



A review of canings in Aceh: A justice and human rights perspective

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Abstract

The enforcement of the caning law is one of the means of enforcing Islamic law in Aceh. Aceh is given the privilege of enforcing Islamic law through the Aceh Regional Government Law Number 23 of 2014. In the field of criminal law, one of the privileges carried out is the implementation of the uqubat of caning. In practice, the caning law that is implemented has drawn controversy from various circles. Many consider caning in Aceh as an act that violates human rights, in its implementation it is still considered selective and tends to be discriminatory. This study aims to identify and explain the caning punishment in terms of justice and human rights. The method used in this research is the normative legal method by adopting a constitutional approach, a conceptual approach that is supported by the natural law conception of Thomas Aquinas. Based on the results of the study, it is known that the implementation of the caning law in Aceh does not conflict with human rights. In practice, the use of whips in Aceh is still discriminatory. Based on the principle of equality before the law, Islamic law enforcers in Aceh must treat everyone equally to get justice.

Keywords: punishment, caning, uqubat, justice, human rights

Introduction

Article 1 paragraph (2) of Aceh Gubernatorial Regulation No 11 of 2006 states that "Aceh is a special province that has privileges in terms of self-governing the government and the needs of its people in accordance with applicable laws and regulations."

One of the privileges given to Aceh Province is the ability to self-governing the government. The power of self-governing makes Aceh Province apply Islamic law as the legal standard in Aceh. The application of Islamic law in Aceh is closely related to the history of the emergence of Aceh Province in the Indonesian state. ^[1] Aceh initiated the spread of Islam in Indonesia and was instrumental in the spread of Islam in Southeast Asia. ^[2]

Law No 11 of 2006 on the Government of Aceh is the legal basis for the implementation of special autonomy in Aceh Province. One of its implementations is the establishment of law based on Islamic as an Aceh's government regulation (qanun Aceh) in the settlement of criminal cases. Qanun Aceh No 6 of 2014 on Qanun Jinayat applies to all people in Aceh, including non-Muslims. In the application of its law, the implementation of Islamic Law in Aceh not only regulates faith and worship, but also criminal prosecution.

The laws of nature are laws that are considered universally and eternally applicable. In addition, the paradigm of natural law does not only speak of its morality, but also as the embodiment of the value of justice in it. Based on this idea, every human being has his own natural rights. This natural law creates the principles of human rights that have no time limit and are owned by everyone. Provisions regarding human rights are laws that come from God, as evidenced by the discussion of human rights contained in various scriptures such as the Torah, Psalms, Gospels and the Quran.

In its implementation, Islamic law that applies in Aceh, especially in the performance of caning, is supported and rejected. ^[3] Caning is one of the uqubat (sentencing by judges for jarimah perpetrators) regulated in Qanun No 6 of

2014 on Jinayat Law. Jarimah are prohibitions in Islam. The caning in Aceh is considered cruel and inhumane, so it has been called a violation of human rights by some circles. ^[4] The caning is considered inconsistent with generally accepted laws in society and is considered a violation of human rights. This is in line with the theory of natural law proposed by Thomas Aquinas which states that every human being has his own natural rights. This right has no time limit and will continue to exist whenever and wherever it is. Therefore, applying the caning law is not universal and violates human rights principles, as explained in the natural law theory.

The Government of Aceh issued an implementing regulation with Governor Regulation No 5 of 2018 which states that the implementation of caning can be carried out in closed places. However, the implementation of caning punishment is carried out openly in front of a large audience to provide a deterrent effect in the form of embarrassment to the perpetrators of criminal acts and to become an example for the society not to commit similar acts. This implementation is not following the Aceh regulation and is responded to as cruel, inhumane, and a violation of human rights. ^[5] In addition, not all perpetrators are executed by caning, so this has also attracted controversy. This is contrary to the principle of equality before the law, known in the natural law, namely that all people are equal. ^[6]

There is still pressure to end canings from international and national organizations, such as the Institute for Criminal Justice Reform (ICJR). The ICJR called on the Indonesian government to cancel the enactment of the caning punishment in Aceh. In addition, to breaking human rights and creating dualism of law enforcement in Aceh, qanun jinayat is believed to be inconsistent with international and domestic criminal law. ^[7]

Departing from these problems, this paper will describe how the execution of the caning in the special region of Aceh should be if it is related to human rights derived from natural law and how ideally the implementation of caning in

accordance with the principle of justice in the eyes of the law (equality before the law).^[8]

Method

To solve this research problem, research methods are needed to answer the problem. This paper uses a philosophical approach with the aim of exploring basic assumptions and linking legal science with religious science.^[9] The topic around the enforcement of caning law applied in Aceh is supported by the concept of natural law by Thomas Aquinas who said the law is based on God and positive law is an application of natural law.

