Rationality Of Imposing The Punishment Of Caning In Aceh (Study Of Rationality Of Penal Policy)

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Abstract. The Imposition of Caning in Aceh is questioned from a review of penal policy, especially from the perspective of human rights. Apart from being based on the philosophy of society, penal policy studies must also be rational, including the protection of people's human rights. Caning punishment in terms of human rights is still controversial, even though this punishment was built on the basis of local wisdom. This study aims to explain the rationality of imposing caning. The problems are, firstly, how caning is enforced in Aceh, secondly, how is the rationality of imposing caning punishment from criminal policy studies. The juridical-philosophical method with primary legal materials is sourced from Pancasila values, and statutory norms. Data collection is done with secondary data with descriptive-qualitative data analysis. The results of the analysis explain that the imposition of caning reflects the philosophical values of the people of Aceh which are based on Islamic Law, which is the embodiment of law based on Belief in One Almighty God, unites, teaches respect for a just and civilized humanity, and realizes social justice for all Indonesian people. The rationality of imposing caning is a punishment that embodies the goals of punishment, namely prevention, education, re-socialization and realizing a sense of remorse for the perpetrators of criminal acts. The application of caning punishment which realizes the purpose of sentencing, and it base on Pancasila Values.

Keywords: Caning, Penal Policy

INTRODUCTION

The issue of determining a criminal act and a crime is built on the basis of the view of society's life. In this case, Karl O. Christiansen argues that the conception of the problem of crime and punishment is an essential part of the culture of any society.[1] Substantially this opinion has the same meaning as that conveyed by W. Clifford when he argued that the very foundation of any criminal justice system consits of philosophy behind a given country.[2] Based on this opinion, it can be understood that the question of determining whether an act constitutes a crime or punishment is closely related to cultural values or the way of life of the people. Cultural values that are philosophical and incarnated in the traditions of society are also the basis for determining a crime and its criminal sanctions. The existence of a determination of the regulation of a criminal act originating from living law has been determined in the 2023 New

[1] Karl. O Christiansen berpendapat bahwa *the conception of problem crime and punishment is an essential part of the culture of any society*. *Some Considerations on the Possibility of a Rational Criminal Policy*, Report for 1973 and Resource Material Series No. 7, UNAFEI, Tokyo, 1974, p. 78.

[2] W. Clifford, *Reform in Criminal Justice in Asia and the Far East*, Experts Papers, dalam Resource Material No. 6 UNAFEI 1973, p. 6.

Penal Code as in Article 2 paragraph (1). This does not only reflect a law based on Pancasila which has a philosophical root, but also has become a living tradition in society. The necessity of penal law is built on the basis of legal politics that reflects philosophical values as well as mentioned in The New Penal Code considerations which among other things states that the national penal law must be aligned with legal politics, conditions, and the development of social, national and state life which aims to respect and uphold human rights. humanity, based on Belief in the One and Only God, just and civilized humanity, Indonesian unity, citizenship led by wisdom in deliberations/representations, and social justice for all Indonesian people. This clearly means that penal law is built on the basis of the philosophical values of Pancasila. This is also clearly stated in Article 2 paragraph (2) The New Penal Law which requires living law to be in accordance with Pancasila values.

In the philosophy of Pancasila, it is stated that Belief in the One and Only God. This means that the law that is built is based on the teachings of God Almighty. As also in Article 29 paragraph (1) The 1945 RI Constitution which stated that the State is based on Belief in the One and Only God. Paragraph (2) states that the State guarantees every citizen to practice their religion and belief. With this provision, a community that carries out laws based on the religion adhered to by a community is guaranteed by the state. The existence of this state guarantee reflects that the state upholds a community to carry out the law which is built from the religious teachings adhered to by its adherents.

Aceh as a part of the territory of the Unitary State of the Republic of Indonesia enforces criminal law which is built from law based on Islamic Sharia. One of them is the imposition of caning. Caning is a type of punishment that has been implemented in Nangroe Aceh. This is based on the mandate of Law number 6 of 2006 concerning the Government of Aceh which gives the mandate to carry out Islamic Sharia which in its heart includes jinayat law (Islamic criminal law). This penal law determines the application of caning as one of the punishments applied in Aceh.

The introduction and imposition of these penalties has generated serious debate. In 2008, the UN Committee Against Torture called on Indonesia to review all national and local legislation that legalizes the use of cruel punishment as a form of criminal punishment. Amnesty International and the Institute for Criminal Justice Reform (ICJR) urge that the caning law and other provisions in the Qanun Jinayat Aceh which violate human rights must be repealed or revised. But on the other hand, namely on the basis of the authority granted by the Law on the Government of Aceh, Law Number 6 of 2006 concerning the Government of Aceh mandates Islamic law to cover all aspects, including the application of jinayah law. The imposition of caning based on the cultural values of society which is based on Islamic law is a tradition that has been around for a long time and is valid. Laws with local values that apply in society are a reflection of laws based on the beliefs and traditions of the people. This law with local values is a reflection of the people's rights to determine the law that applies to their community. In human rights, every community or society has the right to promote, develop or fight for people's rights. on the values for Punishment which are built from the philosophical values of society and incarnated in the traditions of society. Welner Menski mentions that there are laws that reflect a particular community and are built on the basis of philosophical values that can originate from the religion or morals of a society.

