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## **From the Public Space to the Prison Space: Regulation Polemic and the Implementation of Caning Law in Aceh**

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### **Abstract:**

The implementation of caning law in Aceh Province is still sporadic due to a lack of coordination among the government institutions involved in caning law. Then, the prison infrastructure to impose the caning law is also not adequate, and socialization has also not been fully carried out. Besides, in determining the location of the caning, Islamic law requires the fulfillment of two principles namely "open space" and "visible" to the public. Furthermore, the law that guides the implementation of sharia in Aceh does not regulate detail of where the caning can be executed. Hence, the issues that need to be scrutinized in this study are about shifting the norm from "open space" to "prison space" and why there is a disparity in

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determining the place of caning sentences. This study uses a normative legal method by relying on secondary data. All collected data were analyzed by using qualitative analysis. The results show that there has been a shifting norm from "open space" to "prison space" in the application of the caning sentences in Aceh. This shift starts from the open area in the courtyard of the mosque to the prison area as a place to execute a caning sentence. This shifting also allows the people who meet certain criteria to witness the execution of a caning sentence. In addition, there is also a disparity among the sharia courts due to the lack of facilities available in certain the sharia courts in Aceh. Hence, the Aceh government needs to improve the facilities of the sharia courts to be able to execute caning sentences.

**Keywords:**

Caning; Islamic Law; Sharia; Open Space;  
Shifting Norms

**Abstrak:**

Pelaksanaan hukum cambuk di Provinsi Aceh masih bersifat sporadis karena kurangnya koordinasi antar instansi pemerintah yang terlibat dalam pelaksanaan hukum cambuk. Kemudian, infrastruktur penjara untuk melaksanakan hukum cambuk juga tidak cukup memadai, dan sosialisasi juga belum sepenuhnya dilakukan. Selain itu, dalam penentuan lokasi pencambukan, syariat Islam mensyaratkan terpenuhinya dua prinsip yaitu "ruang terbuka" dan "dapat disaksikan" oleh publik. Selanjutnya, undang-undang yang menjadi pedoman penerapan syariah di Aceh tidak mengatur secara rinci di mana hukuman cambuk dapat dilakukan. Oleh karena itu, permasalahan yang perlu dikritisi dalam penelitian ini adalah tentang pergeseran norma dari "ruang terbuka" ke "ruang penjara" dan mengapa terjadi disparitas dalam penentuan tempat hukuman cambuk. Penelitian ini menggunakan metode hukum normatif dengan menggunakan data sekunder. Semua data yang terkumpul dianalisis dengan menggunakan analisis kualitatif. Hasil penelitian menunjukkan bahwa telah terjadi pergeseran norma dari "ruang terbuka" ke "ruang penjara" dalam penerapan hukuman cambuk di Aceh. Pergeseran ini dari ruang terbuka di pelataran masjid ke area penjara sebagai

tempat pelaksanaan hukuman cambuk. Pergeseran ini juga memungkinkan orang-orang yang memenuhi kriteria tertentu untuk menyaksikan eksekusi hukuman cambuk tersebut. Selain itu, juga terdapat disparitas antar Mahkamah Syar'iyah karena kurangnya fasilitas yang tersedia di beberapa Mahkamah Syar'iyah di Aceh. Oleh karena itu, pemerintah Aceh perlu meningkatkan fasilitas Mahkamah Syar'iyah untuk dapat mengeksekusi hukuman cambuk.

**Kata Kunci:**

Hukum Cambuk; Hukum Islam; Syariah; Ruang Terbuka; Pergeseran Norma

**Introduction**

The application of Islamic Sharia in Aceh has a legal basis through Law Number 44 of 1999 concerning the Privileges of Aceh Province. Since then, the "specialty of Aceh" which has been given since 1959 through the Prime Minister's Decree No. 1/Missi/1959 or known as the "Missi Hardi Decision" began to be given an adequate legal norm<sup>1</sup>. The performance of sharia law in Aceh is increasingly gaining legitimacy with the issuance of Law Number 18 of 2001 concerning Peculiar Autonomy for Aceh Province followed by Law Number 11 of 2006 concerning the Aceh Government Law known as UUPA <sup>2</sup>.

Recent laws have given the Aceh Government broad authority to make special regional regulations known as *Qanun* which were imposed in 2006. Article 1 point 21 of UUPA stated that Aceh *Qanun* is similar to a provincial regional regulation that regulates the administration of provincial government and the lives of the Acehnese people. Among the most important *qanuns* that have been issued by the Government of Aceh are *Qanun* Number 7 of 2013

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<sup>1</sup> Henri Chambert-Loir, *Islamic Law in 17th Century Aceh, Archipel*, 2017, <https://doi.org/10.4000/archipel.444>.

