



## **The Caning At Public Areas From The Perspective Of Ulema**

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### **Abstract**

The application of caning in public places and or in correctional institutions raises the pros and cons of people from various circles. The Acehese clerics who are affiliated with the Aceh Ulema Consultative Council provide a different view of the contents of the Governor's Regulation Number 5 of 2018 and tend to keep the caning punishment carried out in public areas. However, the views of the Indonesian Ulema Council relatively agree with the Governor's Regulation No. 10 of 2018. This study aims to find out how the views of the Indonesian and Acehese Ulema Consultative Councils regarding the caning punishment in public areas. This research is empirical or sociological legal research that combines library research and field research. The results of the study indicate that the legal views of the Central Indonesian Ulema Council and the Aceh Ulema Consultative Council, which state that there is an opportunity to change the Whip Governor Regulation and the determination of the requirements and or provisions that regulate the technical implementation of a more humane caning can be used as a solution to address the pros and cons of caning in public areas and public areas. In the Correctional Institution, by conducting research and legal studies together. The review of the Governor's Regulation on the implementation of caning in open areas was reviewed comprehensively in order to find the shortcomings so that there

was an understanding between the ulama and the umara in Aceh in the preparation of the revision of the said Governor's Regulation.

### **Keywords**

Whip Law, Indonesian Ulema Council, Aceh Ulema Consultative Assembly, Governor Regulation

### **Introduction**

The Aceh Government issued Aceh Governor Regulation Number 5 of 2018 concerning the Implementation of Procedural Punishments for Islamic criminal law carried out in correctional institutions. This Governor Regulation was signed with the Ministry of Law and Human Rights of the Aceh region in the presence of Minister Yasonna Laoly (Warsidi, 2018). The Governor of Aceh gave his opinion on relocation, including the circulation of video footage of the execution of the whip and pictures uploaded to YouTube, and Facebook, which will make the convict feel condemned for the rest of his life. However, the convict was only executed by flogging once. Not to mention witnessed by the children, if the parents who are punished have children, then the child becomes a victim of bullying among other children. The governor also stated that some investors complained about the implementation of caning in open areas, which caused a phobia of foreign investors, which has economic value for the progress of Aceh. (BBC, 2018).

The transfer of the location of the caning punishment from a public place to the Penitentiary (closed from public view) reaps the pros and cons of the Acehnese people. Issuance of this Governor Regulation without consultation with the DPRA and the Aceh Ulama Consultative Assembly (FT, 2018). Even though the Governor's Regulation Number 5 of 2018 concerning the transfer of the location of the whip, the leaders in Aceh were not taking it seriously. As reported by Republika on April 13, 2018, the deputy regent of Aceh Besar continues to carry out caning in public places (Hermawan, 2018). Likewise, the Banda Aceh City government continues to execute floggings in public places, arguing that there has been no fatwa from the ulama (Kumparan.com, 2018).

The caning punishment, in the perspective of Islamic law, must be witnessed by a group of believers (Surah An-Nur verse 2). This witness aims to pick Islamic values so as not to violate Islamic law in social life. Scholars of the Shafi'i School recommend the execution of the whip in the presence of four people (Shirazi, 2015). Adnan mentioned several opinions of scholars regarding a group of people who witnessed the caning, including; Ibn Abbas interprets a group of believers as at least two or more people, Az-Zuhri says at least three people more, Hasan al-Bashri says ten people, Quraish Shihab mentions 3 or 4 people more, some others say it was witnessed by at least four people according to with the number of witnesses of adultery (Adnan, 2018). By examining various Islamic legal literature and also looking at the benefits and authority of the Governor of Aceh in the context

of *al-siyâsah al-syar'iyah*, he has the inherent power to choose the location of the caning in open or closed locations. (Jailani, 2018).

One of the important theological, mystical, exegetical and philosophical discussions revolves around the unity of attribute and the essence or name and the named. Article 2 of the RKUHP contains the principle of legal - tas materiel that implicitly recognizes the laws that live in the community or customary criminal law, to respect the diversity of laws that live in Indonesia should be the regulation of criminal acts and criminal sanctions submitted to the development of jurisprudence and local regulations. (Madiasa Ablisar, 2012).

The problem with the application of caning in public places today, there are pros and cons in society. It is necessary to explore the opinions of Aceh scholars affiliated with the Aceh Ulema Consultative Assembly and the views of the Indonesian Ulema Council in order to find strategic legal policies and decisions for the creation of civilized and humanist Islamic law goals. In addition, caning carried out in public places incurs very high costs.

