



A Juridical Analysis of the Caning Implementation in Aceh Prisons and its Relations to Islamic Laws

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Abstract

The Aceh government has implemented Islamic Sharia regulations by enacting Qanun Aceh Number 7 of 2013 concerning Jinayat Procedural Law, and Article 262 contains provisions regarding the implementation of flogging in public places. However, according to Article 30 Paragraph (3) of the Aceh Governor Regulation Number 5 of 2018 concerning the Implementation of Jinayah Procedural Law, the execution of flogging is restricted to prisons and detention centers. This study aims to outline the legal arguments for shifting the implementation of flogging in Aceh and the Islamic legal provisions related to carrying out flogging in public places. This research uses a normative legal method with a statute approach that refers to the concept of law as a rule and also uses Islamic legal doctrine, which is then analyzed qualitatively and described descriptively to find the alignment between the core issues and the normative provisions. The results of the research show that the main reason for issuing the Governor's Regulation regarding the implementation of flogging in prisons is to increase investment, as the implementation of flogging in Aceh has faced opposition from external parties. However, the issuance of the Governor's Regulation contradicts the system of forming legislation in Indonesia and legally lacks legal force. According to Islamic law provisions, the execution of flogging must be witnessed by a group of believers, as explained in the Quran, Surah An-Nur, verse 2. The implementation of flogging in prisons cannot be witnessed, whereas this is an integral part of the agreed implementation of flogging. There needs to be a specific and easily accessible location for the public as a place to carry out flogging penalties.

Keywords: Juridical Analysis, Caning, Aceh Qanun, Islamic Law.

Abstrak

Pemerintah Aceh telah memberlakukan ketentuan syariat Islam dengan menetapkan Qanun Aceh Nomor 7 Tahun 2013 tentang Hukum Acara Jinayat, dan dalam Pasal 262 memuat aturan mengenai pelaksanaan hukuman cambuk yang dilakukan di tempat terbuka. Namun berdasarkan ketentuan Pasal 30 Ayat (3) Peraturan Gubernur Aceh Nomor 5 Tahun 2018 tentang Pelaksanaan Hukum Acara Jinayah membatasi pelaksanaan cambuk di lembaga pemasyarakatan, rumah tahanan. Kajian bertujuan untuk menguraikan argumentasi hukum pengalihan pelaksanaan hukuman cambuk di Aceh dan ketentuan hukum Islam terkait pelaksanaan hukuman cambuk di tempat terbuka. Penelitian ini menggunakan metode hukum normatif dengan pendekatan statute approach yang mengacu pada konsep hukum sebagai kaidah dan juga menggunakan doktrin hukum Islam yang kemudian dianalisis secara kualitatif dan diuraikan dalam bentuk deskriptif sehingga ditemukan kesesuaian antara pokok masalah dengan ketentuan normatifnya. Hasil penelitian menunjukkan bahwa alasan utama dikeluarkan Peraturan Gubernur terkait pelaksanaan hukuman cambuk di lembaga pemasyarakatan untuk meningkatkan investasi karena pelaksanaan hukuman cambuk di Aceh selama ini mendapat pertentangan dari pihak luar. Namun demikian, keluarnya Peraturan Gubernur tersebut bertentangan dengan sistem pembentukan peraturan perundang-undangan di Indonesia, dan secara yuridis juga tidak memiliki kekuatan hukum. Menurut ketentuan hukum Islam, eksekusi cambuk wajib dipersaksikan kepada sekelompok orang beriman, ini sebagaimana dijelaskan dalam al-Quran surah an-Nur ayat 2. Pelaksanaan hukuman cambuk di lembaga pemasyarakatan tentu tidak dapat disaksikan, padahal ini merupakan satu paket yang disepakati dalam pelaksanaan hukuman cambuk. Perlu adanya sebuah lokasi khusus dan mudah diakses oleh publik sebagai tempat pelaksanaan *'uqubat* cambuk.

Kata Kunci: Analisis Yuridis, Hukuman Cambuk, Qanun Aceh, Hukum Islam.



Introduction

Law Number 44 of 1999 concerning the Implementation of the Privileges of the Special Region of Aceh Province (UU Number 44 of 1999) has given privileges to the people of Aceh to carry out and administer several areas of life. Among the privileges given are those mentioned in Article 3 Paragraph (2) of Law Number 44 of 1999, namely the administration of life in several fields such as the administration of religious life, the administration of traditional life, the administration of education, and the role of ulama in determining regional policies. The implementation of post-reform regional autonomy focuses on the independence of provincial regions in building their own households. According to the concept of autonomy, it is divided into three, namely ordinary autonomy, special autonomy and special autonomy, which are emphasized in Article 18, Article 18A and Article 18B of the 1945 Constitution.¹

The aim of the Aceh Government to implement Islamic Sharia perfectly (*kaffah*) is to implement a number of qanuns in the field of Islamic Sharia. Previously it had been established with the enactment of Qanun Number 12 of 2003 concerning Khamar Drinks, Qanun Number 13 of 2003 concerning Maisir, and Qanun Number 14 of 2003 concerning Seclusion.² The consequence of implementing religious life as referred to above is a form of enforcement of Islamic law for every adherent, namely carrying out all actions commanded by Allah SWT and His Messenger and avoiding every prohibition, as explained in Islamic law, and each of these actions will become the basis for The Aceh Government in making and issuing regional regulations.

