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Does Caning Contribute to Criminal Law Enforcement? A Case Study of Aceh, Indonesia

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Abstract.
Since the beginning of the reform era, the Qanun jinayat has been incorporated into the Indonesian constitutional system. However, its application is reaping benefits and drawbacks in policy and practice, where caning is used as a logical result of the Qanun jinayat. This study aimed to reaffirm the background of the legislation of Qanun in Aceh Province and its place within the Indonesian constitutional framework. Additionally, we investigated the applicability of the concept of caning as a substitute for punishment in the context of updating the national criminal code. A normative juridical research methodology was used, comprising a statutory, analytical, and comparative study approach. According to the interpretation of Article 7 of Law Number 12 of 2011 on the Formation of Legislation, the findings of this study showed that the role of Qanun in the Indonesian constitutional system was equivalent to regional laws. In addition, caning is viewed as an alternative to punishment in the context of amending the country's criminal code by considering the theoretical features of punishment, its intent, the cost-benefit analysis, and its efficacy.

Keywords: Qanun, Caning, Criminal Law Reform

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1. Introduction

Aceh Province has a unique characteristic in the way of how its administration is implemented, since it is the only province in Indonesia that adopts the Islamic sharia in the organization of social life. It has been arranged so pursuant to Law Number 44 of 1999 on the Implementation of Aceh Privileges. Given the application of sanctions in the form of canings, which were previously unheard of in the Indonesian criminal justice system, *Jinayat*, one of the fields that fall under the purview of Islamic sharia, introduces its own pattern to the order and law enforcement system in Aceh Province. Some sins and crimes, such as *ikhtilath* (illegitimate mixing of men and women), *khalwat* (men being with women who are not their *mahram*), *maisir* (gambling), and *khamr* (drinking

while being intoxicated), sexual abuse, rape, accusing others of adultery, homosexual, and lesbian are punishable by caning.

Even today, there are still many benefits and drawbacks associated with using caning as a method of implementing *Qanun Jinayat* in the Aceh Province, both nationally and internationally[1]. By including *Qanun Jinayat* as one of the methods to achieve peace, stability, and safety both in this world and the hereafter, more Acehnese people are in favor of (supporting) the use of caning. Additionally, a lot of people believe that the Illegal Code is violated when some criminal crimes are punished by caning[2]. Given that the sources of the two pieces of legislation—the Criminal Code, which is based on Dutch law, and *Qanun Jinayat*, which is based on Islamic Sharia—are distinct, this disagreement is seen as legitimate[3].

A total of 385 infractions were noted from 2018 to 2021. *Khalwat* had the most cases of 167, followed by *Ikhtilath* with 165 cases, *Khamr* with 31 cases, *Maisir* with 4 cases, *Liwath* with 17 cases, and sexual harassment with 1.201 cases, 184 out of which were subjected to caning, although there are other sanctions, such as coaching, that truly predominated its application in order to punish all of these offences[4]. An alternate punishment that is applied according to the type of offence was coaching sanctions. Although there are many benefits and drawbacks, caning is still used today in a number of nations. This present study aims to examine the use of caning from the standpoint of the law, the national criminal justice system, and the applicability of its use in the context of criminal law reform.

2. Methods

A comparative study is utilized to supplement the normative-juridical research methodology, which also includes a statutory and analytical approach. The gathering of the evidence was conducted through literary analysis and using a conceptual framework to explain and connect to pertinent theories. In addition to primary, secondary, and tertiary legal sources, this study also uses secondary data sources gleaned from the literature. The study's findings are evaluated and described qualitatively.

3. Results and Discussion

3.1. The Aplication of Islamic Law in Aceh

Sharia refers to all that Allah Almighty has decided for His believers that takes the shape of Islam as a religion (*ad-din*), which includes all matters ranging from law, aqidah, and morality, through both the Qur'an and Sunnah that is in the form of confessions, words, and actions. As it evolved, the term "Sharia" came to be used to denote Islamic law, which has its roots in the Qur'an, Sunnah, and *ijtihad*[5]. Despite having the biggest Muslim population in the world, Indonesia does not always strictly adhere to Islamic sharia in its administration. The Province of Aceh carries out the application of Islamic sharia through a particular autonomy strategy that is based on two factors, namely socio-historical and juridical factors. It is impossible to separate historical reasons from the application of Islamic sharia in the Aceh Province. In 1516–1530, Sultan Ali Mughayat Shah successfully unified several Islamic kingdoms and established the Aceh Sultanate. According to the Constitution of the Kingdom of Aceh Darussalam, the Qur'an, Al-Hadith, *Ijma*, and *Qiyas* serve as the source of law for the government of the kingdom[6]. Islamic sharia has replaced the traditional punishments of the Acehnese people with a variety of sanctions, making its way as the living law of the people of Aceh even before Indonesia gained its independence.