[3] The enactment and imposition of caning for several types of crimes in Aceh is one of the issues in special penal law related to sentencing issues, particularly with regard to the philosophical values underlying a sentence or crime, the issue of penal sanctions and the issue of the rationality of a penal sanction to realize penal goals.

The study of criminal theory and policy reveals the existence of rationality in the application of punishment.4 Karl O. Christiansen put the rationality of criminal politics on the rational application of means to deal with crime. This rational means of realizing the goals of crime prevention. 5 With this perspective, the imposition of caning in force in Aceh must be tested for its rationality in criminal and sentencing policies. First, rationality from the point of view of people's lives as the basis for determining a sentence. Second, rationality from the point of application of punishment as a method that reflects the purpose of the crime.

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[3] Welner Menski, Perbandingan Hukum Dalam Konteks Global : Sistem Eropa, Asia dan Afrika, Cet. II, Nusa Media, 2014, p. 240-243.

[4] Punishment as a sanction aimed at overcoming a crime is an embodiment of a criminal politics which is a rational societal effort to deal with crime. Sudarto interprets criminal politics as a rational attempt by society to prevent of crime. Sudarto,*Kapita Selekta Hukum Pidana*, Alumni Bandung, 1986, p. 73. The meaning of criminal politics has similarities with Marc Ancel's opinion which defines criminal politics Marc Ancel bahwa *criminal policy is the rational organization of the control of crime by society*. Marc Ancel, *Social Defence*, 1965, p. 209. Marc Ancel's opinion was also quoted by G. Peter Hoefnagles in his book,*The Other Side of Criminology: An Inversion of the Concept of Crime*, Cluwer Deventer, Holland, 1969, p. 57.

[5] Karl O. Christiansen berpendapat *Some Considerations on the Possibility of a Rational Criminal Policy*, in Report For 1973 and Resource Material Series No. 7, UNAFEI, Tokyo, 1973, p. 74-75.

The enactment and imposition of caning punishment for several types of criminal acts in Aceh is one of them.

Problems

1. How is the punishment of caning in the Nangroe Aceh Darrussalam region enforced?
2. What is the rationality of the sentencing policy regarding the application of caning in the Nangroe Aceh Darrussalam region?

RESULT AND DISCUSSION

Implementation of Caning in the Aceh Nangroe Darussalam Region

Caning is a type of punishment regulated in Qanun No. 6 of 2014 concerning Jinayat Law. The regulation on caning in this Qanun is an elaboration of the administration of the Aceh governance system based on Islamic Sharia. Law Number 11 of 2006 concerning the Government of Aceh which states that Islamic sharia is the source and tradition of the Acehnese people in letter c which among other things mentions, namely: c. that this high resilience and fighting power comes from a view of life based on Islamic law which gave birth to a strong Islamic culture, so that Aceh becomes a capital area for the struggle to seize and defend the independence of the Unitary State of the Republic of Indonesia.

The determination of a view of life based on Islamic sharia creates a strong Islamic culture. The regulation of caning and its implementation is in jinayah law (penal law). This criminal arrangement has been regulated separately in Qanun 6 of 2014. Clearly the basis for consideration of Qanun 6 of 2014 concerning Jinayah Law includes that based on the mandate of Article 125 of Law Number 11 of 2006 concerning the Government of Aceh, Jinayat law (Penal Law) is part of Islamic Shari'at implemented in Aceh.

Qanun Number 6 of 2014 concerning Jinayah Law has determined the imposition of caning for several types of criminal acts (jarimah). Some criminal acts (jarimah) whose punishment is in the form of caning are as follows:

1. Khamar is a drink that is intoxicating and/or contains alcohol with a level of 2% (two percent) or more.
2. Maisir is an act that contains an element of betting and/or an element of chance that is carried out between 2 (two) or more parties, accompanied by an agreement that the winning party will receive certain payments/benefits from the losing party either directly or indirectly.
3. Khalwat is an act of being in a closed or hidden place between 2 (two) people of the opposite sex who are not Mahrams and without marital ties with the consent of both parties which leads to an act of Zina.
4. Ikhtilath is acts of affection such as making out, touching, hugging and kissing between men and women who are not husband and wife with the consent of both parties, either in closed or open places.
5. Mahram is a person who is forbidden to marry forever, namely biological parents and so on upwards, step parents, children and so on downwards, stepchildren of wives who have had intercourse, siblings (biological, father and mother), suckling brothers, nursing father and mother, father's siblings, mother's siblings, children's siblings, parents-in-law (male and female), son-in-law (male and female).
6. Adultery is intercourse between one or more men and one or more women without marriage ties with the consent of both parties.
7. Sexual Harassment is an immoral act or an obscene act that is intentionally committed by someone in public or against another person as a victim, whether male or female, without the victim's consent.
8. Liwath is the act of a man by inserting his penis into the anus of another man with the consent of both parties.
9. Musahaqah is an act of two or more women by rubbing their limbs or genitals with each other to obtain sexual stimulation (pleasure) with the consent of both parties.
10. Rape is sexual intercourse between the genitals or anus of another person as a victim with the perpetrator's penis or other objects used by the perpetrator or against the vagina or genitals of the victim with the perpetrator's mouth or against the mouth the victim with the perpetrator's penis, by force or coercion or threats against the victim.