Based on the identification of the problems described above, this paper includes normative legal research. This research uses normative juridical research by conducting a statute approach, a conceptual approach which is supported by the concept of natural law according to Thomas Aquinas.

Discussion and Analysis

Implementation of Caning Enforcement from a Human Rights Perspective

The implementation of caning has been criticized as a violation of the Human Rights Principles by the Institute for Criminal Justice Reform (ICJR) which considers the use of caning as a form of torture, inhumane, degrading and cruel punishment.^[10] Whereas in practice, the process of caning execution is carried out by taking into account the aspects of justice, safety and health of prisoners.^[11] This means that the execution of the caning is not carried out arbitrarily as stipulated in the technical guidelines for the implementation of uqubat whip in the Governor's Decree No 10 of 2005.

The theory of natural law or commonly called natural law is an eternal law because in this theory the norms contained come from God and human reason who live in every human heartstring. The characteristic of natural law put morality in law with two types of flow: irrational dan rational.^[12] According to this view, if a law formed by humans contradicts the principles of natural law, then the law is not the proper law to implement.^[13] The purpose of the natural law is justice and expediency.

A law must be following morals, fair, and provide benefit universally. Every human being has a moral that forms a human judgement of something based on understanding of humanity. This means that it is everyone's obligation to treat others the way they want to be treated.^[14]

In line with Thomas Aquinas's statement that he believes that law comes from God, so does the law in Islamic teachings come from God.^[15] Islamic law states that every right comes from the Quran and Sunnah, and the human rights that are highly regarded and occupy important positions. In Islamic teachings, a person's right to life is highly protected, and there is a prohibition against murder and torture against others. Human rights talks cannot be separated from the concept of natural law, because it comes from given birth to the concepts of human rights.^[16]

The law of nature can justify whether a law is good and provide justice and expediency.^[17] Therefore, it is necessary to hold philosophical activities regarding caning punishment in Aceh, such as observing the moral principles of caning by understanding the philosophical basis for its formation of it so that we can think of the correct view of it.^[18]

Caning is a punishment specifically regulated in qanun jinayat. Qanun jinayat recognizes the existence of *hudud* and *ta'zir*. *Hudud* means limits that people may not violate.

Ta'zir is a type of *jarimah* whose punishment has been determined in a qanun whose form is optional, and the amount is within the highest or lowest limits. *Uqubat hudud* is performed in the form of caning punishment. *Uqubat* is the punishment given by the judge to the perpetrators of *jarimah*. *Uqubat hudud* in the execution of the caning for perpetrators of illegal sexual intercourse according to Islam, accusing someone of having sexual intercourse illegally without four witnesses (*qadzaf*) and alcoholism. Furthermore, uqubat ta'zir is given to those who commit *jarimah maisir* (gambling game), *ikhtilat*, (an act of affection between a man and a woman who is not husband and wife), *khalwat* (to be alone in a quiet place with a man and a woman who is not husband and wife), *liwath* (a man who likes the same sex), *musahaqah* (an act of two or more women with how to rub each other's body parts to get pleasure), rape, sexual abuse, and to those who commit *khamar* (drunkenness), *qadzaf* (blaming others for adultery), and adultery involving children.