<sup>2</sup> Moch Nur Ichwan et al., "Islam and Dormant Citizenship: Soft Religious Ethno-Nationalism and Minorities in Aceh, Indonesia," *Islam and Christian-Muslim Relations* 0, no. 0 (2020): 1-26, <https://doi.org/10.1080/09596410.2020.1780407>.

regarding the Sharia *Jinayat* Procedural Law and *Qanun* Number 6 of 2014 regarding Sharia *Jinayat* Law. These two *qanuns* had caused a conflict between the executive and legislative bodies when they were still in the form of a draft of *qanuns*. The Governor of Aceh at that time refused to approve the *qanun* on *jinayat* law<sup>3</sup>. That is why *Qanun* on the *Jinayat* Procedural Law was passed earlier than *Qanun* on *Jinayat* Law.

In addition to the polemic on the passing of the *qanun* mentioned above, the *Qanun* on *Jinayat* Procedural Law has also attracted the attention of the wider community.<sup>4</sup> This is inseparable from several contradictory provisions. Article 262 Paragraph 1 of *Qanun* Number 7 of 2013 stated that "*Uqūbat* (sentence) is executed in an open public space and possible to be observed by people who attend that execution". In practice, the phrase "open space" in this provision is translated into the courtyard or courtyard of the mosque. Therefore, almost all executions of caning sentences since the issuance of the *qanun* have been carried out in the courtyard of the mosque<sup>5</sup>.

However, in paragraph 2 of the article, is also stated that "The implementation of caning sentences as referred to in paragraph (1) is forbidden to be attended by children under 18 (eighteen) years old". Then, Paragraph 4 mentioned that "the distance between the place of the standing of the convicted person and the witness community no less than 12 (twelve) meters." In fact, the implementation of the caning sentences as executed in Banda Aceh, Meulaboh, and Tapaktuan occurred in the courtyard of the mosque and this execution were also attended by children which hard to be avoided. From a practical point of view, it is stated that the execution of the caning sentences which takes place in an open location often violates

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<sup>3</sup> Tim Maan and Dina Afrianty, "Aceh's Islamic Criminal Code Formalising Discrimination," in *Crime and Punishment in Indonesia*, vol. 1 (Routledge, 2020), 135–80, <https://doi.org/10.15642/JIIS.2007.1.1.135-180>.

<sup>4</sup> Yogi Febriandi, Muhammad Ansor, and Nursiti Nursiti, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *QIJIS (Qudus International Journal of Islamic Studies)* 9, no. 1 (2021): 103, <https://doi.org/10.21043/qijis.v9i1.8029>.

<sup>5</sup> Muhammad Siddiq Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)," *QIJIS: Qudus International Journal of Islamic Studies* 7, no. 2 (2019): 301–28.

the provisions contained in Article 262 paragraphs 2 and 4 of the *qanun* mentioned above.

This condition prompted the Aceh's governor to issue a Governor Regulation (*Pergub*) Number 5 of 2018 concerning the Enactment of the Sharia *Jinayat* Law. This *Pergub* furthermore regulates the implementation of the caning sentences in Aceh. In Article 30 Paragraph 3 of this *Pergub* is stated that "The open place as referred to in point 1 is located in the community institution/detention center/detention branch." This *Pergub* at the same time limits the meaning of "open space" as stated in paragraph 1 of Article 262 of the *Qanun* Number 7 of 2013 to "open space" which takes place at the Community Institution/Detention Center/Detention Branch. In other words, there is a shift in the meaning of "open space" which was previously carried out in the courtyard of the mosque to a detention center or branch of the detention center.

After this *Pergub* has been applied suddenly causing a polemic in the community. Some elements of society suspect that there are hidden agendas behind the issuance of the *Pergub*. There are some elements of society who think that this *Pergub* is a form of foreign intervention to weaken the implementation of sharia law in Aceh Province<sup>6</sup>. This polemic became more and more massive in the community when leaders in districts and cities throughout Aceh fight against that *Pergub*<sup>7</sup>.

Even though this *Pergub* Number 5 of 2018 has been passed to be implemented some caning sentences were still executed in the mosque's courtyard. For example, Banda Aceh City Government continues to execute caning sentences for online prostitutes on April 20, 2018, in the courtyard of the Jami' Mosque, Lueng Bata Village. Whereas previously on April 12, 2018, the Governor of Aceh signed a cooperation agreement with the Head of the Regional Office of Law

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<sup>6</sup> Maan and Afrianty, "Aceh's Islamic Criminal Code Formalising Discrimination."

<sup>7</sup> Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and The Convention Against Torture: A Critical Appraisal," *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 11-24.

and Human Rights Ministry in Aceh to implement caning sentences in prisons.<sup>8</sup>

After signing the cooperation document between the Aceh Government and the Head of Law and Human Rights Ministry in Aceh, no longer caning sentences are allowed to be executed in the mosque's courtyard. This condition is in line with the provisions of Paragraph 4 Article 30 of *Pergub* Number 5 of 2018 which states that "the enforcement of caning sentences in the prison/Detention Center/Branch of Detention as referred to in paragraph (3) is carried out after the existence of a cooperation document between the Aceh Government and the Regional Office of the Law and Human Rights Ministry.