11. Qadzaf is accusing someone of committing Zina without being able to present at least 4 (four) witnesses.
12. Based on Qanun No. 6 of 2014 several criminal acts that are punishable by caning are presented in the **TABLE 1**.

Table 1. Punishable by Caning

No	Article	Offence	Type of punishment				explanation
			Hudud	Ta'zir			
				Caning	fine	prison	
1		**Khamar**	**40 x**				
		residive	**40 x**	**≤ 40 x**	**≤400 gr pure gold**	**≤40 months**	
		produce, store, sell or import		**≤ 60 x**	**≤600 gr pure gold**	**≤60 months**	
		buying, carrying/transporting, or gifting Khamar		**≤ 20 x**	**≤200 gr pure gold**	**≤20 months**	
		Khamar includes children		**≤ 80 x**	**≤800 gr pure gold**	**≤80 months**	
2		**Maisir**					
		≤ 2 gr pure gold		**≤ 12 x**	**≤120 gr pure gold**	**≤12 months**	
		≥ 2 gr pure gold		**≤ 30 x**	**≤300 gr pure gold**	**≤30 months**	
		Organizing Facilitation		**≤ 45 x**	**≤450 gr pure gold**	**≤45 months**	
		Involve children		**≤ 45 x**	**≤450 gr pure gold**	**≤45 months**	
		≤ 2 gr pure gold involved children		**≤ 12 kali x 1/2**	**≤120 gr pure gold x ½**	**≤12 months x 1/2**	
		≥ 2 gr pure gold involved children		**≤ 30 kali x 1/2**	**≤300 gr pure gold x ½**	**≤30 months x 1/2**	
		Jarimah khalwat		**≤ 10 x**	**≤100 gr pure gold**	**≤10 months**	

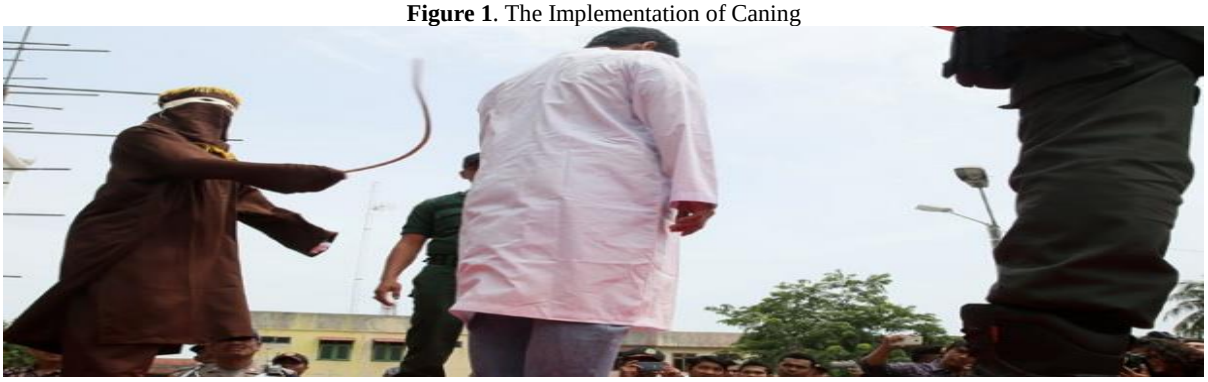
		Facilitation, promotion Khalwat		**≤ 15 x**	**≤150 gr pure gold**	**≤15 months**	
		Jarimah Ikhtilath		**≤ 30 x**	**≤300 gr pure gold**	**≤30 months**	
		Facilitation, promotion Ikhtilath		**≤ 45 x**	**≤450 gr pure gold**	**≤45 months**	**cumulatif or alternatif**
		Involve children over 10 years		**≤ 45 x**	**≤450 gr**	**≤45 months**	
		Ikhtilath with muhrim					
	30 (1)	**Accusing Ikhtilath cannot be proven**		**≤ 30 x**	**≤300 gr pure gold**	**≤30 months**	
	(2)	**Recidive**		**≤ 45 x**	**≤450 gr pure gold**	**≤45 months**	
	33 (1)	**Zina**	**100 x**				
	(2)	**Recidive**	**100 x**		**≤120 gr pure gold**	**≤12 months**	
	(3)	**Facilitation and Promotion zina by person or business institution**		**≤100 x**	**≤100 gr pure gold**	**≤100 months**	
	34	**Zina with children**	**100 x**	**≤100 x**	**≤100 gr pure gold**	**≤100 months**	**Hudud can be added with ta'zir**
	35	**Zina with Muhrim**	**100 x**		**≤100 gr pure gold**	**≤100 months**	**Hudud can be added with ta'zir**
	37	**Confession Has Committed Adultery**	**100 x**				
	46	**Sexual Harassamant**		**≤45 kali**	**≤450 gr pure gold**	**≤45 months**	**alternative penal nature**