In addition, since the Dutch colonized Indonesia, the people of Aceh have faced challenges in upholding the Islamic law. Separatist movements began to emerge due to the difficulties that persisted well into the era of independence. Law Number 44 of 1999 on the Application of Provincial rights of the Special Region of Aceh (Law 44/1999) was finally enacted after much wrangling. This Law was passed as a follow-up to the power for Aceh Province that was granted in 1959 by the Decree of the Prime Minister of the Republic of Indonesias Number 1/ Missi/1959 on the Privileges of Aceh Province, which included the sectors of religion, customs, and education. In addition, Law Number 18 of 2001 on Special Autonomy for the Province of the Special Region of Aceh as Nanggroe Aceh Darussalam Province (Law 18/2001). By creating regional policies that are more sympathetic to the desires of the Acehnese people about the role of scholars, this law is meant to allow the Aceh government authority to exercise its rights. Additionally, Article 25 of Law 18/2001 grants the Aceh government the power to set up a unique judicial institution as the Sharia's implementer, namely the Sharia Court, also known as the *Syariyah* Court, which has multiple levels like the District Court in each Indonesian province.

3.2. The Position of Qanun through the Lens of Indonesian Law

Qanun is an Arabic word that signifies a collection of established rules or standards. So that it can be interpreted as a law that has a formal legal status or has evolved into a positive law, i.e., the formalization of law by the legislative institution into a rule of law that is applicable in a particular nation, binding on the entire community, and carrying the threat of penalties for violators. The meaning of *Qanun* is different from Sharia to set it apart. *Qanun*, also known as *Qânûn Wadh'î*, is a law created or produced by the people to control the life and the public relations both individually and in a social group. The source of the law is where *qanun* and sharia fundamentally diverge. While *qanun* is formed by the people, sharia is derived from the revelation of Allah[7]. *Qanun* is defined as "regional regulations, which are the regulations for executing laws in the Aceh province in the context of implementing special autonomy" in Article 1 Number 8 of Law 18/2001. Its objectives are to promote welfare, control human behavior to bring about peace in social interactions, achieve and sustain justice, and safeguard the safety and interests of everyone[8].

The trichotomy of written legal sources is a philosophy of legal education in Indonesia that holds that the three legal systems—Western law, Islamic law, and customary law—are the sources of written law that is currently in force in Indonesia. The place of Islamic law in Indonesia's national legal system has been acknowledged as one of the origins alongside the western legal system and customary law in the development of national law. According to Article 29 paragraph (2) of the 1945 Constitution, which states that "The State guarantees the freedom of each person to adopt their own religion," the province of Aceh has the privilege of enforcing laws based on Islamic law. The norm has a logical repercussion for the state: it must actively make every effort to allow each of its citizens to embrace religion and conduct their worship rituals in accordance with their unique religions and beliefs.

In Aceh Province, where Islamic Sharia is practiced, the state actively supports religious life as well as its legislative endeavors to create and build a legal framework based on Islamic religious principles. Therefore, the constitution, *qanun*, as well as local laws in other provinces, dictate the state's active engagement in this topic. Simply put, due to their socio-historical inherited practice of upholding Islamic law, the people of Aceh are accorded exceptional autonomy in the form of privileges to uphold Islamic law in all spheres of their existence (the living law). Even so, because there are exemptions

and freedoms of choice, it does not render Acehnese people who practice other religions intolerant.

According to the terms of Article 1 Number 21 of the Aceh Government Legislation, *Qanun* Aceh is a law comparable to provincial laws that governs how the Aceh government is run and how its citizens live their lives. If it is related to the provisions of Article 7 of Law Number 12 of 2011 on the Establishment of Laws and Regulations, which list the classifications and order of laws and regulations, including (i) the 1945 Constitution, (ii) Laws and Government Regulations in Lieu of Laws, and (iii) Provincial Regulations, it is clear. Additionally, it has been made clear in his explanation that the *Qanun* imposed in the Aceh Province fall within the heading of Regional Regulations.