One of the Qanuns as an implication of rules regarding prohibited acts according to Islamic Sharia is Aceh Qanun Number 6 of 2014 concerning Jinayat Law (Qanun Jinayat Law). Based on the provisions of Article 1 Number 15; Number 16; Number 17; Number 18; and Number 19 of the Qanun Jinayat Law, it is known that jinayat law is a law that regulates actions prohibited by Islamic Sharia (*jarimah*) which in the Qanun are threatened with *uqubat hudud* and/or *ta'zir*.³ These actions according to Article 3 Paragraph (2) of Qanun Jinayat include: (a) wine; (b) maisir; (c) seclusion; (d) understand; (e) adultery; (f) sexual harassment; (g) rape; (h) Qadzaf; (i) Liwath; and (j) Musahaqah.

One of the punishments that a judge can impose on a perpetrator who is legally and convincingly proven to have deliberately committed a sinister act is caning. The number of lashes the perpetrator receives depends greatly on the type and form of the *jarimah* act carried out. For example, a perpetrator will be sentenced to 40 (forty) lashes if he is proven to have deliberately drunk wine for the first time based on a permanent court decision. In contrast to the act of adultery, the number of lashes that will be received reaches 100 (one hundred) lashes.⁴

The execution of the *Jarimah* sentence against the convict after a court decision will be carried out in an open place and can be seen or witnessed by people present among the

¹Zaki Ulya, Refleksi Memorandum of Understanding (MoU) Helsinki Dalam Kaitan Makna Otonomi Khusus di Aceh, *Jurnal Konstitusi*, Volume 11, Number 2, June, (2014), 372.

²Zaki Ulya, Dinamika Penerapan Hukum Jinayat Sebagai Wujud Rekonstruksi Syariat Islam di Aceh, *Jurnal Rechtsvinding*, Volume 5 Number 1, (2016), 136.

³*Uqubat* is a punishment that can be imposed by a judge on a perpetrator of *jarimah*; *hudud* is a type of *uqubat* whose shape and size have been explicitly determined in the qanun; *Ta'zir* is a type of *uqubat* that has been determined in the Qanun, the form of which is optional and the amount is within the highest and/or lowest limits.

⁴See Article 15 Paragraph (1) and 33 Paragraph (1) Qanun Hukum Jinayat. The number of lashes received by the condemned person is based on the provisions stipulated in the Koran.

believers. This is as mandated by Article 262 Aceh Qanun Number 7 of 2013 concerning Jinayat Procedural Law (hereinafter abbreviated as Qanun Jinayat Procedural Law). Based on this, people then choose open places such as mosque courtyards or other public places as locations for carrying out caning punishments.

The choice of location for caning punishment in an open area has resulted in polemics. There are several groups, especially foreign parties or institutions, who consider that carrying out caning in the open violates human rights. For these reasons, the Governor of Aceh issued Governor Regulation Number 5 of 2018 concerning the Implementation of the Jinayah Procedural Law (hereinafter abbreviated to the Jinayah Procedural Regulation). In Article 30 paragraph (3) of the Jinayah Events Gubernatorial Regulation, it is known that what is meant by an open place for carrying out caning punishments is a Correctional Institution, Detention Center (Rutan) or Detention Branch.

Aceh Governor's Regulation Number 5 of 2018 which revises the provisions for the implementation of Islamic criminal law called Qanun Jinayat certainly reaps polemics from various parties, especially observers and guardians of the implementation of Islamic Sharia in Aceh, because one of the contents of the regulation regulates the transfer of caning punishment from open spaces to institutions. correctional. The Governor of Aceh at that time, Irwandi Yusuf, said that the transfer of caning to prison (correctional institution) was aimed at guaranteeing the rights of convicts, because previously it was carried out in public places and was seen by children. Another reason is for the sake of smooth investment, so that investors are not afraid to invest in Aceh. This can also help improve and advance the economy in Aceh. This reason was conveyed after the signing of the regulation (Thursday, 12/4/2018).