Even though *Pergub* Number 5 of 2018 has been issued many District Governments refuse to implement it. Not only in Banda Aceh, but opposition to the governor's regulation above also occurred in several other areas. In Central Aceh, the caning of five perpetrators of *ikhtilat* (mixed) and *khamar* (wine) on 9<sup>th</sup> May 2018 was still carried out outside prisons. The same thing also happened in Lhoksuewawe, where two residents who were involved in adultery were lashed 100 times in the courtyard of the Great Mosque of the Islamic Center on 26 April 2018. Moreover, the Vice Head District of Aceh Besar had issued a strong statement refusing the implementation of the caning law in the prison.

From several initial observations that have been made, the execution of the caning sentences in the first prison was carried out in Meulaboh on 15<sup>th</sup> May 2018 against a perpetrator of the crime of *Jarimah khamr* (sins in drinking wine).<sup>9</sup> Of course, the discrepancy between regulation and the implementation in determining the place of execution of the caning creates legal uncertainty in the enforcement of Islamic law in Aceh.

Several previous studies have highlighted the implementation of caning in public. One of which is a research conducted by Cesar J. Rebellon and Murray Straus<sup>10</sup> as random sampling. This study found

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<sup>8</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 21, 2018.

<sup>9</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 16, 2018.

<sup>10</sup> Cesar J. Rebellon and Murray Straus, "Corporal Punishment and Adult Antisocial Behavior: A Comparison of Dyadic Concordance Types and

that exposure to caning can cause children and adolescents to experience acute antisocial behavior which is difficult to cure, especially if the victim is their parents. The caning punishment is also still being debated by Farrel<sup>11</sup>. He explained that the implementation of caning in Singapore, Brunei Darussalam, Malaysia, and Aceh-Indonesia is justified by local law. Although constitutional, the application of the law in these countries has received widespread criticism from the global world because the imposition of caning punishment is considered contrary to human rights.

Next is Fonseca's research which explains the sociological impact of caning in the post-colonial period. He explained that colonized countries are trying to revolutionize their criminal justice system by removing the caning punishment from their legal system. This effort was born from the realization that caning is a way for Western countries to stick to the grip of colonialism in colonized countries by treating inhumane corporal punishment to indigenous people in their colonized countries<sup>12</sup>. In the context of implementing the caning punishment in Aceh, Armia<sup>13</sup> found that the execution of caning in a public space did not guarantee a deterrent effect for the accused. In addition, children who are exposed to see the whipping process, have the potential to imitate the whipping process in their lives.

All studies mentioned above do not address the topic highlighted in this study. Therefore, it is highly urgent to conduct a study explaining the shift of the norm of "open space" to "prison space" both in the *Qanun on Jinayat Procedures* and the Governor's

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an Evaluation of Mediating Mechanisms in Asia, Europe, and North America," *International Journal of Behavioral Development* 41, no. 4 (2017): 503–13, <https://doi.org/10.1177/0165025417708342>.

<sup>11</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," *Journal of Social Sciences* 7, no. 11 (2018).

<sup>12</sup> David S. Fonseca, "Reimagining the Sociology of Punishment through the Global-South: Postcolonial Social Control and Modernization Discontents," *Punishment and Society* 20, no. 1 (2018): 54–72, <https://doi.org/10.1177/1462474517740888>.

<sup>13</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

Regulation about the Implementation of *Jinayat* Procedural Law in Aceh. In addition, this study also examined to reveal why there is a disparity in determining the place of the caning sentences in Aceh.

### Method

This research employs qualitative research by using data from 23 districts/cities, namely Aceh Barat District, Aceh Barat Daya District, Aceh Besar District, Aceh Jaya District, Aceh Selatan District, Aceh Singkil District, Aceh Tamiang District, Aceh Tengah District, Aceh Tenggara District, Aceh Timur District, Aceh Utara District, Bener Meriah District, Bireuen District, Gayo Lues District, Nagan Raya District, Pidie District, Pidie Jaya District, Simeulue District, Banda Aceh City, Langsa City, Lhokseumawe City, Sabang City, and Subulussalam City.

All data and information were collected by conducting library research, and in-depth interviews with some resources person. The data were then analyzed using the policy content analysis method<sup>14</sup>. The data that has been analyzed were then documented in a descriptive-narrative form.

### Discussion and Result

#### Places of Execution of Whips Under Various Regulations

In the *Qanun* of the *Jinayat* Law, ten acts of *jarimah* are regulated which can be punished by canning. The ten *jarimah* are *khamr*, *maisir* (game of chance), seclusion, *ikhtilāt*, adultery, sexual harassment, rape, *qadzāf* (accusing adultery), *liwāt* (sodomy), and *musāḥaqah* (lesbian).<sup>15</sup> However, the determination of the place of execution of the caning is not regulated in the *Qanun* on *Jinayat* Law. Rather, it is regulated in the *Qanun* on *Jinayat* Procedural Law.

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<sup>14</sup> Damon M. Hall and Rebecca Steiner, "Policy Content Analysis: Qualitative Method For Analyzing Sub-National Insect Pollinator Legislation," *MethodsX* 7 (2020): 100787, <https://doi.org/10.1016/j.mex.2020.100787>.

<sup>15</sup> Government of Aceh, "Qanun Aceh No. 12 of 2003 Concerning Alcoholic," 2003.