The results of previous studies found that the purpose of carrying out caning in public places was to achieve the objectives of the implementation of the punishment itself. The purpose is to give shame to the perpetrators so that in the future, they will no longer dare to commit criminal acts. The next goal is to be a lesson for people who see the execution of the caning so that people who see the whipping procession do not dare to commit crimes or criminal acts. (Misran, 2017).

This research is considered important to find out how the wise views of the scholars in interpreting texts and strategic legal decisions for the development of the legal system in Indonesia with local and national nuances still contribute to the self-respect of convicts, which have been considered incompatible with human rights. The issue of relocating the location of the caning execution from an unlimited open area to the location of the Penitentiary in Aceh in this study is also urgent so that it will be able to provide information on the government's national strategic policy that has an impact on the community in accepting the enforcement of the caning law in Aceh.

This study aims to determine the application of the caning law in open areas according to the views of the Indonesian Ulema Council and the Aceh Ulema Council.

### **Research Methods**

This research includes field research, namely research that is carried out systematically by lifting existing data in the field, with the method used in this study using qualitative research methods. (Nufiar et al., 2020). This research is empirical or sociological legal research that combines library research and field research. This study consumes the opinions of the Indonesian Ulema Council and the Aceh Ulema Council.

The focus of this research is the legal artifact in the form of the Aceh Qanun, which is practised in the daily life of the Acehnese. The research method used is

the sociological, legal method. The approach used is the legal approach and the legal, social approach (Ibrahin, 2008). Both of these approaches examine laws and regulations relevant to the subject of this research and sociological facts about how the law works in society.

## **Results and Discussion**

This paper is realistic to achieve and has benefits both theoretically and practically. The theoretical objectives are formulated in the form of legal concepts and views that fully describe the legal views of the Indonesian Ulema Council and the Aceh Ulama Consultative Council on flogging in public areas and in prisons and the rationale behind the different legal views of the Indonesian Ulema Council and the Aceh Ulema Council towards caning in public areas and Correctional Institutions.

The practical goal is expected to be achieved after the researcher tries to make the legal views of the Indonesian Ulema Council and the Aceh Ulema Consultative Council a practical guide for the implementation of the application of caning as a strategic policy of the Aceh Government and the Central Government in addressing the pros and cons of caning in public areas and prisons.

### **The Legal View of the Central Indonesian Ulema Council**

The execution of caning for violators of Aceh Qanun Number 6 Concerning Law Islamic criminal law must be witnessed by a group of people from among the faithful is a shari'ah provision. This obligation is based on the commandment contained in the Qur'an Surah An-Nur verse 2: "and let (the implementation of) their punishment be witnessed by a group of believers". In various hadiths, it is also explained that the implementation of caning is carried out in public. However, the verse and hadith do not explain in detail how many people have witnessed the caning. The verse above clearly and clearly states that it is the believers who are allowed to witness the lashing.

If we trace the opinion of the scholars of the Shafi'i school of jurisprudence, the technical provisions for the implementation of caning can be found in the Kitab Al-Muhazzab fi al-Fiqh al-Shafi'i, volume 3, pages 382-383, which states; Article: Al-Mustahab (recommended), the execution of the hudud punishment is attended by a group of people based on the word of Allah in Surah An-Nur Verse: 2, Wal Mustahab, should be witnessed by four people from among the believers because the implementation of *hadd* is due to their testimony, the convict must remain in good health, strong and in normal weather conditions when the whipping is carried out (see Kitab Al-Mu'tamad fi Al-Fiqh al-Shafi'i, juz V, page 159).

Based on the explanation of the book above, the implementation of caning in the Penitentiary does not conflict with the Shari'ah, nor does it conflict with the opinion of the Shafi'i school of jurisprudence. Because basically, textually, the order for the execution of the whip for adultery is emphasized by witnessing the execution

by a group of people without mentioning the place where the execution was carried out. Although contextually, it can be understood that witnessing the execution is rather difficult to realize if it is carried out in a Correctional Institution if you look at the reality of the Correctional Institution's condition and the public's interest in visiting the Correctional Institution.

Basically, the issuance of the Regulation of the Governor of the Whip is 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 prosper the people in various lives based on the Shari'ah through state institutions.

Therefore, the central Indonesian Ulema Council and the Aceh Ulama Consultative Council have different legal views in relation to the process of carrying out canings in Correctional Institutions, as stated in the Governor's Regulation Number 5 of 2018 concerning the Transfer of the Location of the Public Area Whip Punishment to a Correctional Institution which is an amendment to the Governor's Regulation Number 10 of 2005.