The Governor's Regulation regarding the Jinayah Event caused strong protests from the Aceh People's Representative Council (DPRA). Chairman of the DPRA, Muharuddin stated that the Governor's Regulation violated the rules and was not procedural.⁵ A similar protest was expressed by Iskandar Usman Al-Farlaky, who said that the reason for moving the caning punishment to prison was irrelevant and contrary to Aceh Qanun Number 7 of 2013 concerning the Jinayat Procedural Law. Where, in Article 262 it is stated that uqubat (punishment) caning is carried out in an open place and can be seen by people present. The same article also states that children under 18 years of age are not permitted to attend caning.

Based on the issuance of the Governor's Regulation and the occurrence of conflict and even rejection from various parties, the transfer of caning punishment to correctional institutions is a legal product of the Governor's Regulation, and this will certainly become more interesting when examined in the light of Islamic legal rules which say that the implementation of caning punishment must be witnessed and this is a form of maqashid sharia in the application of Islamic law. This study will of course focus on the juridical review of the legal arguments for transferring the implementation of caning sentences in Aceh and the provisions of Islamic law related to the implementation of caning sentences in the open and witnessed.

The implementation of caning punishment in Aceh requires in-depth research and linking it to a review of Islamic fiqh, in order to find a bright and clear point regarding two contradictory thoughts in responding to the presence of the Governor's Regulation. This means that there are substantive matters that need to be studied more seriously and in depth

⁵<http://aceh.tribunnews.com/2018/04/21/dpra-sepakat-mohon-pergub-apba-dan-pergub-cambuk>, accessed 18 October 2019.

as to why the Governor's Regulation was issued as well as the view of Islamic law as contained in the Qur'an and hadith which are recommended by the ulama and have been written in Islamic fiqh books as a point of control or the main reference in formulating Islamic law into positive law (qanun). The implementation of caning punishment in Aceh requires in-depth research and linking it to a review of Islamic fiqh, in order to find a bright and clear point regarding two contradictory thoughts in responding to the presence of the Governor's Regulation. This means that there are substantive matters that need to be studied more seriously and in depth as to why the Governor's Regulation was issued as well as the view of Islamic law as contained in the Qur'an and hadith which are recommended by the ulama and have been written in Islamic fiqh books as a point of control or the main reference in formulating Islamic law into positive law (qanun).

Method

This research is a qualitative literature review. This study will refer to materials available in various books, articles or writings in other forms that are related to the application of the law of flogging in the review of fiqh or Islamic law and existing regulations in Aceh as formulated in qanuns or governor regulations that have been issued. confirmed.

The results of the description will then be discussed and analyzed from the perspective of theories and opinions of experts in the field of legal science and also according to the author's own analytical opinion. The aim is to confirm a conclusion that can describe and answer the problems raised in this research.

This normative juridical legal research includes research on legal principles. In practice, this research is referred to as legal research which uses secondary data sources or data obtained through library materials. The data collection for this research is in the form of a documentation study, searching for data regarding the things or variables studied, namely verses from the Koran, hadiths of the Prophet related to the application of the law of flogging and other forms of punishment in various literature, whether in the form of books or books of interpretation, fiqh, ushul fiqh and other references, and also includes regulations for implementing Islamic Sharia that have been established in Aceh.

The concept of the rule of law

The term authority has a position that is parallel to authority in English. Authority in Black's Law Dictionary means legal power, the right to command or act; the right or power of public officials to comply with legal rules within the scope of carrying out public obligations.⁶ Meanwhile, in the literature, experts have tried to define the meaning of the word authority. Philipus M Hadjon describes authority as legal power.⁷ HD Stout states that authority is the totality of rules relating to the acquisition and use of governmental authority by public law subjects in public legal relations.⁸

⁶<https://anzdoc.com/bab-ii-landasan-theori7a2ecde0d71d8d383bb316db3b62c23e19397.html>, accessed 27 October 2019.

⁷Syofyan Hadi, "Theory of Authority ", [https://www.academia.edu/5708875/ TEORI_ OF AUTHORITY?](https://www.academia.edu/5708875/TEORI_OF_AUTHORITY?auto=download) auto=download, accessed 23 October 2019.

⁸Abdul Rauf Alaudin Said, " *Division of Authority of the Central Government-Regional Government in Widest Autonomy according to the 1945 Constitution* ", <https://media.neliti.com/media/publications/37009-ID-pembagi-kekerjaan-tengah-tengah-anggaran-regions-in-autonomy-wide-lua.pdf>, accessed 23 October 2019.

Based on this understanding, it can be seen that authority has an important position in the study of constitutional law and state administrative law. Because every action and decision issued by the government must always be based on the authority it has. This is in line with the principle of legality which is the main principle in a legal state which is often formulated with the expression "*het beginsel van wetmatigheid van bestuur*" namely the principle of the legitimacy of government.⁹

Judging from the source of acquisition, there are three categories of authority, namely as follows:

1. Attributive authority

This is an authority granted directly by statutory regulations. Regarding attributive authority, responsibility and accountability rests with the official or agency as stated in the basic regulations.