In the Qanun on *Jinayat* Law, the provision for the spot of lashing sentences is stated in Article 262 Paragraph (1) "caning sentences is conducted in an open public space and visible by those in attendance". There are two norms governing the execution of canings in this article. The first is "open space" and the second is "viewable to those who present". This provision requires the execution of the caning to be conducted in an open public space which is possible to be witnessed by those who attend the punishment. However, this provision as well as other related provisions is not explained what is meant by "open space" and "number of people attending". So that the determination of the place of execution of the caning is vulnerable to the practice of legal uncertainty and abuse of power.

Since the caning punishment was first introduced in Aceh through Qanun Number 12 of 2003 regarding Alcoholic Liquor (*Khamr*), Qanun Number 13 of 2003 regarding Gambling (*Maisir*), Qanun Number 14 of 2003 concerning adultery until the issuance of Qanun on the *Jinayat* Procedure Code<sup>16</sup> found some variation in the determination of the location of the caning; although generally carried out in front of the mosque which is classified as a crowded area. This execution happened in the districts of Gayo Lues, Southwest Aceh, West Aceh, Pidie Jaya, and Bireuen. In the Nagan Raya district, executions were carried out in the city square, namely in the district office complex. In the district of Central Aceh, the execution of the caning was carried out in the field next to the Art Sports Building (GOS). In the Bener Meriah district, the execution of the caning was carried out in several different places. The main standard for choosing the place of execution in Bener Meriah is the sub-

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<sup>16</sup> R. Michael Feener, "Engineering Transformations in the 'Religion-Development Nexus': Islamic Law, Reform, and Reconstruction in Aceh," *Religion* 51, no. 1 (2021): 40-57, <https://doi.org/10.1080/0048721X.2020.1792051>.

district mosque where the caning convict lives. However, if the convict's domicile is too far away, it will be carried out at the district mosque. The execution was also carried out once in front of the Bener Meriah District Attorney's Office for more practical reasons.

The norms of “open space” and “can be seen by those present” are intended so that caning has a preventive effect on those who witness the punishment. However, this does not happen. Some of the caning convicts were recidivists of the same sentence before. The data of recidivists of *Jinayat* law violators started from 2016 to 2020 can be seen in Table 1 below.

**Table 1. Recidivists of *Jinayat* Law Violators**

No	Year	Number of Cases	Number of Recidivist	Percent (%)
1	2016	279	75	26.8
2	2017	314	93	29.6
3	2018	301	75	26.8
4	2019	256	68	26.5
5	2020	281	71	25.2

Source: Aceh Syar'iyah Court (2020).

Table 1 above indicates that an average 26.98% of perpetrators of *jinayat* violations in Aceh from 2016 until 2020 were recidivists who had committed the same cases before. In terms of criminal law perspective, this percentage is very high<sup>17</sup>. In addition, the data above also show the ineffectiveness of the implementation of whipping in the open space. The presence of several people who witnessed the caning and convicts being

<sup>17</sup> Seena Fazel and Achim Wolf, “A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice,” *PLoS ONE* 10, no. 6 (2015): 1–8, <https://doi.org/10.1371/journal.pone.0130390>.

shown in public could not provide a maximum deterrent effect to the convicts.

Numerous expressions that are nearly identical to the definition of "open space" in the *Qanun* on the *Jinayat* Procedural Legislation can be found in national law. The term is "public space". In some regulations, it is stated that "public space" does not include presidential institutions, hospitals, military headquarters, bus terminals, train stations, ports, national companies, and houses of worship<sup>18</sup>. To interpret the norms of "public space" as described in the above regulation, the Head of the Indonesian Police issued a Regulation regarding the Enactment of Public Space. In the regulation, public space is described as a free space where everyone can access, visit, and see the space. Almost the same explanation can also be found in the Criminal Code<sup>19</sup>

From the explanation above, it appears that the norm of "public space" in national law is deciphered through certain laws, not merely through the discernment of stakeholders as frequently occurred in the determination of "open place" in caning executions. A regulation-based interpretation system can prevent legal uncertainty and arbitrary actions by state officials in law enforcement. Unfortunately, such a regulation-based interpretation has not been found in the *Qanun* on the *Jinayat* Law, especially in determining the "open space" and "number of people present" in the execution of the flogging.

The corporal punishment governed in the *Qanun* on *Jinayat* is a derivative of Islamic law which is summarized in fiqh. In fiqh itself, whipping is a form of sanction for violators of

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<sup>18</sup> Rika Kurniaty, "Local Elites and Public Space Sustainability: The Local Elite Roles in the Presence and Usage of Public Space in Malang Raya, Indonesia," *Procedia Environmental Sciences* 20 (2014): 506-15, <https://doi.org/10.1016/j.proenv.2014.03.063>.

