are places where suspects or defendants are detained for the investigation process. Both places have binding rules and regulations for all residents. In general, the detention house is not a public place that can be visited by the public at any time, but a closed place so when someone visit, he must go through strict procedures.

There are two criteria that must be met so that the location is suitable to be used as a place for the caning procession. First, a public place that can be accessed by everyone and secondly the punishment must be witnessed by a group of people. Residents of prisons and detention centers including officers and prisoners witnessed the execution of the caning in prison or detention centers that have been carried out in some regions in Aceh and it. However, because prisons and detention centers are not public spaces, other people cannot access them easily, so the punishment only has a physically painful effect but does not have a deterrent effect on the convict. The punishment also does not provide much lessons and education to the general public.

If the government continues to implement Gubernatorial Regulation Number 5 of 2018 to apply the caning punishment in prison or detention centers, then the implementation should be carried out in the prison yard so it is open to the public but limited to minors.

The caning punishment has a very high educational value such as the value of a deterrent effect, religious value, psychological value and awareness value if it is implemented in a public place (Asdiana 2020). These values are not beneficial if the punishment is implemented in a closed manner, even though the level of legal awareness of the Acehnese is still not optimal, this can be seen that many *jinayah* violations due to the lack of supervision by the government and also the indifferent culture of Acehnese people (Ferizal 2019).

The implementation of *'Uqubat* canning in prison or detention centers is considered to be full of politicization of law. People are worried that this is a step from outsiders to omit the syiar of Islamic law in Aceh. In addition, this regulation is also seen as being able to reap the application of the law that is sharp downwards and blunt upwards, this is due to public concerns about manipulation as if the implementation of *'uqubat* caning has been carried out in the Correctional Institution.

Conclusion

The implementation of caning in prison and detention centers in Aceh is implemented in a closed manner which is only attended by officers and residents of prisons and detention centers. Whereas in Qur'an and Hadith the execution of caning punishment must be carried out in a public space and witnessed by a group of people. So the implementation of caning in prison and detention centers in Aceh does not meet all the standards in Qur'an

and hadith. Therefore, it is expected that the government will revise the policy to continue implementing the caning punishment in public places.

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