2. Delegative authority

It is authority that originates from the delegation of a government organ to another organ on the basis of statutory regulations. For delegative authority, responsibility and accountability shift to those given that authority and shift to the delegate

3. Mandatory authority

This is authority that originates from a process or procedure of delegation from a higher official or agency to a lower official. Mandatory authority exists in the routine relationship between superiors and subordinates, unless expressly prohibited.

From the various explanations above, it can be concluded that authority is a formal power that comes from the law, while the authority itself is a specification of authority which means whoever here is a legal subject who is given authority by law, then the subject The law has the authority to carry out certain regulations within its authority because of the orders of the law.

The concept of a legal state has been developed since the time of Plato and Aristotle. Plato (429-374 BC) tried to describe the form of an ideal state through his works. So in the book he produced during his old age, namely *Nomoi*, he firmly stated that the existence of legal regulations in a country was a necessity.¹⁰ Then, it was continued by his student Aristotle (384-322 BC) who required the existence of a constitution and legal sovereignty in a country.¹¹

In the following period, ideas about the rule of law increasingly developed. Philosophers tried to discuss this problem to find an ideal form of state that was appropriate to the era. The terminology regarding the rule of law is also adapted to suit the times. For example, in the current modern era, the concept of the rule of law is influenced by two world legal systems, namely Continental Europe with its "*rechtsstaat*", and Anglo Saxons with its "rule of law". These two terms have slightly different systems and implementation but have the same goal, namely administering government based on law.

Indonesia is also a legal country, this is in accordance with Article 1 Paragraph 3 of the 1945 Constitution Amendment which states that "The Indonesian state is a legal state".

⁹Ridwan HR, *Hukum Administrasi Negara*, (Jakarta: Rajawali Pers, 2013), 91.

¹⁰Azhari, *Negara Hukum Indonesia, Analisis Yuridis Normatif Tentang Unsur-Unsurnya*, (Jakarta: UI-Press, 1995), 12.

¹¹Sayuti, "The Concept of Rechtsstaat in the Indonesian Legal State", p. 82, via <https://media.neliti.com/media/publications/220458-kompet-rechtsstaat-dalam-negara- Hukum-in.pdf>, accessed 24 October 2019.

However, the concept of a state of law adopted by the Indonesian state is different from the concept of a state of law in Continental Europe and Anglo Saxon, because the Indonesian state of law is based on Pancasila.¹²

The concept of the Indonesian Rule of Law is idealized in that what must be the commander-in-chief in the dynamics of state life is law, not politics or economics. Therefore, the jargon commonly used in English to refer to the principle of the rule of law is ' *the rule of law, not of man* ', that is, government is basically the law as a system, not individuals who only act as "puppets" in the scenario system that regulates it.

The position of qanun in the Indonesian legal system

Pancasila as the philosophy or way of life of the Indonesian people has an important position in the structure of the national legal system. Using Hans Kelsen's theory, namely the Legal Pyramid theory (stufentheorie) which was later developed by his student Hans Nawiasky, it can be concluded that Pancasila is the fundamental norm of the Indonesian state.¹³

Fundamental state norms are norms that form the basis for the formation of a country's constitution or basic laws. A constitution requires fundamental state norms as the basis for the direction of state policy. Then in Nawiasky's theory, there are several sequences of norms after fundamental norms, namely the basic rules of the state; formal laws; and implementing regulations and autonomous regulations. In relation to the hierarchy of statutory regulations in Indonesia, Article 7 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations determines the sequence of statutory regulations in Indonesia, namely the 1945 Constitution of the Republic of Indonesia; MPR Decree; UU/Perpu; Government regulations; Presidential decree; Provincial Regional Regulations; City/Regency Regional Regulations.

Aceh is one of the provinces in Indonesia which has its own specificities including the implementation of Islamic Sharia with a set of regulations (Qanun-qanun). By taking into account the characteristics of the Acehnese people's struggle to achieve independence as well as the various dynamics of state administration after Indonesia's independence, Aceh has gained privileges in administering government. Article 16 Paragraph (2) of Law Number 11 of 2006 concerning the Government of Aceh states that the specialties of Aceh include the authority to organize religious life in the form of implementing Islamic Sharia for its adherents in Aceh while maintaining harmony between religious communities; implementation of traditional life based on the Islamic religion; providing quality education and adding local content material in accordance with the provisions of Islamic Sharia; as well as the role of ulama in determining Aceh Government policy.¹⁴

Jinayat Law Qanun exists as written rules in the implementation of Islamic Sharia in Aceh. In the explanation, it is stated that there are 4 (four) main principles that guide the formation of these qanuns, namely, they are based on the Al-Qur'an and the Sunnah of the Prophet Muhammad; the interpretation or understanding of the Al-Qur'an and Hadith will be connected to the local conditions and needs (customs) of the Acehnese people in particular as well as to the regulations that apply within the framework of the Unitary State of the Republic of Indonesia (NKRI); This interpretation and understanding will be

¹²Ridwan HR, *Hukum Administrasi Negara...*, 97.