<sup>19</sup> Efrizal Harun Sharief, Wika Hawasara, and Ramlani Lina Sinaulan, "Hate Speech Through Social Media in Indonesia: Based on Space Transition Theory in Cyber Criminology," in *International Seminar Welcoming The Society 5.0 With Writing Literacy Acceleration*, 2021, 337-45.

sharia law <sup>20</sup>. In fiqh five things need to be considered in the execution of caning. First, *al-jālid* (executor). Second, *al-majlūd* (convicted), third, *al-jild* (a measure of whipf), fourth, *al-sauṭ* (whip tool), and fifth, *al-makān li iqāmat al-jild* (place of execution) <sup>21</sup>.

There is no definite provision in *fiqh* regarding the place of execution of the caning. The fiqh of jinayah gives law enforcement officers the freedom to choose the place of execution anywhere by considering two principles. First, consideration of the benefit, both benefit of the executor and the condemned. Second, there is access to be seen by a group of people <sup>22</sup>.

Likewise, there is no definite provision in fiqh regarding the number of groups of people who are required to witness the caning. Al-Nawāwī requires a minimum of 2 people because the witnesses required in the sale and purchase transaction are two people as stated in Surah Al-Baqarah 282<sup>23</sup>. Meanwhile, Al-Zuhr argues that the minimum number is 3 people because the smallest plural number in Arabic is three<sup>24</sup>. Meanwhile, Hasan al-Baṣrī argues that the minimum number of witnesses to the caning is ten people. The number ten is understood from Surah Al-Nūr verse 2, “*tā'ifatun minna al-mu'minīn*” (the whipping sentence should be witnessed by a group of believers). In the

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<sup>20</sup> Wahbah Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu*, Dar Al-Fikr, VII, vol. 8 (Damaskus: Dar al-Fikr, 2007).

<sup>21</sup> 'Abd al-Qadir Audah, *Al-Tasyri' Al-Jina'i Al-Islami Muqarinan Bi Al-Qanun Al-Wad'i*, IV (Cairo: Maktabah al-Usrah, 2011).

<sup>22</sup> Mansuri Muhammad, “Daur Al-Siyasah Al-Jina'iyah Fi Tahqiq Al-'Adalah Al-Jina'iyah (Dirasah Syar'iyah Maqasidiyah),” *Majalah Al-Buhuts Wa Al-Dirasat* 1, no. 17 (2020).

<sup>23</sup> Mahyuddin bin Syaraf Al-Nawawi, *Majmu' Syarah Al-Muhazzab*, IV (Beirut: Maktabah al-'Alamiyah, 2017).

<sup>24</sup> Audah, *Al-Tasyri' Al-Jina'i Al-Islami Muqarinan Bi Al-Qanun Al-Wad'i*.

understanding of the Arabs, it is only called *āifatun* (a group) if the minimum number is ten people<sup>25</sup>.

In the absence of definite rules in the Qur'an, Sunnah, and *ijtihād* of previous scholars in *fiqh* books, it provides an opportunity for policymakers in Aceh to rearrange the norm of "open space" by considering two principles, namely: (1) benefit executors and convicts and (2) can be seen by those present.

In addition to Aceh, the caning penalty is also applied in several countries in the Southeast Asia Region. These countries are Singapore, Brunei Darussalam, and Malaysia<sup>26</sup>. The application of caning in these countries is more a legacy of British colonial law. Meanwhile, the caning punishment that applies in Aceh is purely adopted from Islamic law<sup>27</sup>. The acts that are subject to caning are also different. In Malaysia and Brunei Darussalam, caning is imposed for violators of sharia law<sup>28</sup>. Meanwhile, in Singapore, the punishment of caning is applied to certain crimes regulated in the Singapore Criminal Procedure Code. In addition, Singapore also uses caning to discipline prison inmates<sup>29</sup>. In addition to Southeast Asia, several countries with Muslim majority populations also apply caning in their legal systems. Among these countries are Qatar, Yemen, Iran, United Arab Emirates, Saudi Arabia, Sudan, and

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<sup>25</sup> Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu*.

<sup>26</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," *Journal of Social Sciences* 7, no. 11 (2018).

<sup>27</sup> Chuanyu Luo, "Brunei's Islamic Law: Introduction and Comments. In China-ASEAN Relations: Cooperation and Development," *Series on China-ASEAN Relations* 1 (2018).

<sup>28</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," 2018.

<sup>29</sup> Benjamin Joshua Ong, "The Doctrine of Severability In Constitutional Review: A Perspective From Singapore," *Statute Law Review* 40, no. 2 (2019): 150-74, <https://doi.org/10.1093/slr/hmx030>.

the Northern Territory of Nigeria <sup>30</sup>. These countries apply the punishment of caning in almost all criminal acts<sup>31</sup>. More details about the country, source of whip punishments, and the scope of action is shown in table 2 below.

**Table 2.** The Differences in the Source and Scope of the Punishment of Caning

No	Country/Territory	Source of Whip Punishment	Scope of Action
1	Aceh	Islamic law	<i>khalwat, maisir, seclusion, ikhtilat, adultery, sexual harassment, rape, qadzaf, liwath, and musahaqah</i>
2	Malaysia	British colonial law	All sharia violations
3	Brunei Darussalam	British colonial law	All violations of the Shari'a
4	Singapore	British colonial law	Certain criminal acts and disciplinary punishments for prisoners
5	Saudi Arabia, Qatar, United Arab Emirates, Yemen, Sudan, Iran, Northern	Islamic law	Almost all crimes

<sup>30</sup> Elizabeth T. Gershoff, "School Corporal Punishment in Global Perspective: Prevalence, Outcomes, and Efforts at Intervention," *Psychology, Health and Medicine* 22 (2017): 224-39, <https://doi.org/10.1080/13548506.2016.1271955>.