According to Mahfud MD, there are two ways to look at the place of *Qanun Jinayat* of Aceh Province in the country's criminal justice system: I Law Number 12 of 2011's explanation of Article 7 which affirms that *Qanun* is equal to Regional Regulations, not the Criminal Code, which is the primary general norm in the Indonesian criminal law system. This is due to the implementation of *Qanun* that is not applicable on a national level. *Qanun*, nevertheless, is only applicable in a few regions, especially Aceh Province. According to the legal maxim of "*lex posteriori derogate legi inferiori*", a lower law must not conflict with a higher one[9].A special law may supersede a rule of law that is of a general character according to the legal principle known as "*lex speciali derogate legi generali*." If this theory is adopted, the more particular legislation known as *Qanun Jinayat* can be used to throw out the universally recognized national criminal law, as it only applies to the Muslim population of Aceh Province. Meanwhile, the non-Muslim groups of Aceh would be given the option of choosing between the two to comply to the restrictions (legal subjugation). The use of *Qanun Jinayat* in the national criminal law system is an application of the legal principle of *lex speciali derogate legi generali*, where the Criminal Code is positioned as the *lex generali*.

3.3. Caning in Aceh in the Context of National Criminal Law

Caning is a type of form of sanction for limbs other than the crime of cutting off hands and/or feet, *qishas* crime, beating crime, and stoning, which are the four main types of sanctions in Islamic criminal law[10]. Specifically, the two categories of *jarimah*—*Jarimah Hudud* and *Jarimah Ta'zir*—are subject to caning in Aceh. Different sanctions are being threatened by each. While *maisir, khalwat*, partially *ikhtilat*, and sexual assault

fall within the category of *jarimah ta'zir, khamr, zina*, and other forms of *ikhtilat* do not. The sort of *uqubath* or threat of punishment for the perpetrator is logically affected by such variances. There is only one sort of sanction used in 'uqubath hudud, and that is caning. There are two different sorts of *'uqubath ta'zir,* the first of which primarily takes the form of flogging, fines, incarceration, and restitution. Second, another *uqubath ta'zir* consisting of social work, coaching by the state, parental or guardian restitution, returns to parents or guardians, marital dissolution, permit revocation or disenfranchisement, deprivation of specific things, and social work.

Caning is actually used in nations with populations that are not exclusively Muslim or that follow the Islamic sharia. Singapore, which is known as a developed nation that supports human rights, is one of the nations with a non-Muslim majority population that still uses caning in their criminal justice systems[11]. It is used in Singapore under Articles 325-332 of the 2010 Criminal Procedure Code of Singapore, which covers crimes like attempted murder, rape, armed robbery, drug possession, and vandalism. Rattan canes having a diameter of no more than 1.27 cm are used for caning. Adult offenders will receive no more than 24 lashings, and juvenile offenders will receive no more than 10 lashings. Caning is also not permitted for women, men over the age of 50, or anybody who have been given the death penalty. Saudi Arabia, Nigeria, Sudan, Yemen, Brunei Darussalam, and Malaysia are other nations that still use caning as an alternative to punishment.

3.4. Caning as an Alternative to Punishment

Due to the ideals and standards incorporated into the Criminal Code, crime is still seen as a form of revenge for the perpetrator's acts. While the idea of punishment has evolved from what was once absolute and limited to acts of vengeance, a relative theory that claims that the goal of punishment is not only retaliation but also the establishment of order in society has also emerged[12]. The two ideas of punishment that were previously thought to be unfair gave rise to the united theory. Where the combined theory combines absolute theory and relative theory, punishment aims to achieve social order and prevent the crime from happening again in society. As a result, there is an educational process to get the offender ready for a resocialization process throughout the sentence as a form of accountability so as not to commit the same criminal act again. This combination view was later extensively adopted by many nations around the world, but the Criminal

Code and the Criminal Procedure Code do not, of course, reflect this. It still has an absolute and retaliatory orientation to punishment. This is evident in the layout of the various criminal penalties that still place a strong emphasis on the offender's cell or prison.

Caning is viewed as an alternative to punishment in the context of modernizing the criminal code of the country and serving as a substitute remedy for issues brought on by incarceration, one of which is the issue of prison overcrowding, which generates new social issues and has the potential to violate inmates' human rights to the point of taking their own lives. 260,281 persons were detained in Indonesia according to figures from the Ministry of Law and Human Rights, even though the country's prisons could only hold 131,931 inmates. There was a 97% overcapacity as a result[13].The Tangerang Class 1 Prison Fire Case, which happened in September 2021, is one instance of a recent case. In that instance, 45 people had died, and it was discovered that the prison had 400% more inmates than it could hold[14]. The case in question is only one of many issues brought on by a criminal justice system that is no longer in line with contemporary ideals and advancements, making it imperative that any revisions to criminal legislation be carried out methodically and systematically.