	47	Sexual Harassamant against children		≤90 kali	≤900 gr pure gold	≤90 months	alternative criminal nature, the weight is multiplied by 2 from the crime of sexual harassment
	48	Rape		≤125 x ≥175 x	≤1250 gr pure gold ≥1750 gr pure gold	≤125 months ≥175 months	Can be added to restitution if there is a request from the victim ≥750 gr gold (Article 51) taking into account the circumstances of the perpetrator (2), if the perpetrator is forced to rape, restitution is imposed on the person who forced it (3)
	49	Rape with Muhrim		≤150 x ≥200 x	≤1500 gr emas≥2000 gr emas	≤150 months ≥200 months	
	50	Rape against children		≤150 x ≥200 x	≤1500 gr pure gold≥2000 gr pure gold	≤150 months ≥200 months	
	57	Accused of adultery (qadzaf)	80 x				
	58	Recidive of qadzaf	80 x		≥400 gr pure gold	≥40 months	the nature of the penal can be cumulated
		Qadzaf with the request of the victim	80 x				Restitution ≥400 gr gold
	63 (1)	Liwath		≤100 x	≤1000 gr pure gold	≤100 months	Alternative the penal nature
	(2)	Recidive of Liwath		≤100 x	≤120 gr pure gold	≤12 months	the punishment of caning can be cumulative with a fine and/or imprisonment
	(3)	Liwath against children		≤100 x	≤1000 gr pure gold	≤100 months	The main sentence can be added (cumulated) with an alternative additional punishment
				≤100 x	≤1000 gr pure	≤100 months	

					gold		
	64 (1)	**Musahaqah**		**≤100 x**	**≤1000 gr pure gold**	**≤100 months**	**Alternative penal nature**
	(2)	**Recidive**		**100 x**	**≤120 gr gr pure gold**	**≤12 months**	**the nature of the penal can be cumulated**
	(3)			**≤100 x**	**≤1000 gr gr pure gold**	**≤100 months**	**The penal nature can be accumulated so that it is like multiplied by 2.**
		Against Children		**≤100 x**	**≤1000 gr pure gold**	**≤100 months**	

A literature review sourced from online news reports that convicts violating Islamic Sharia laws were executed by caning at the Baitusshalihin Mosque, Ulee Kareng, Aceh, September 18 2015. The Sharia Court of Banda Aceh City issued public canings for 17 qanun violators (regional regulations). **Figure 1** presents the implementation of caning.

Figure 1. The Implementation of Caning



On February 19 2016 seven men were executed by caning in the yard of the Al-A'la Mosque, Gampong Cot Mosque, Lueng Bata, Banda Aceh, because they were proven to have played domino rock gambling (see **FIGURE 2**).

Figure 2. Caning Execution

Picture Seven men were whipped in the yard of the Al-A'la Mosque, Gampong Cot Mosque, Lueng Bata, Banda Aceh, because they were proven to have played domino rock gambling. They were whipped six times each.

In another district of Aceh Tamiang, caning is also carried out for perpetrators of gambling crimes (maisir). An online library source from okezone.com reported that as many as 27 residents of Aceh Tamiang, Aceh Province, on Wednesday (17/2/2016) were caned in the courtyard of the Islamic Center, Aceh Tamiang. The 27 residents were sentenced to caning in the gambling case, which has permanent legal force from the Aceh Tamiang Sharia Court (see **FIGURE 3**).

Figure 3. Caning Execution because of Gambling (source:Okezone.com documentation).

Likewise with the implementation of caning in Aceh Besar District. Implementation of caning punishment for two perpetrators of khalwat / obscenity on Friday (15/1/2016). The two convicts sentenced to caning were an obscene couple, namely the man Musliadi 11 times lashed and the woman Linawati 12 times whipped, because both were proven to have violated Aceh Qanun/regional regulation Number 6 of 2014 article 25 paragraph (1) concerning sincerity. The flogging which took place in the courtyard of the Al-Munawwarah Grand Mosque, Jantho City, Aceh Besar District, after Friday prayers, was witnessed by hundreds of members of the local community and Forkopimda elements (**FIGURE 4**).

Figure 4. Implementation of caning for perpetrators of obscene acts

In Banda Aceh City, caning has also been carried out for 18 perpetrators of crimes proven to have violated Islamic law in the form of drinking liquor (liquor or khamar), gambling (maisir), and immoral (khalwat). Of the 18 convicts, six of them were whipped 240 times or one person was each lashed 40 times. An executor whipped 20 times per convict. After that, he handed over his cane to another executioner to continue the execution for up to 40 times. The expressions of the convicts after being whipped varied, some smiled, raised their hands at the audience, got angry, some looked down in shame as they were led to the waiting room. **FIGURE 5** presents the implementation of the intended caning.