¹³ Chadijah Rizki Lestari dan Basri Efendi, Tinjauan Kritis Terhadap Peraturan Gubernur Nomor 5 Tahun 2018 Tentang Pelaksanaan Hukum Acara Jinayat, *Jurnal Hukum; Samudra Keadilan*, (Volume 13, Nomor 2, Juli-Desember 2018), 229.

¹⁴ Law Number 11 of 2006 concerning the Aceh Government, Article 16 Paragraph 2.

endeavored to always be oriented towards the future to meet the needs of the Indonesian people; and still use the good old (mahzab) rules. The implications of the main principles mentioned above can be seen in the application of the principles as stated in Article 2 of the Jinayah Law Qanun, namely Islam; legality; justice; balance; benefit; protection of human rights; and learning to the community.¹⁵

The scope of regulation in the Jinayah Law Qanun consists of the perpetrators of jarimah; finger; and 'uqubat. ¹⁶This is as determined by Article 3 Paragraph (1) Jinayah Law Qanun. In Paragraph (2) it is further stated that the type of jarimah referred to is khamar; maisir; seclusion; come to terms with it; adultery; sexual harassment; rape; qadzaf; liwath; and effort. This determination is made by following existing fiqh rules. Jarimah perpetrators who are proven legally guilty will be subject to 'uqubat hudud and 'uqubat ta'zir, including caning.

The caning punishment in Aceh has actually been carried out since 2005. The location itself is carried out in an open place as mandated by Article 262 paragraph (1) of the Jinayah Procedural Law Qanun. However, both the Jinayah Law Qanun and the Jinayah Procedural Law Qanun do not limitatively define the meaning of open space. In practice, as long as the place is considered open according to general and community understanding, it has fulfilled the requirements as intended in this article.

However, the presence of the Governor's Regulation (Pegub) on the Jinayah Procedural Law which regulates in a limited way the meaning of open space is the main discussion or the focus point in this article. *First*, in fact, the Governor of Aceh can form statutory regulations based on delegation from provincial regional regulations or higher statutory regulations.¹⁷ However, neither the Jinayah Law Qanun nor the Jinayah Procedural Law Qanun task the Governor to further regulate the procedures for carrying out caning punishments. In fact, referring to Article 252 of the Jinayah Procedural Law Qanun, the prosecutor is responsible for determining the place and time for implementing uqubat whip after coordinating with the Chairman of the Sharia Court, the Head of the Health Service, and other agencies in charge of the local Regency/City Wilayatul Hisbah.

Second, if you look at it from the perspective of language use, even though the Qanun does not limitatively regulate the meaning of open places, the rules in Article 262 paragraph (1) Jinayah Procedural Law Qanun, that "flogging is carried out in an open place and can be seen by those present", this is very clear and clearly understandable. Even though the Qanun does not define open spaces in a limited way, Maria Farida Indrati has an opinion that the use of Indonesian in statutory regulations is the general and standard Indonesian language.¹⁸

The meaning of language rules in statutory regulations can use the current modern interpretation, namely "single approach or principle". Interpretation with a "single approach or principle" means that the words in the regulations should be interpreted in their meaning and significance according to ordinary grammar but need to be connected to the will and purpose of the regulations as well as the intentions of those who wrote them.¹⁹

Based on Islamic studies, one of the purposes of punishment is to provide learning to society. This aim was then adopted as a principle in the Jinayah Procedural Law Qanun. So

¹⁵Chadijah Rizki Lestari dan Basri Efendi, *Tinjauan Kritis Terhadap...*, 230.

¹⁶Jarimah is an act that is prohibited by Islamic Sharia. 'Uqubat is a punishment that can be imposed by a judge on a perpetrator of jarimah.

¹⁷Maria Farida Indrati S, *Ilmu Perundang-Undangan*, Book 1, (Jakarta: Kanisius, 2013), 107.

¹⁸Maria Farida Indrati S, *Ilmu Perundang-Undangan...*, 199.

¹⁹Maria Farida Indrati S, *Ilmu Perundang-Undangan...*, 204-205.

in practice, to fulfill the criteria above, state officials choose the mosque yard as the location for carrying out caning punishments. Apart from providing a deterrent effect to the perpetrator, it also serves as a warning to the people who witness it not to commit similar acts.

This goal will certainly not be achieved if implemented based on Article 30 Paragraph (3) Governor's Regulation on Jinayah Procedural Law, namely in correctional institutions or detention centers. Because this place is actually a closed place. Even though it is open to the public, people are usually reluctant to come to the location just to see the flogging procession. As a result, the aim of the punishment will not be achieved, because there will be no or not enough people to witness the caning. At a further stage, it is feared that flogging will become an ordinary punishment that will not have an impact on reducing the number of acts of jarimah.