The central Indonesian Ulema Council, through its fatwa commission, is of the opinion that they agree with moving the location of the caning punishment from a public area to a correctional facility based on reasons considered by the Governor of Aceh, which include concerns that the whipping process will be witnessed by children and the spread of videos and photos. The convicts were widely lashed. Because this affects not only the convicted but also affects the victim's family. Even if the whipping process is maintained to be carried out in a public area, then those who witness the caning execution need to be limited to those who have reached a certain age. For example, it is limited to those who are over 16 years old or 17 years old and over. And it is also necessary to make some kind of provision that prohibits visitors who witness the caning from recording or taking pictures. This is according to the central Indonesian Ulema Council, so there will be no additional penalties for the convicts and their families, namely social punishment due to the spread of photos and videos, which of course, are very difficult to prevent, especially through social media and others.

Therefore, the central Indonesian Ulema Council offers a solution for the polemic of transferring the caning sentence from the public area to the Penitentiary, namely the construction of a permanent open hall for the implementation of the caning law instead of other public areas such as mosques. This is carried out in order to save the cost of carrying out the execution of the caning sentence that has been running so far.

### **The Legal View of the Aceh Ulemas Consultative Assembly**

The Aceh Ulema Consultative Assembly is of the view that the Aceh Ulema Consultative Council does not agree with Governor Regulation number 8 of 2018 concerning the transfer of the location of the whip from a public area to a Penitentiary with the argument that so far, the process that has been running has not experienced any problems. If the problem can be proven by the party that

rejects the caning in the open, then the Aceh Ulama Consultative Council is willing to discuss and discuss it. This is based on the condition of society in general, that people have never rejected the execution of the caning in public because it is legally in accordance with the provisions of fiqh. However, there are a small number of NGO elements that express their objections to caning in public areas.

So, according to the Aceh Ulama Consultative Council, as long as the existing provisions are still relevant to be implemented, there is no need to make new provisions in the form of a new Governor Regulation which is not necessarily better than what has been running and implemented in an orderly manner in all regions in Aceh.

Even if there is a concern, if the caning punishment is carried out in a public area, it will be witnessed by minors, or there is a concern that the audience will take pictures or videos and spread them on social media, the solution is not by moving the place of caning from the public area to the Penitentiary. It is enough to make a stipulation or strict prohibition rule for spectators not to bring children to the place of execution of the whip or prohibition for spectators to take pictures or record the execution process. This is considered adequate rather than having to issue a new Governor Regulation, although if it is returned to the fiqh provisions, it may not contradict.

Therefore, the Aceh Ulema Consultative Council is of the view that the caning punishment for perpetrators of violations of Qanun number 6 of 2014 concerning Islamic criminal law in Aceh is still carried out in open areas with strict selection of witnesses for whipping violators. Because it gives more problems for the implementation of Islamic Shari'ah in Aceh as a whole, even if there are deficiencies found in the implementation process in the field, of course, these can be improved continuously without having to change the existing provisions and running well so far, until there are other causes and factors that require the transfer of the place of execution of the caning from an open area to a closed area such as a Penitentiary with another special place.

### **Strategic Thoughts of the Indonesian Ulema Council and the Aceh Ulema Council**

Based on the results of interviews with the Central Indonesian Ulema Council and the Aceh Ulema Consultative Council, there is an opportunity for a review and reinterpretation of the procedures for carrying out caning in the open in particular and the implementation of Islamic criminal law procedural law in general. The views of the Central Indonesian Ulema Council that support the existence of special provisions and requirements for the implementation of caning in public areas and the adaptive thinking of the Aceh Ulama Consultative Council in reviewing the punishment of whipping in the open when discussed together have become a momentum for the Aceh Government and the central government in finding solutions for the ideal place for implementation. Whipping punishment.

If this idea is accepted, then the preparation of the Governor's Regulation

will be more accommodating and fair in accordance with the *maqashid shari'ah*, which is the basis for the preparation of the Governor's Regulation Number 05 of 2018, which states that one of the principles of the preparation of the Governor's Regulation is benefit or benefit, justice and respect for human rights.

Islamic criminal law and the procedural law of Islamic criminal law that have so far governed the Acehese people in the modern era within the framework of the Unitary State of the Republic of Indonesia are able to regulate the order of people's lives better and more perfectly. The disobedience of the district/city government in Aceh in rejecting the Governor's Regulation Number 5 of 2018 would not have occurred if every Governor Regulation to be issued *hadd* taken into account and involved components of the community and related institutions such as the Aceh Ulema Consultative Council as a party that had *hadd* the formal legal power to ask for their views.