Figure 5. Caning Execution because of violated Islamic Law (Drinking, Gambling, and Immoral behaviour)

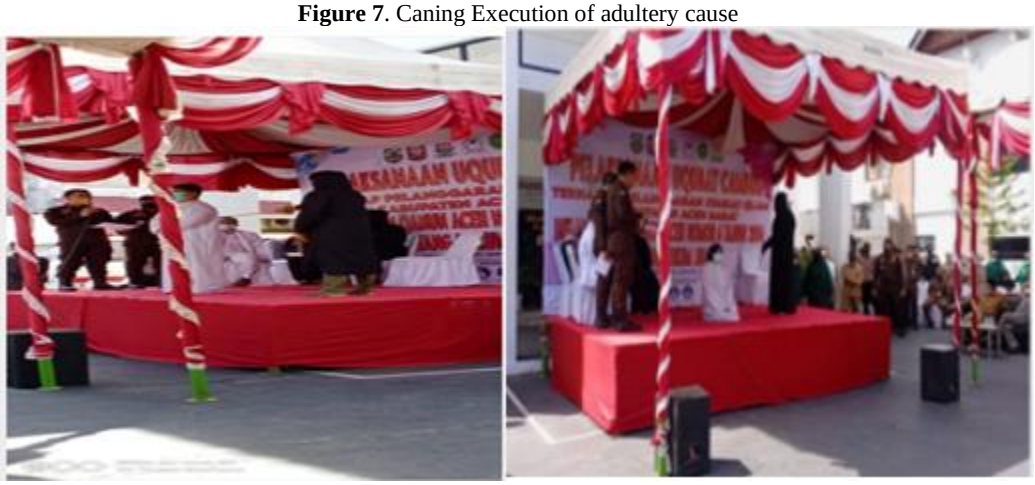
Meanwhile, 12 others with the initials AZ (45), IY (65), MTY (26), ID (25), BR (40) and SZA (32). The six men are drivers. They were arrested while playing gambling at the Integrated Terminal, Batoh, Banda Aceh and caned six times each, for violating Article 18 of Qanun Jinayat concerning maisir or gambling. Furthermore, the convicts AJ (56), ERA (49), AM (44) and AH (38) were also sentenced to seven lashes each because they were proven to have gambled. They were caught in the Ulee Lheu area, Banda Aceh, while playing playing cards. In addition to playing cards, officers also confiscated Rp. 400,000 in betting money which has now been handed over to Baitul Mall. The other two convicts who were whipped today were the perverted perpetrator with the initials TRM (21) and his daughter SSM (19). The two were students, and were raided by residents at a boarding house in the Punge Blang Cut area, Banda Aceh, November 24 2015. Both were found guilty of violating Article 23 paragraph 1 of Qanun Jinayah and caned eight times each. In his speech, the mayor said that the implementation of the caning law was a mandate from Allah and the constitution regarding the application of Islamic law in Aceh. "This caning is not torture, but it is the gateway to repentance," he said. According to him, the execution of this caning is not a spectacle, but a lesson for others to stay away from all violations of Islamic law. "Those who were whipped today are indeed guilty people, but they are not necessarily more despicable than us," he said.

The implementation of caning punishment is also imposed on 5 (five) violators of Islamic law undergoing a procession of punishment between six to 25 times of caning in front of a large audience. The execution was held in the courtyard of the Baitul Musyahadah Mosque or known as the Teuku Umar Mosque, Banda Aceh, Monday (16/5/2016). The first caning convict who took the execution stage had the initials TB (53). He was sentenced to six lashes because he was found guilty of committing maisir or gambling and violating Article 18 of Qanun Number 6 of 2014 concerning Jinayat. Then, Zul (58) was whipped 25 times for violating the same article. Furthermore, Saf (22) and his daughter Z (21) were sentenced to 15 lashes each because they were proven to have committed obscenity without marriage ties and were found to have violated Article 25 Paragraph (1) of Qanun Number 6 of 2014. And the convict who was sentenced to the last caning was on behalf of Sai (46). He was flogged 17 times because he was found to have been involved in khamr or drinking liquor (**FIGURE 6**)

Figure 6. Executioners execute violators of Islamic law at Cot Mosque, Banda Aceh (Salman Mardira/Okezone)

On January 25, 2022, the execution of the perpetrators of adultery who were not married was also carried out in the courtyard of the West Aceh District Attorney's Office (**FIGURE 7**)

Figure 7. Caning Execution of adultery cause



The execution of MU (40 years) and ER (37 years) who committed adultery who were sentenced to 100 lashes at the Class II Penitentiary in Meulaboh. [6] North Aceh District Prosecutor's Office (Kejari) executed 10 convicts for violating Islamic law who were found guilty of committing khalwat (mesum) and maisir (gambling act) (**FIGURE 8**). [7]

Figure 8. Caning Execution of Khalwat and Maisir.

Rationality Of Criminal Policies On The Implementation Of Caning Criminal In Aceh.