Third, the procedure for issuing the Governor's Regulation on Jinayah Procedural Law is contrary to Qanun Number 13 of 2017 concerning procedures for giving consideration to the Ulama Consultative Council. In Article 11 paragraph (1) it is stated that "Every Aceh Government policy relating to Islamic Sharia must receive consideration from the Aceh MPU". Where the form of consideration is written as mandated in Article 1 Number 16 of the same Qanun. However, these considerations never requested. This was stated by the Deputy Chair of the Aceh MPU, Tgk. Faisal Ali.²⁰

Fourth, if the problem is related to photo or video recordings that may have been taken and the presence of underage children who were present and witnessed the caning procession, then of course alternative or solutions can still be sought, for example by increasing security procedures. and strict requirements or no longer implemented in open locations that can be accessed by anyone, especially children, or locations that are sterile and out of reach of children. All of these stages can be taken without losing the aim of Islamic punishment as a religious law that is firmly adhered to by the people of Aceh.

Fiqh review of the law of caning in prisons²¹

Aceh Governor Irwandi Yusuf, stipulated Aceh Governor Regulation (Pergub) Number 5 of 2018 concerning the Implementation of the Jinayat Procedural Law . One article in the Governor's Regulation regulates that the place for carrying out uqubat (punishment) caning from a very open location, is transferred to a correctional institution (prison). Pros and cons emerged in response to the Governor's Regulation with various views. Agreeing or disagreeing is influenced by the openness of democracy and the dynamics of subjective legal thinking in society in responding to the background issue of the issuance of the Governor's Regulation.

This article does not comment on the various arguments of the parties for and against the Governor's Regulation regarding the location of the caning punishment , but tries to analyze the position of the ijihad of the Governor's Regulation on the caning penalty in the constellation of the existence of sharia, fiqh, and *al-siyasah al-syar'iyah* . The meaning of

²⁰ Porch Online, 4/15/2018.

²¹Opinion, Jailani, (Alumnus of the Modern Fiqh Doctoral Program and Chair of the Islamic Religious Education Study Program, Tarbiyah and Teacher Training Faculty, UIN Ar-Raniry Banda Aceh), Serambinews.com article, "*Can Uqubat be caned in prison?*", <https://aceh.tribunnews.com/2018/04/20/can-uqubat-whip-in-prison?page=all>.

shari'a and fiqh is relatively rarely differentiated, both in terms of terminological definitions and applied substance, especially if shari'a and fiqh are linked to *al-siyasah al-syar'iyah*.

On this basis, of course an academic explanation is needed; Does the decision to implement flogging in correctional institutions conflict with Islamic law, and is not in accordance with the views of the Islamic school of jurisprudence (especially the Shafi'i school of thought)? So if so, then how does *al-siyasah al-syar'iyah's review* address the Governor's Regulation phenomenon? The description of this study is certainly very necessary in order to minimize the pros and cons of the Governor's Regulation regarding the location of the caning punishment, which is not illegal and is understood proportionally.

Fiqh is identical to sharia, but technically the operations of sharia and fiqh are different. Sharia is all the provisions that Allah has set for every Muslim as stated in the Al-Qur'an and Sunnah, including monotheism, morals, halal and haram. Sharia comes from Allah SWT, has comprehensive characteristics, provides convenience and lightness, is moderate and balanced, perfect, firm and cannot be changed. Fiqh is the provisions of the Shari'a which have been interpreted and explained technically by fiqh scholars based on the guidance of the Al-Quran and hadith, giving birth to various schools of fiqh.

Shari'a certainly has significant differences with fiqh, including: First, Shari'a, as the provisions of Allah SWT, cannot change because these provisions were established based on Divine revelation to the Messenger, both contained in the Al-Qur'an and al-Sunnah. Fiqh contains a number of practical sharia provisions sourced from the Al-Quran and Sunnah, but there are provisions that are determined based on thought or *ijtihad*. Sharia is never different, but the provisions of fiqh may differ as a consequence of the thinking of fiqh scholars or the result of *ijtihad* by scholars who are qualified in their field of expertise.

Fiqh is a technical explanation of Shari'a texts through the development of other Islamic scientific disciplines. For example, ablution is mandatory when a Muslim wants to pray. Wudhu' is mandatory according to the law, because it is expressly stipulated in the Qur'an and a series of hadiths. However, regarding the technicalities of performing ablution, there are of course different opinions among sectarian scholars as to whether to wash part of the head or the whole head.