Therefore, the Aceh Government, together with related parties in enforcing Islamic Shari'a, ideally establish pro-shari'ah public policies based on communicative and participatory logic by prioritizing the communication process and public participation while still referring to ethical values.

In the *al-siyâsahal al-syar'iyyah* system, the government has and plays an important role in integrating the concept of *ijtihad* in an effort to find the benefit value of a case such as the implementation of whipping in a correctional institution, to be examined from very diverse perspectives. State power is very important to mediate and execute one of the many benefits debated by many parties in a case. The Governor of Aceh, in the context of *al-siyâsahal al-syar'iyyah*, has the inherent power to choose the location for the execution of the caning to be in a very open location or in an open location.

Therefore, it is hoped that the Aceh government will determine the location for the implementation of canings for violators of Islamic criminal law qanun needs to consider several juridical and non-juridical aspects. In this case, the mainstream understanding of the community towards the process of implementing punishment for violators of the qanun of Islamic criminal law needs to be considered. Or at least the governor needs to find an alternative solution that can represent an element of a deterrent effect for violators of Islamic criminal law qanuns so that the goals desired by Islamic law in relation to the enforcement of hudud punishments, namely prevention and deterrent effects can be achieved and not neglected.

One solution to the polemic on the implementation of caning for violators of the qanun of Islamic criminal law is to announce the procession of the implementation of the hudud in print or electronic mass media. One of these solutions is offered by Su'ud bin Abdu Al 'Ali Al Barudi Al Utaibi in his book *Al Mausu'ah Al Jinaiyah Al Islamiyyah Al Muqaaranah* (Utaibi, nd).

### **Construction of the Ideal Whip Governor Regulation**

Based on the background of the different legal views of the Indonesian Ulema Council and the Aceh Ulama Consultative Council, it is based on an

understanding of the verse that orders to witness the execution of the caning of the adulterer in the letter An-Nur paragraph 2, which in its entirety means: "a woman who commits adultery and a man who commits adultery." who commits adultery, then lash each one of them a hundred lashes, and do not have mercy on both of them prevent you from (practising) Allah's religion, if you believe in Allah and the hereafter, and let (the execution of) their punishment be witnessed by a group of people. believers."

The verse explicitly commands that the execution process of the adulterer is witnessed by some believers. The word in Surah An-Nur verse 2 to describe some people who witnessed the execution of the whip is the word *Taaifah* which means congregation or a group of people or part of something. This is where the various opinions of scholars emerge in understanding the meaning of Ta'ifah.

Several books of commentary found several opinions of scholars who explain the meaning of *taaifah*. For example Abu, Hasan Muqatil bin Sulaiman bin Basyir Al Azdy Al Balkhi, when explaining the letter An-Nur verse 2 (Then lash both of them with 100 lashes), mentions that the male adulteress is flogged with a cloth covered in her skin. Meanwhile, women are whipped while sitting with their clothes on. (and do not be merciful to both of them prevent you from (carrying out) Allah's religion) meaning that you are weak in carrying out Allah's commands by cancelling the hudud punishment for both (if you believe in Allah and the Last Day), which is the day of vengeance, then do not ever cancel hudud punishment. Then when he explained part of the verse; (he let their punishment be in the form of lashes (witnessed by a group of believers.) He said the meaning is two or more people as a punishment for both and a lesson for the believers. Al Farra` said: meaning الطائفة is one or more people (Balkhi, 2002).

Imam Al Tsuari, in his commentary, quoted Imam Mujahid's opinion as narrated from Abi Najih when explaining the same verse; and let (the execution of) their punishment be witnessed by a group of believers.)Mujahid said that meaning الطائفة is one or more men (Kufi, 1983). Among them is the opinion of Ata', narrated by Al Tsauri from Ibn Abi Najih, that Taifah means two or more people. Then the opinion of the qatadah, which he narrated from Ma'mar, on the explanation of God's word; (let a group of believers witness the second punishment), Qatadah said; one of the Muslims (Al Humairi, nd).

Meanwhile, Imam Al Shafi'i, in his commentary, gives a different opinion on this matter. Imam Shafi'i said: The punishment of accusing the wife of adultery is not carried out except by the presence of a group of believers. For at the time of the Messenger of Allah, the people (companions) would not be present at a matter that the Messenger of Allah himself wanted to cover, and he did not attend it unless his other companions were also present. Likewise, all adultery punishments are attended by a group of believers of at least four people. Because in adultery testimony, witnesses can not be less than four people. This is similar to the word of Allah in the verse of the punishment for lashing for adultery (let a group of believers witness the second punishment) (Shafi'i, 2006).