<sup>31</sup> Rebellon and Straus, "Corporal Punishment and Adult Antisocial Behavior: A Comparison of Dyadic Concordance Types and an Evaluation of Mediating Mechanisms in Asia, Europe, and North America."

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## Nigeria

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In the nations utilized as comparisons for the implementation of the corporal penalty in this study, as shown in Table 2 above, the caning sentences are carried out in a closed space or a location away from public access. Like a public prison, as it is in Singapore, or a special prison, which is used in Malaysia, it also has a high level of secrecy and security.<sup>32</sup> In these countries, the execution of caning is very close to the public spotlight. Access to the place of execution was only granted to officers authorized to handle canings such as prison wardens, executioners, security, and health teams<sup>33</sup>.

After the issuance of Aceh's Governor Regulation on the Enactment of the Sharia Jinayat Law, the wide "open space" norm in the *Qanun* on Sharia *Jinayat* Law is narrowed down to an "open space" within the Penitentiary/Detention Center/Branch of prison". This is as regulated in Article 30 Paragraph (3) of the Governor's Regulation on the Implementation of *Jinayat* Procedural Law. This change in norms gives the impression that the regulations for the implementation of canings in Aceh are influenced by the regulations for the implementation of canings in other countries. However, this study found that these changes were not at all influenced by similar regulations in force in Malaysia, Singapore, or Brunei Darussalam.

This study found three reasons that caused the Governor of Aceh at that time to issue a Governor Regulation for the Implementation of the *Jinayat* Procedural Law. The first is the juridical reason. Both the *Qanun* on *Jinayat* Procedural Law and Governor Regulation on the implementation of *Jinayat* Procedural Law require that children under 18 years of age cannot participate in flogging.

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<sup>32</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," 2018.

<sup>33</sup> Chee Huay Chong and Kee Jiar Yeo, "The Residue Effects of Parental Corporal Punishment on Young Adults' Psychological Adjustment: Evidence From Malaysia," *SAGE Open* 8, no. 1 (2018), <https://doi.org/10.1177/2158244018757287>.

Meanwhile, the practice of caning in an open place was attended by many people, including children under 18 years of age. The second is political reason. The implementation of lashing in the open space further increased the Islamophobic sentiment which affected investors' distrust of the investment climate in Aceh, as acknowledged by the Governor of Aceh at the time<sup>34</sup>. Whereas, Aceh as the only region in the archipelago where sharia law is officially implemented needs to prove that the implementation of Islamic law will not hamper economic growth and investment climate as many parties have feared.

The third is the sociological reason. The execution of caning which was carried out in the courtyard of the mosque made a bad image of the enforcement of Islamic law in Aceh. Because apart from being a spectacle, visitors are also free to capture the whip procession with a camera which is then disseminated to various media. Moreover, in Acehnese culture, showing people's mistakes in public is seen as an unethical act (Aceh: *seumaloe*)<sup>35</sup>. Even more embarrassing, the implementation of whipping in the open has been used as a new tourist destination, both by local, national, and even international tourists<sup>36</sup>.

### **Disparities in the Enforcement of the Corporal Punishment in Aceh**

The implementation of the caning sentences in Aceh involves four government institutions. The first institution is the Municipal Police - Sharia Guardian Police (*Satpol PP -WH*) which is responsible for disseminating, supervising, and enforcing sharia law throughout Aceh<sup>37</sup>. *Satpol PP-WH* is one of the popular institutions in Aceh due to

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<sup>34</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

<sup>35</sup> Reza Idria, "Tales of The Unexpected : Contesting Syari'ah Law in Aceh, Indonesia" (Harvard, 2020).

<sup>36</sup> Reza Indria, "Provisional Notes on How 'Hilarious' Living Under Sharia Law (The Case of Aceh)," *Kawula: Journal of Local Culture* 5, no. 2 (2018).

<sup>37</sup> Khairul Hasni, "Sharia Police: Gender Discrimination and Elite Politics in Aceh," *Al-Hayat: Journal of Islamic Education* 4, no. 1 (2020): 7728.



the routine patrols carried out by this institution. In addition to routine patrols, these institutions usually work based on reports they receive regarding various types of sharia violations that occur<sup>38</sup>. In addition, the incorporation of Wilayatul Hisbah into the Civil Service Police also has an impact on decreasing the effectiveness of the work of this institution in the enforcement of Islamic law. Considering that Wilayatul Hisbah and the Civil Service Police have different duties and functions<sup>39</sup>.