The purpose of caning is essentially to provide a deterrent effect so that the perpetrator changes and does not repeat his actions.^[19] The implementation of canings that can be seen directly by the community aims to provide learning and prevention so that crimes are not committed again in the future. The caning punishment is done to stop crime and protect society from crime. Human rights now tend towards individualist rights, whereas human rights in classical Islamic thought depart from communal interests. Islam recognizes individual rights, but they must be socially contextualized. People dare not break the law because whips are used to provide social benefits. As a school of natural laws, which states that good laws are useful laws.^[20]

The execution of the caning in Aceh aims to shame the perpetrators and become a lesson for the society. In its implementation, caning punishment in public takes humanity into account, which is shown by the stage of medical examination first. The execution was also attended by doctors.^[21] This is also an indication that in its implementation caning in Aceh pays great attention to the safety of perpetrators. The perpetrator's willingness to accept the execution of the caning is expected to return to society immediately without worrying about the criminal stigma attached to it. The perpetrator is committed to improving himself, so as not to commit violations in the future. Criminal caning as punishment is formed with the value of spiritualism. The embodiment of the value of spiritualism is seen in its purpose of humiliating the perpetrator and its direct execution.

Qanun jinayat law in Aceh has the principle of self-submission for non-Muslims who commit criminal acts, including caning. Many non-Muslims choose to serve canings rather than imprisonment. Most non-Muslims choose caning, not only out of curiosity but also considering the practicality of punishment. Imprisonment is considered more burdensome for him and his family because the perpetrator is detained for a longer period of time, while the caning execution process is short so that the perpetrator can immediately return to the family, returning to work after serving his sentence.^[22]

The non-Muslim defendants said they preferred the caning because the sentence was completed sooner than the sentence of confinement which was considered longer. Moreover, they were convinced that the criminal execution of the caning did not cause severe pain and injury

considering that the executioner was not justified in taking the hoop. When compared to the suffering felt as a result of criminal confinement is certainly more torturous in the true sense than the punishment of caning.^[23]

Acehnese (Muslim or non-Muslim) accepted public canings, but in 2018 the Governor of Aceh issued Governor's Decree (Pergub) No 5 of 2018 on the Jinayat Law which said caning would be carried out in prisons. After the issuance of the Pergub, until now there are still areas that carry out caning in public. Enforcement should still be done in public because the essence of the target of a criminal punishment is to give shame rather than physical harm. The purpose of criminalizing canings as desired by Islam was not achieved. It is from these philosophical reasons that it can be known that the law of caning is in no way contrary to human rights. Public execution, with shameful philosophical motives for criminal deeds, and the possibility of criminals to be executed, is an admirable way to rejoin citizens without worrying about criminal stigma, suggesting that there is a possibility of finding a respectful path. In fact, the effect of caning is more emphasized on the psychological aspects of prisoners, in the form of a sense of deterrence and the obligation to improve themselves, so that they can control themselves and not break the law in the future. Legal justice and respect for human rights values are psychologically reflected for the purposes for which these sanctions are created. Therefore, the author summarizes what causes the caning to be more feasible to be applied in public and has more preventive effects in it so that the author describes these factors systematically as follows:

1. To embarrass so as to cause a deterrent effect

The deterrent effect in this incident can be interpreted as someone who carries out punishment in front of a large audience so that the perpetrator can feel a sense of "humiliation" so as to make the perpetrator ashamed of his own actions and not to repeat the deeds done. This form of deterrent effect may not all apply the same thing in sentencing, therefore the punishment carried out in the general public causes a more deterrent effect.

2. For Education or lessons for the community

The law of caning carried out in the general public certainly makes a spectacle for the public so that from the spectacle the public can judge which is wrong and which is right, therefore from the incident makes the community learn about what the community sees is wrong. It is very important not to commit any wrongdoing, as is the case with the socialization of the police.

3. Maintaining the Characteristics of Aceh as a Province that implements Islamic teachings in Kaffah

Aceh is a province with a very strict Islamic culture, Islamic culture in Aceh is not just nonsense but Islamic culture in Aceh has been felt very strongly starting from the Aceh government regulations that prioritize Islamic treasures and Islamic sharia in it. To honor the struggle of the province of Aceh for the privilege of caning, it should be maintained in the general public, because in order not to eliminate the characteristics of Aceh itself.

4. To Reduce Crime Rates

Crime in big cities and including Aceh is very high, therefore the existence of canings can at least make

perpetrators or potential perpetrators who want to carry out violations of Islamic law in Aceh think twice, from this fear the impact is that it can reduce the crime rate in the Aceh Province.