The caning punishment which is applied in Aceh Province does deviate from the provisions of Article 10 of the Indonesia Criminal Code where the article does not recognize caning as a type of punishment, as for the forms of criminal sanctions based on the origin of 10 of the Indonesia Criminal Code, namely (i) The main crime consists of: death penalty, criminal punishment imprisonment, confinement, fines, and imprisonment. (ii) Additional penalties consisting of: Revocation of certain rights, confiscation of certain goods, and announcement of judge decision. Therefore, the idea as a punishment within the framework of national legal considerations is considered a logistical consideration for the method of implementing caning punishments carried out in public which is considered to have a far greater psychological impact than other types of punishments carried out in closed and isolated places. like imprisonment. The implementation of the punishment will cause more embarrassment so that it has a deterrent effect (not only for the perpetrators, but also for the wider community who participated in witnessing the implementation of the caning or not. So that it can be a preventive effort so that the perpetrators and the community do not commit similar acts. The caning punishment also has educational values as follows: (i) Educate humans to be patient, (ii) Educate humans to fear Allah SWT/God, (iii) Educate humans to be responsible. (iv) Educate

people to have a culture of shame, (v) Have psychological repressive and deterrent power for perpetrators of criminal acts and for the public who see them.

Article 10 of the Indonesia Criminal Code does not recognise caning as one of the punishment options, hence the caning sentence used in Aceh Province does diverge from its provisions. Regarding the types of criminal penalties based on the 10th fundamental principles of the Criminal Code, they are as follows: (i) the primary crime, which carries the death penalty, imprisonment, detention, fines, and cover crime. (ii) Additional criminal offences that include the taking away of certain rights, taking away of certain goods, and disclosing a judge decision. Making it an alternative to punishment to modify the national criminal legislation is therefore thought to make sense given that the caning method is thought to have a considerably bigger psychological impact compared to other types of punishment. Whether they take part in watching the enforcement of caning, the execution of the punishment will result in increased shame, which has a deterrent effect on both the offender and the larger community, so that it can serve as a preventive measure to stop repeat offences by both the community and the perpetrators. Additionally, caning has the following educational benefits: (i) to teach the people to be tolerant; (ii) to teach the people to be committed to Allah Almighty; (iii) to teach the people to be accountable. (iv) to promote a culture of shame; (v) to have psychologically and repressively deterring effects on offenders and anybody in society who witnesses them.

Several perspectives can be considered when deciding whether to include caning as an additional form of criminal punishment in the national criminal law system as part of an update. The philosophy of punishment is the first. As a type of criminal body, criminal caning falls under the category of combined criminal theory, which combines absolute theory and aim theory. This theory sees the existence of a criminal to defend the interests of the society as well to punish wrongdoers, therefore it anticipates that it will have a deterrent impact on both the perpetrator and the larger community. According to this idea, punishment must include not only physical and mental pain but also criminal sanctions and education for both the offender and the larger community. In this instance, public canings have a more significant psychological effect than other forms of punishment, such as imprisonment that takes place behind closed doors. Whether or whether they take part in watching the application of the caning, caning will result in increased shame, which has a deterrent effect on both the perpetrator and the larger

community. Therefore, it serves as both a deterrent for the offender and a preventative measure that educates the community about not committing similar crimes.

The second is penal policy. Criminal law can be amended to allow canning using both penal and non-penal facilities. The caning itself serves as a form of punishment for the offender, while the psychological impact on the community that witnesses it directly or indirectly serves as a non-punitive measure. As such, it automatically counts as a preventive measure or educational effort to promote order, public safety, and general well-being. The third is the cost and benefit concept, which states that when compared to the death penalty, incarceration, and imprisonment, caning is by far the least expensive option[15]. Unquestionably, the state has overseen providing for all the prison inmates' necessities as well as for all necessary infrastructure, infrastructures, and services. The last refers to how serious a crime is. The punishment of caning is said to be milder and more effective to have a deterrent impact than incarceration and confinement, which rob a person of their freedom, the death sentence, which robs a person of life, and the penalty of fines, which rob a person of property.

4. Conclusion

The implementation of *Qanun Jinayat* has logical repercussions for the use of this form of caning as corporal punishment. When it comes to revising the national criminal code, caning is regarded as a substitute punishment. This is based on the theory that Indonesia, which still imposes criminal sanctions that are directed at punishing offenders and concentrated in prisons, causes the emergence of a classic social problem in Indonesia, namely the overcrowding of prisons, which may even be the root of human rights violations for the prisoners themselves. The idea of caning's success as a substitute for punishment in Indonesia can be examined from a number of angles, including (i) how the use of caning satisfies the theory of combined punishment; (ii) how its goals satisfy components of criminal policy through both penal and non-penal ways; (iii) Caning is much less expensive than other forms of criminal punishment, according to the cost-benefit principle; (iv) compared to imprisonment and imprisonment, which rob a person of their freedom, as well as the death penalty, which takes a person's life, and the penalty of fines, which takes a person's property, caning is thought to be less severe and more effective at having a deterrent effect.

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