It was narrated by Ash'atsh from his father that he said: I came to Abu Barah on a need. At that time, he was bringing out his slave girl at the door of the house because she had committed adultery, then she called a man and said, lash the slave 50 times. Then he called a group of people. Then read the word of God (وَلْيَشْهَدْ عَذَابَهَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ).

Furthermore, the opinion of Ibn Zaid in the explanation of the letter An-Nur verse 2; is that Al *Taaifah* must be present when the implementation of adultery is four people. And the opinion that is closest to the truth is the opinion that states that the least number of Muslims who should be present at the time of the adultery is one or more people. Because Allah SWT generalizes in the verse (وَلْيَشْهَدْ عَذَابَهَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ), and *taaifah* in the use of people can be represented by one person and above.

If this is the case, where Allah SWT does not give an indication that the meaning of the word *taaifah* is a certain amount, then it can be understood that the presence of a minimum number of meanings of *taaifah* can be a way out for the enforcement of hudud punishment as ordered by Allah verse (وَلْيَشْهَدْ عَذَابَهَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ). However, despite the fact that this is the case, in my opinion, it is *Sunnah* that there are no less than four people who are present in the enforcement of the *had* of adultery. Because if so, all scholars believe that the person who enforces the *had* of adultery has done what should be done (Tabari, nd).

The Indonesian Ulema Council is of the view. Caning punishment in public areas for perpetrators of criminal violations of Qanun Number 6 of 2014 concerning Islamic Criminal Law should be reviewed. Article 4 Paragraph (1) Governor Regulation Number 10 of 2005, which states that the caning law is carried out in an open place that can be witnessed by many people in the presence of prosecutors and doctors, must be reviewed because it is considered to have increased the sentence for the convicted person. Therefore, it is necessary to meet the requirements and/or conditions for the person who witnessed the execution of the caning, such as age restrictions, prohibition on documentation and the absence of insults against the convict at the time the execution was carried out.

The Aceh Ulama Consultative Council is of the view that the caning punishment in an open area for perpetrators of criminal violations of Qanun Number 6 of 2014 concerning Islamic Criminal Law is maintained as long as there is no study and or research on the lack of implementation of Article 4 Paragraph (1) of the Governor's Regulation Number 10 of 2005 which states that the caning law is carried out in an open place that can be witnessed by many people in the presence of prosecutors and doctors. If the research proves there are shortcomings, then it is reviewed. Article 30 Paragraph (3) of the Governor's Regulation Number 05 of 2018 states that the purpose of the caning punishment being carried out in an open place is that the Penitentiary / Detention Center / Detention Center Branch is not discussed,

## Conclusion

1. The legal views of the Central Indonesian Ulema Council and the Aceh Ulama Consultative Council state that there is an opportunity to change the Whip

Governor Regulation and the determination of the requirements and or provisions that regulate the technical implementation of the caning punishment that is more humane can be used as a solution to address the pros and cons of caning in public areas as well as in Correctional Institutions. Conduct research and study the law together. The review of the Governor's Regulation on the implementation of caning in open areas was reviewed comprehensively in order to find the shortcomings so that there was an understanding between the ulama and the umara in Aceh in the preparation of the revision of the said Governor's Regulation.

2. Legal statements regarding the caning punishment contained in the Qur'an, hadith, and the views of scholars of commentary, madhhab fiqh, need to be studied in detail and thoroughly in order to find an ideal view for the implementation of caning in the public area. The legal view of the Shafi'i school of jurisprudence, which states that the punishment of whipping is Sunnah, is witnessed by four believing men. If four believers have witnessed the lashing, then the execution of the punishment has also been valid.

### **Suggestion**

Based on the results of the research on the substance of the Governor's Regulation and analysis of the provisions of Islamic law on the number of people who witnessed the execution of the caning, the researcher recommends the following implementation provisions:

- a. The execution of the caning is carried out in a room that can ensure witnesses are people who are worthy of witnessing the caning according to the Governor's Regulation.
- b. The execution of the caning was not carried out on an open stage, which swallowed the government's budget, so the execution was not carried out due to the unavailability of the government budget.
- c. Executive, judicial and legislative institutions reformulate the provisions for the implementation of caning punishments that are more comprehensive, fair and low-cost so that the decision of the Shariah Court that has received an implementation decision can be executed for sustainable law enforcement.

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