The second institution is the Prosecutor's Office. In addition to having the authority to enforce national law, the Aceh Prosecutor's Office is also given additional authority to enforce the law in Aceh's *Qanun*. This additional authority gives strength and weakness to the Prosecutor's Office in Aceh<sup>40</sup>. With this additional authority, the Prosecutor's Office in Aceh is the only public prosecutor's office in Indonesia with the authority to handle cases of violations of the Shari'a<sup>41</sup>.

In addition, the prosecutor's biggest challenge in enforcing sharia law in Aceh lies in the source of funding.<sup>42</sup> As a vertical institution, the Aceh Prosecutor's Office obtains direct budget sources from the central government related to the prosecution and execution of criminal acts regulated in the Criminal Code. As for sharia cases, all financing is charged to the Aceh Expenditure Budget (*APBA*). This is

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<sup>38</sup> Benjamin Otto and Jan Michiel Otto, "Shari'a Police in Banda Aceh: Enforcement of Islam-Based Regulations and People's Perceptions," in *Islam and The Limits of the State Reconfigurations of Practice, Community and Authority in Contemporary Aceh* (Leiden: Brill, 2016).

<sup>39</sup> Ahmad Fuad Fanani, "The Implementation of Sharia Bylaws and Its Negative Social Outcome For Indonesian Women," *Indonesian Journal of Islam and Muslim Societies* 7, no. 2 (2017): 153-74, <https://doi.org/10.18326/ijims.v7i2.153-174>.

<sup>40</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

<sup>41</sup> A G Berutu, "Peran Polri, Kejaksaan Dan Mahkamah Adat Aceh Dalam Penegakan Syariat Islam Di Aceh," *Ahkam: Jurnal Hukum Islam* 7, no. 2 (2019), <https://doi.org/10.21274/ahkam.2019.7.2.CITATIONS>.

<sup>42</sup> Febriandi, Ansor, and Nursiti, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia."

because the enforcement of Islamic law is seen as part of the implementation of regional autonomy. If the Aceh government does not have enough budget or does not budget for the prosecutor's office at all, it will be difficult for the prosecutor's office to carry out its duties and functions in the implementation of sharia law in Aceh.

This situation becomes a barrier in the execution of the whip. Often the prosecutor's office delays the execution of the caning to the following year or replaces it with a sentence of imprisonment due to running out of the budget that year. Even in several districts/cities such as Southeast Aceh and Gayo Lues Districts, the prosecuting attorney compromised with the Judges of the Sharia Court not to impose caning sentences on the defendants. Because of the judge has decided the defendant to be sentenced to lashes, but the prosecutor's office does not carry out the caning, it becomes a new legal issue in the enforcement of sharia law in Indonesia's westernmost province<sup>43</sup>.

The third institution is the Islamic Shari'a Service. This institution has the most strategic role compared to other institutions in the implementation of sharia law in the region. The main task and function of this institution are to draft the rules that will be legislated, to make revisions, and ensure the enforcement of these rules<sup>44</sup>. More than that, the Islamic Shari'a Service is also given the responsibility to ensure that all government agencies run the wheels of government following Islamic values<sup>45</sup>. This authority has become the biggest obstacle for the Islamic Sharia Service in carrying out its duties and functions. It is impossible to impose the entire responsibility for implementing such a broad Islamic law on one government agency's shoulders.

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<sup>43</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 13, 2013.

<sup>44</sup> Ade Irma, Mohd Hatta, and Syukur Kholil, "Communication Management of Islamic Sharia Agency in Applying Women's Islamic Fashion in Banda Aceh," in *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences*, ed. Norshahril Saat and Ahmad Najib Burhani, vol. 3 (Singapore: ISEAS Publishing, 2020), 576-87, <https://doi.org/10.33258/birci.v3i1.808>.

<sup>45</sup> R. Michael Feener, *Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia*, ed. Anver M. Emon, I (Oxford, United Kingdom: Oxford University Press, 2013).

The fourth is the institution of the Sharia Court. This institution has a significant role in the implementation of sharia law in the province. Outside of Aceh, this institution is called the Religious Court. Similar to the prosecutor's office, the Syariah Court exercises additional powers to try *jinayat* cases as regulated in Aceh *Qanun* that The Religious Courts in other provinces do not have the authority<sup>46</sup>. Just like the prosecutor's office, the issue of funding is also the main problem of the Sharia Court in the enforcement of Islamic law. In addition, often violations of the sharia are resolved through the customary court, not through the Sharia Court, which also poses a challenge for the Sharia Court in the enforcement of Islamic law.

In addition to the four institutions above, the Jinayat even *Qanun* also mandates the Aceh Prosecutor's Office as the executor of the caning to coordinate with the Health Office to check the health condition of the convicted person. Thus, the Health Service becomes the fifth institution whose duties and functions are related to the execution of caning. However, because it is not the main institution, the role of the Health Service in enforcing the caning punishment is not very significant. After the issuance of the Governor Regulation for the Implementation of Canning Sentence, the Provincial Office of the Justice and Human Rights Ministry become the sixth institution related to the enforcement of corporal sentences. Considering Aceh's Governor Regulation ordered that the execution of the caning can be carried out at the Correctional Institution, Detention Center, or Detention Center Branch.