Rationality in Relations with People's Views of Life

The rationality of sentencing policy is based on the notion that criminal politics as a way of dealing with crime must be rational. Rationality is built on the application of rational penal sanctions that deal with criminal acts, and on the embodiment of better goals. Analysis of the theory and criminal policy studies proposed using the thought of a criminal law policy approach that reflects the views of people's lives was presented by W. Clifford and Karl O. Christiansen. Both link criminal and sentencing issues to the philosophy of life of the people concerned. Karl. O Christiansen argues that the conception of the problem of crime and punishment is an essential part of the culture of any society. [8] W. Clifford argues that the very foundation of any criminal justice system consists of philosophy behind

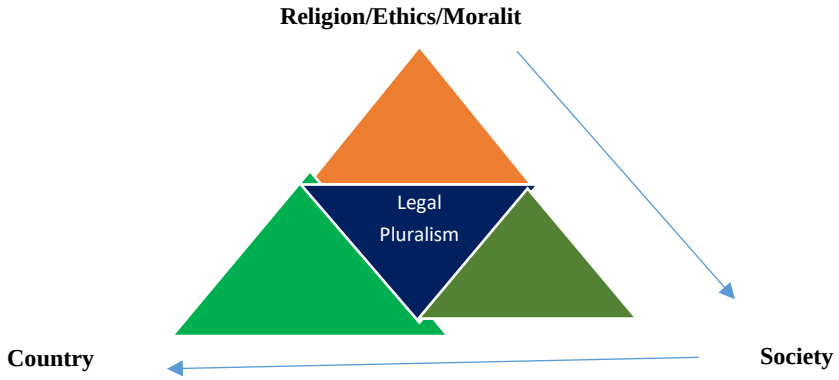
[6] **https://news.republika.co.id/berita/rozzyx425/dua-pelaku-zina-di-aceh-barat-dihukum-cambuk-100-kali diakses tanggal 30 Maret 2023**

[7] **https://aceh.antaranews.com/berita/329100/10-terpidana-pelanggaran-syariat-islam-di-aceh-utara-dihukum-cambuk diakses tanggal 8 mei 2023.**

[8] Karl O. Christiansen, Op.,Cit.

a given country. [9] Based on this opinion, caning as a punishment in jinayat law regulated in Qanun Number 6 of 2014 concerning Jinayah Law is an implementation of Law no. 11 of 2006 concerning the Government of Aceh which gives the mandate to implement a government system based on Islamic Sharia, by upholding justice, benefit and legal certainty. One of the considerations stated that this resilience and high fighting power came from a view of life based on Islamic law which gave birth to a strong Islamic culture, so that Aceh became a capital area for the struggle to seize and defend the independence of the Unitary State of the Republic of Indonesia. From this point of view, the application of caning as a punishment in the Shari'a imposed in Aceh has become a strong Islamic culture and has become customary law in force in Aceh. By using Vinogradof's perspective which places legal culture as a process of giving and receiving based on decency and appropriateness, religious awareness is in the rational awareness of the parties to apply caning to legal events as stipulated in the Qanun on Janayah Law. This process shows a continuous relationship as a give-take process based on decency. In general, Werner Menski describes the process of interaction of various orders, both originating from religious orders, customary orders and legal orders. Illustration of the interaction of these orders as shown in **FIGURE 9.**

Figure 9. Relation of Religion, Society and Country.



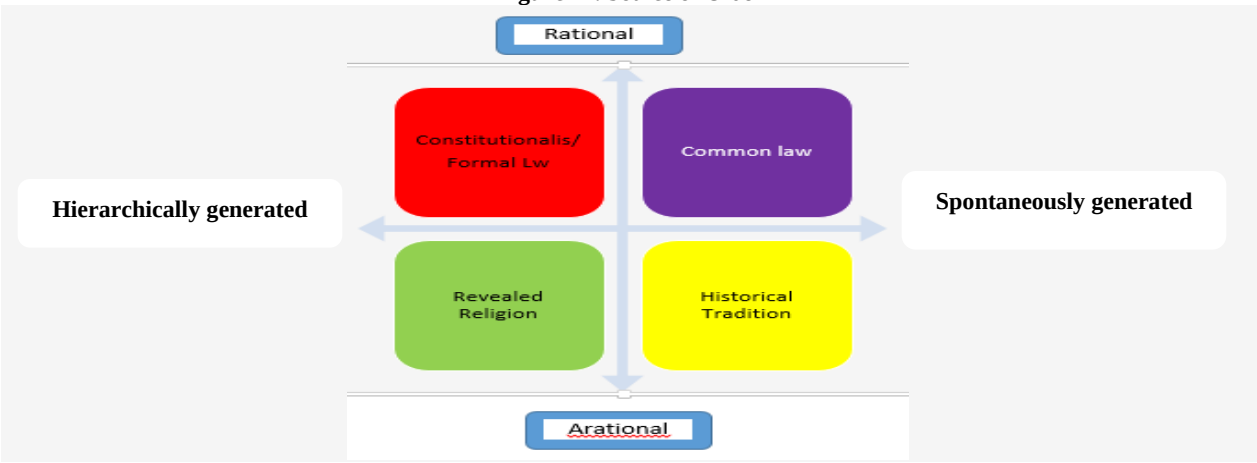
The process of legal interaction originating from religion becomes customary law and state law