Second, the provisions of the Shari'a are perfect, eternal and contain general rules and principles which guide the determination of law. In contrast to fiqh, which is a product of *mujtahid* thought from sharia texts, it is an explanation of general principles. The general principle of the five daily prayers that must be carried out in any condition and situation is the sharia contained in the Al-Qur'an and hadith. However, when talking about the technicalities of praying in abnormal conditions, fiqh scholars differ in opinion according to the situation, conditions and place of the incident when the prayer is to be performed.

Third, the provisions of sharia must be followed by all Muslims, without being influenced by historical background and geographical conditions. However, the provisions of fiqh are not required to be followed by Muslims who follow *madhhab* clerics in different regions. Obligatory prayer is according to the Sharia, but the prayer technique is not mandatory for every Muslim in region A to follow the prayer technique in region B. The choice of school of thought is based on history and the region where the school of fiqh developed. When a Muslim chooses a particular school of thought to follow, he is also obliged to consistently follow the technical implementation of prayers according to the directions of his chosen school of thought.

Based on the differences between sharia and fiqh above, the author elaborates on the "Ijtihad of the Governor's Regulations regarding the rules for implementing caning

sentences" in Correctional Institutions which is at the heart of the controversy; does it violate the provisions of the sharia and/or violate the provisions of the fiqh of madhhab scholars or Islamic law? and, do the thoughts of the Aceh Governor's Expert Team have an academic study in selecting the location for the execution of the caning sentence which was moved to the environment or grounds of the Penitentiary?

The implementation of flogging executions for violators of Aceh Qanun Number 6 concerning Jinayat Law must be witnessed by a group of believers as a sharia provision. It must be witnessed by a group of believers as Allah SWT says, "and let (the execution of) their punishment be witnessed by a group of believers." (QS. an-Nur: 2).

Various hadith provisions also explain the implementation of public caning. However, the verses and hadith do not explain in detail how many people witnessed the caning. The verse above clearly and clearly states that believers are allowed to witness the caning.

If we explore the opinions of the scholars of the Shafi'i school of fiqh, regarding the technical provisions for carrying out caning punishments, it is found in the Book of *Al-Muhazzab fi al-Fiqh al-Syafi'i*, volume 3, pages 382-383, which states; Article: Al-Mustahab (recommended), the execution of the hudud sentence is attended by a group of people based on the word of Allah in Surah An-Nur Ayat: 2, Wal Mustahab, it should be witnessed by four people from among the believers, because the implementation of the had is due to their testimony, the convict must be in healthy, strong and in normal weather conditions when the flogging is carried out (see also; Buku Al-Mu'tamad fi Al-Fiqh al-Syafi'i, juz V, page 159).

Based on the surah of the book above, the implementation of caning punishment in correctional institutions does not conflict with the Shari'a, nor does it conflict with the opinion of the Syafi'i school of fiqh. Issuance of a Governor's Regulation regarding the location of the implementation of caning punishment as a form of ijtihad in the context of *al-siyasah al-syar'iyah*, which examines the authority and duties of the Head of Islamic Government to manage and improve the welfare of the people in various aspects of life based on sharia through State institutions, including considering progress economics such as to attract foreign investors to develop the economy in Aceh Province.

Al-siyasah al-syar'iyah plays an important role in integrating the concept of ijtihad in an effort to find the beneficial value of a case, such as the implementation of flogging in a correctional institution, to be observed from very diverse points of view. The power of the state is of course very important to mediate and execute one of the many benefits debated by many parties in a case.²² In the author's opinion, the Governor of Aceh, in the context of *al-siyasah al-syar'iyah*, has the inherent power to choose the location for carrying out the caning sentence in a very open location, or in an open but limited location, by selecting the Correctional Institution as the location for the execution of the sentence whip.

Theories of punishment and mechanisms for implementing caning

The purpose of punishment in Islamic Sharia is the realization of the objectives of Islamic law itself, namely as retribution for evil acts, prevention in general and prevention in particular as well as protection of the rights of victims. Another definition states that punishment is suffering imposed on someone as a result of their actions breaking the rules.

²² Habibuddin, *Kajian Hukum Islam Terhadap Peraturan Gubernur Aceh Nomor 5 Tahun 2018 Tentang Pelaksanaan Hukuman Acara Jinayah Di Lembaga Masyarakatan*, (Banda Aceh, Fakultas Syariah and Hukum UIN Ar-Raniry, 2020), 57.

Punishment with certain punishments is intended to bring about the benefit of the people in preventing injustice or harm.²³

In Islamic criminal law there is a theory of retribution known as the *answering theory* and the *zawajir prevention theory*,²⁴ which a criminal offense will be given a sanctions or punishment as a response to his actions and also as an anticipation for other members of society not to commit similar criminal acts or other criminal acts that will result in a punishment. *Answering* means giving appropriate punishment to the perpetrator of the crime so that it can have a deterrent effect on the perpetrator and act as a deterrent for those who would commit the act.