Practically, the existence of various institutions in dealing with the execution process leads to a lack of good coordination among one another. It has, among others, resulted in a various decision for determining the location of caning in all districts/cities in Aceh. In Nagan Raya and Subulussulam, for example, canings have been carried out in prisons. This is because the two regencies/cities have prisons that meet eligibility standards to be used as places for caning executions. For violations of the shari'a that occurred in Nagan Raya, the execution of the whip was carried out in Class II prisons. While in

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<sup>46</sup> Sufiarina, "The Position and Competence of The Shariah Court of Nanggroe Aceh Darussalam in Indonesia Justice System," *Indonesia Law Review* 5, no. 2 (2015): 165-86.

Meulaboh, Subulussalam, and Singkil District, execution of caning sentence takes place in prison.

Conversely, in Southwest Aceh, the caning was carried out in the courtyard of the Class III Blang Pidie Prison, not inside it. The same thing happens in the East Aceh in which the caning execution was carried out in the courtyard of the local Islamic Shari'a Office and in Bener Meriah and Bireuen District which choose the courtyard of the local Prosecutor's Office. In Takengon, meanwhile, the caning process is executed in front of the Arts Building. Meanwhile, Banda Aceh, Aceh Besar, and Lhokseumawe choose the courtyard of the mosques as the spot.

The spots for caning punishment which varies greatly show that the coordination among related government agencies is not simultaneous yet. Therefore, to overcome this problem, the Aceh Government should have included an article in the Governor's Regulation on the Implementation of Shari'a Law which regulates the coordination among these institutions, according to determining the location of the caning. Doing so, it will create a good understanding so that the expected coordination can be realized.

In addition to coordination problems that are still partial-casuistic in nature, this study also found infrastructure problems as one of the causes beyond disparity in the rules and implementation of the caning law in Aceh. Among 23 regencies/cities in Aceh, it turns out that not all prisons meet the requirements for caning executions. According to Aceh's Provincial Office of Justice and Human Rights Ministry, only seven prisons meet the criteria and requirements to be used as places for caning executions.<sup>47</sup> They are Class II.A Penitentiary in Banda Aceh, Class II.A Penitentiary Meulaboh, Class III Penitentiary Blang Pidie, Langsa Narcotics Class III Penitentiary, Class III Women's Correctional Institution Sigli, Bener Meriah State Prison, and Aceh Singkil State Detention Center

This condition makes it difficult to implement the provisions for the implementation of caning in prisons/prisons/detention

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<sup>47</sup> Faisal A Rani, "Islam and National Law: A Formal Legal Review on Sharia Laws in Aceh," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 20, no. 1 (2020): 47-57, <https://doi.org/10.30631/al-risalah.v20i1.521>.

houses because detainees must be transferred from districts/cities to other districts/cities. As a result, a lot of time, funds and personnel will be involved in the relocation. For example, it took more than ten hours to transfer a prisoner in Simeulue Regency to Meulaboh. This is not comparable to the whipping process which only takes less than 30 (thirty) minutes.

The same condition also occurred in the Nagan Raya Regency area, where the prison did not meet the requirements and criteria for being used as a place for whipping. Therefore, the Nagan Raya State Prosecutor's Office on August 12, 2018, when he was about to execute the whip, had to move the execution to the nearest prison that met the requirements and criteria of the Provincial Office of Justice and Human Rights Ministry in Aceh, namely Class II Prison Meulaboh, West Aceh.

In some cases, the disparity in the rules and implementation of caning occurs due to a lack of socialization between the government and the community at the district/city level. Lack of socialization causes non-uniform understanding between policymakers in each district/city. It is not surprising that until 2021 there are still regional heads (regents) who still insist on refusing to carry out canings in prisons. Even though the prison infrastructure in the area has met the requirements and criteria given by the Provincial Office of Justice and Human Rights Ministry in Aceh. As the refusal made by the Deputy Regent of Aceh Besar. In his view, the execution of caning in prisons is not following the spirit of Islamic law.

### **Conclusion**

The shift in the "open space" norms is supported by political and sociological reasons. As it is known, the implementation of caning in the open increases the sentiment of Islamophobia which has an impact on the investment climate and economic growth in Aceh. Sociologically, the implementation of caning in the open space worsens the image of Islamic law in Aceh. Although the shift in "open space" norm is possible for juridical, political, and sociological reasons cannot be accepted. However, in its application, there is a disparity between rules and practices. The disparity is caused by three factors, namely Partial-casuistic coordination, inadequate prison infrastructure, and inadequate socialization. The lack of

understanding and perception of leaders in 23 districts/cities shows that the socialization carried out so far has not been maximized. This has resulted in some regencies/cities carrying out canings in prisons as regulated in the Governor's Regulation on the Implementation of the *Jinayat* Procedural Law. However, there are still many regencies/cities that carry out caning in the open as regulated in the *Qanun* on the *Jinayat* Procedural Law. Some other regencies/cities took a compromising stance by carrying out canings in the prison yard, the prosecutor's office, or the local Islamic law office.

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