Implementation of Caning based on the Principle of Equality Before the Law

Legal theory states a good law is a law that contains morals in it. However, in addition to considering the value of morality, there is a main goal it wants to achieve, namely creating justice in society. The law is not merely a tool for upholding justice, but also a reflection of a country's sense of justice. Therefore, justice is a very important value in law.

Article 6 of Qanun Aceh 2014 on Qanun Jinayat states that the principles of implementing the jinayat law are Islamic principles, legality, justice and balance, profit, protection of human rights, and for society. Based on this principle of Islamic law, the execution of the caning must not conflict with the values of justice and human rights. However, some law enforcers do not follow the standards for implementing Islamic law, namely giving different treatment among lawbreakers based on social status. In fact, the application of this principle includes the principle of equality before the law. Before heading to the regulations of Article 6 of Qanun Aceh 2014, which cover everything, namely equality before the law, first explain the reasons for applying the principles to the cases handled.

Regarding the application of caning, some people argue that law enforcement is repressive to perpetrators who are weak socio-politically or economically, on the contrary, law enforcement officials seem to turn a blind eye to perpetrators of violations who have a good socio-political and economic background. Some convicted canings consider this to be a form of discrimination and injustice that generates dissatisfaction from the public and the existence of this selective cutting practice is not based on the substance of Islamic sharia in qanun jinayat.

One example of the implementation of the caning sentence, which was considered unfair, was when the Deputy Head of the Sabang thwarted the execution of a police officer who was declared by the Sabang Syariah Court to have violated the rules of Islamic law (qanun), namely being involved in gambling. The failure to carry out the caning sentence was due to the fact that the punishment originating from the qanun did not apply to the police.

The execution of the caning of the gambling case was carried out in front of the Subussalam Mosque, Sabang. Ahead of the execution, several police officers along with Deputy Police Chief Sabang sued the caning, as they judged that the punishment stemming from qanun did not apply to police who had their own rules.

The attitude of the police officers caused protests from various circles of society. This incident is one of the causes of more and more people who do not believe in justice in the enforcement of Islamic law, because they feel that caning is unfair in practice. In fact, the enforcement of Islamic sharia law, which applies specifically to Aceh, applies to all citizens in Aceh. The police may have their own internal rules, but they still have to follow specific regulations in Aceh, which means that if the police violate the law in Aceh (qanun jinayat), the caning penalty will still be enforced.

In addition to the cases above, an example of the implementation of caning punishment which is considered discriminatory, is the suspicion that one high-ranking person at the Aceh regional office of the Ministry of Religion committed illegal intercourse according to Islam ^[24]. However, the legal process was canceled on the grounds that there was insufficient evidence.

The injustice of the events that have been mentioned has made people's views distrustful of law enforcement, so the aim of implementing Islamic law in Aceh Province to realize justice and provide benefits to the people of Aceh is difficult to implement. With this injustice, the community does not believe in law enforcement, so the noble goal of enacting Islamic law in Aceh Province to realize justice and provide benefits to the people of Aceh is difficult to implement. Law enforcement must not have low morality and have the obligation to enforce Islamic law fairly indiscriminately so that justice can be achieved.

Therefore, caning punishment is ideal in the Aceh region. That is, when discriminatory practices such as those described above no longer exist and the principle of equality before the law applies. Universally, EBL has become a national law and principle, requires law, and applies to everyone. Textually, the EBL is written in a legal document whose overarching legal code confirms that the rule of law applies to all matters of legal force. On the other hand, from a legal point of view, we can see that the law itself does not allow only a few parties to benefit without a good reason before the law. Any exception would violate the legal concept. This application is important to create an ideal and justice-filled punishment.

There are a number of recommendations that can be used to encourage optimism on the above issues. Some of them are mainly aimed at improving the quality of workers or legal professionals who have good insight in understanding legal principles without relying solely on political or economic interests. Be brave and independent in carrying out the law; have the ability to see the law; beneficial to those in need, not just those who can pay or contract the law. Make sure all of the above conditions apply equally to professions such as judges, prosecutors, lawyers, and police. Second, the contribution of academia to construct a deep and rational discourse that can be easily understood by the general public in the context of public education.

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