Thus, the preventive aspect is a consequence of the *zawajir theory*, which requires the prevention of crimes against society or those convicted or those who have committed them. So based on this theory, a punishment is determined with the intention of retaliating for actions that harm other people's rights, of course with appropriate retribution, such as the types of criminal acts that are punished by caning as mentioned above.

According to the *Zawajir theory*, punishment serves to make the perpetrator of the crime aware so that he does not repeat the crime he committed and this punishment serves as a lesson for other people so that they do not dare to commit the same action. Meanwhile, according to the *answer theory*, punishment functions to save the convict from torment in the afterlife, in other words to erase the sins of the perpetrator, so the connotation of punishment is *ukhrawi*. In this case, scholars have different opinions about which theory should be prioritized.²⁵ However, in essence, Islamic criminal law enforced in Islamic Sharia has 2 (two) aspects, namely prevention and retaliation. By implementing these two things, it is hoped that society will be safe, peaceful and full of justice.

However, Islamic criminal law has currently undergone a change or paradigm shift in carrying out punishment (*uqubah*) against perpetrators of criminal acts, from those that are in the nature of retaliation (*answer*) and penance, to laws that create fear in other people so that they do not dare to commit crimes. criminal act.

To achieve the objectives of these theories, the mechanism for implementing punishment in the concept and theory of Islamic criminal law is in open places or public places that can be seen by the general public, not in closed places that cannot be seen by many people, including for example carrying out the execution of caning sentences in correctional institutions. Sharia' has specified one example of the crime of adultery in Surah an-Nur verse 2.

Based on the verse above, the mechanism for carrying out caning punishment must be carried out and witnessed by a group of believers, meaning it must be in an open place and can be seen or witnessed by other people. Even though the instructions in this verse only apply to cases of adultery, it is possible that it also applies to every other criminal act, because the aim is the same, namely for learning and prevention, both for the perpetrator of the crime himself and for other people who witness directly or know the news.

Based on the description above, it can be understood that caning punishment consists of hudud and ta'zir, namely: qazaf, adultery, khamar, khalwat, maisir (gambling), false witnesses and others. The mechanism for carrying out caning punishment must be carried out in a public or open place and can be seen by other people. The aim of this witnessing is to

²³Makhrus Munajat, *Hukum Pidana Islam di Indonesia*, (Yogyakarta: Teras, 2009), 178.

²⁴Abu Su'bah, *al-Hudud fi al-Islami*, (Cairo: al-Halaah al-'Ammah, 1974), 26.

²⁵Ahmad Fathi Bahansi, *al-Uqubat fi al-Fiqh al-Islami*, (Cairo: Maktabah Dar Urubah, 1961), 13.

serve as a lesson and deterrence, both for the perpetrators of criminal acts themselves and other people who see it in accordance with the objectives of the *zawajir* theory in the concept of Islamic law. With this punishment, it is hoped that it can reduce or minimize the number of crimes that can harm oneself, one's family and others.

Law enforcers must be able to synergize in realizing a good law enforcement process, not only are the rules made well but the application in the field must also be able to describe the rules that have been agreed upon as a common legal umbrella in enforcing Islamic law in Aceh Province.

The mechanism for implementing caning in Islam, which must be carried out in an open place and can be witnessed, needs to be regulated by increasing security procedures and strict requirements so that the implementation process can be more orderly. So that it is not witnessed by children and videotaped, it is necessary to have a special location that is easily accessible to the public, even if possible, make it permanent so that in the future whoever is going to be caned, the location that has been provided will be the place or location for the caning *uqubat*.

Further study is also needed regarding the purpose of publicizing the implementation of caning punishments in the media (both print and electronic). Because media publications are also part of witnessing caning sentences to the public in this modern era. Media publications are of course also able to have a mental and psychological influence on what is reported, especially with the limited space and time to directly witness the implementation of caning. Apart from that, it also provides educational or learning value for those who watch or read the news through the media.

Conclusion

The reason for the change in the implementation of caning punishment from previously being witnessed to the public to being limited to institutions This is due to the fact that up to now there has not been a technical regulation on the implementation of flogging, so regulations need to be made so that the implementation is more orderly, so that it is not watched by minors (18 years old), so that people who watch do not record the execution process, let alone share it on social media. The point is that the transfer of caning punishment to prison aims to protect the human rights of convicts. Apart from that, caning, whether carried out in a closed or open area, still tortures the convict.

The implementation of the flogging execution must be witnessed by a group of believers, which is a provision of Islamic law. Witnessing the caning punishment is one of the packages agreed upon in carrying out the punishment. However, although the minimum limit only requires that the punishment be witnessed by a group of people, it does not state the maximum number of people who can attend and witness the punishment . The criteria for the place where the caning punishment is carried out is that it must be an open place, and does not limit anyone who wants to witness the caning punishment being carried out.

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