Diversity of Orders in Society Based on this picture, it can be interpreted that the application of caning is based on Islamic Shari'a which originates from the Qur'an. This crime only applies to Acehnese who are Muslim. For Acehnese who are non-Muslims, other laws apply as specified in The New Penal Code except if the non-Muslims voluntarily follow and submit to Qanun No. 6 of 2014 concerning Jinayah Law. The criminal determination and implementation is based on the teachings of God Almighty in accordance with the provisions of Article 29 paragraph (1) Constitution of The Republik Indonesia has been remanded which states that the state is based on Belief in the One and Only God. Penal law and criminal justice are in accordance with the thoughts of Prof. Moeljatno Professor of the Faculty of Law UGM who stated: "In our country which is based on Pancasila, with the existence of divine precepts, any knowledge (including law) that is not accompanied by divine knowledge is incomplete. Furthermore, it is stated that the best wisdom is the obedience to Allah. [10] Bismar Siregar offered the idea of law enforcement based on the teachings of God Almighty, as sourced from the Religious Scriptures. [11] Barda Nawawi Arief developed the idea of a divinely-inspired sentencing policy by emphasizing the existence of a juridical-scientific-religious approach, in addition to a juridical-contextual and global/comparative perspective approach. [12] The argument put forward by Barda Nawawi Arief has been determined in several laws. Article 2 paragraph (1) Law no. 48 of 2009 concerning Judicial Power. This juridical-religious principle is also emphasized in Article 8 (3) No. 16/2004 concerning the Prosecutor's Office which states "For the sake of justice and truth based on Belief in the One and Only God, the prosecutor conducts

[9] W. Clifford, Op.Cit.
[10] Public Lecture at UII Yogya in Purwokerto on 12 September 1963 entitled The Legal Aspects of Actions That Cause the Death of People. Muljatno, *Membangun Hukum Pidana*, Bina Akasara, 1985, p. 23. This opinion is also used as a reference by Barda Nawawi Arief. Barda Nawawi Arief, *Reformasi Sistem Peradilan (Sistem Penegakan Hukum) Di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, t.t., p. 49.
[11] Bismar Siregar, *Keadilan Hukum dalam Berbagai Aspek Hukum Nasional*, Rajawali Press., Jakarta 1991.
[12] Muljatno in Barda Nawawi Arief, *Reformasi Sistem Peradilan (Sistem Penegakan Hukum) Di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, *Op.,cit.*, p. 47

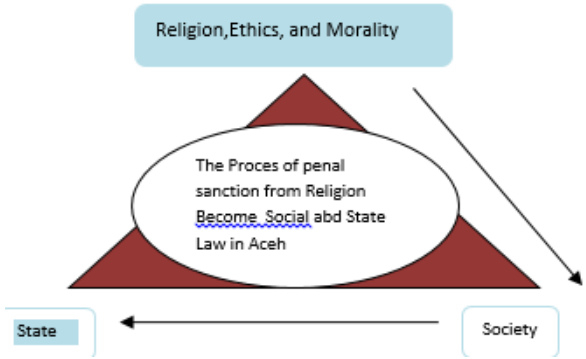
prosecutions with conviction based on valid evidence. This means that justice (in the prosecution of prosecutors) should not only be based on the guidance of the law, but must also be based on "God's guidance".[13] The existence of God's demands based on His holy us makes the source of legal norms also come from God. Francis Fukuyama illustrates it in the **FIGURE 11**:[14]

Figure 11. Source of Order



This means that an order based on historical tradition, customary law coexists with a legal order as well as a religious order which is hierarchical in nature. The legal order through law is in the rational-hierarchical area, while the customary order is in the spontaneous-rational area. Meanwhile, the customary order is in a hierarchical-irrational area. The practice of carrying out the punishment of caning applied in Aceh Nangroe Darussalam is clearly an implementation of the teachings of God Almighty as taught in Islamic Law which originates from the Al-Qur'an, al-Hadith, the agreement of authoritative scholars' opinions. By using Francis Fukuyama's thinking, caning which originates from Islamic law which originates from the Qur'an has a hierarchical-arational pattern of hudūd law,[15] but caning in the form of ta'zir law[16] shows a rational hierarchical nature of law. Even if it has become a tradition that has long been implemented in society, caning reveals its rational, hierarchical order. Caning for certain prohibited acts originates from Islamic law and has become customary law. In Aceh, there is *a legal expression ngon adat hantom cre, lagee zat ngon sipeut*, which means: customary law and Islamic law cannot be separated. The acceptance of customary law originating from religion is also stated in state regulations as stipulated in Qanun Number 6 of 2014 concerning Jinayah Law. This process can be illustrated in the **FIGURE 12**:

Figure 12. The Process of Caning Sanction from Religion Law Become Social and Statute Law



[13] Barda Nawawi Arief, *Reformasi Sistem Peradilan (Sistem Penegakan Hukum) Di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, t.t. p. 47. Take note Barda Nawawi Arief, *Pendekatan Keilmuan dan Pendekatan Religius Dalam rangka Optimalisasi Penegakan Hukum (Pidana) di Indonesia*, Badan Penerbit Universitas Diponegoro, 2011, p.14- 15.

[14] Francis Fukuyama, *The Great Social Disruption : Human Nature and The Reconstitution of Social Order*, The Free Press, New York, 1999, p. 152.

[15] Hudud law is a law that has been determined with certainty and certain from Allah SWT as mentioned in the Qur'an.

[16] The ta'zir law is a law whose type and number are not determined with certainty in the Qur'an, but is determined by the power of the State both in laws and in judges' decisions.

Rationality in Penal Sanctions that Achieve Better Penal Purposes.

The rationality of caning is based on the idea that punishment is a means to achieve better criminal goals. Karl O. Christiansen argues that the fundamental prerequisite of defining a means, method or measure as a rational is that the aim or purpose to be achieved is well defined.[17] In the 2023 Penal Criminal Code, several objectives of punishment are determined, namely:

1. Preventing the commission of criminal acts by upholding legal norms for the protection of society;
2. Socialize the convict by conducting training so that he becomes a good and useful person;
3. Resolving conflicts caused by criminal acts, restoring balance and bringing about a sense of peace in society, and
4. Release the guilt of the convict.

Punishment is not meant to suffer and humiliate human dignity.

Most of the perpetrators who were subjected to caning bowed their heads in shame, even fainted because of their embarrassment. They were subjected to caning in open yards/fields witnessed by the wider community, even documented and widely reported in the mass media, both print and online. The offender's remorse and guilt embody deterrence goals that are specific to the offender. Specific prevention has a significant degree of deterrence if the perpetrator regrets that this event has occurred. Prevention for the community (general prevention) has a significant level because the crime is carried out openly in the presence of the wider community which can potentially become a means of psychological coercion (psychological coercion) that prevents people from committing similar acts. This general prevention embodies the objective of prevention introduced in criminal law theory and policy. The purpose of prevention has also been determined in Law no. 1 of 2023 concerning the Penal Code, namely preventing the commission of criminal acts by enforcing legal norms for the protection of society.

Analysis of criminal law theory and policy reveals that the execution of crimes in courtyards and open fields witnessed by the public with the level of the number of lashes adjusted to the type of crime (jarimah) committed and with the level of guilt realizes the goal of socializing the convict by providing guidance so that he becomes a good person and It is useful to create a deterrent effect and remorse for convicts. The existence of remorse and shame on the part of the perpetrators regarding the implementation of the punishment of caning which was witnessed by the community as a result of the actions committed is the initial process of a coaching goal to become a good member of society. Moreover, direct caning can bring back the perpetrator with his family and society to give the perpetrator an opportunity to improve his behavior. After serving the caning sentence, all convicts were declared free and allowed to go home. This fact explains that the application of caning create a deterrent effect and return convicts who have finished serving their crimes to realize the criminal goals of being able to reconcile convicts with their families and communities to improve the convict's behavior with the support of the surrounding environment.

The purpose of the crime in the form of resolving conflicts caused by criminal acts, restoring balance and bringing about a sense of peace in society is realized when the weight of the type of act committed is equal to the weight of the number of canings imposed. The implementation of caning in an open manner witnessed by the wider community is carried out in order to reinforce the importance of the balance of life and social peace. Violations that occur are a form of violation of the balance of life and peace in society. Recovery is realized through the application of caning which, on the one hand, emphasizes to the psyche of the perpetrators the importance of maintaining individual morality for the balance and peace of society. The balance of sentencing is also realized between the balance of its open nature and the balance of criminal tools or methods, namely in the form of rattan, the amount and method of imposition taking into account fair and civilized human values. The physical suffering experienced is temporary and medical therapy is provided, but it must provide education to the perpetrators and the community (civilized values). The aim of restoring balance and peace to society which was damaged by the perpetrators of criminal acts has the same meaning in substance as Muladi's opinion which generally states that crime has the function of repairing individual and social damages arising from the actions of the perpetrators. [18]

[17]Karl Christiansen, Op.,Cit.

[18] Muladi, *Lembaga Pidana Bersyarat,* Alumni, Bandung, 1985, p. 61.

Caning is an open punishment and the amount is adjusted according to the type of crime and the guilt involved in realizing the criminal objectives specified in the 2023 Penal Code, namely prevention, resocialization of convicts, resolving conflicts caused by criminal acts, restoring balance and bringing a sense of peace in society.

The imposition of caning as a crime in general contains an imposition of suffering. However, the imposition of suffering inherent in the application of caning is intended to bring about justice, restore balance, bring benefit to society and individuals and to educate society as the principle of the application of caning in Article 2 of Qanun No. . 6 of 2014 concerning Jinaya Law. Thus the application of caning punishment is not intended to suffer humans, even though there is suffering in it which is the essence of imposition of punishment. The imposition of suffering attached to punishment in the form of caning can be treated immediately. Suffering in the form of shame is accepted when the imposition of caning is witnessed openly. The emergence of this shame has the potential to force the perpetrator's psychology (psychologischedwang) not to repeat the crime. The application of caning to crimes listed in the Qanun actually reflects the implementation of an efficient prevention objective, because for the type of crime, the application of caning has the maximum quality of prevention, the level of suffering is relatively small, because it takes place quickly, easily and is directly treated by medical doctors. and does not result in the emergence of various sufferings that have been caused by the implementation of imprisonment.

It's just that the imposition of caning in Aceh is considered contrary to human rights, including violating the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which has been ratified into Law Number 5 of 1998. Rahmatillah (2012) stated that judging from the conception and Universal Human Rights documents, Islamic criminal law is contrary to human rights standards, even the application of Islamic criminal law is a form of human rights violation. In the records of the Institute for Criminal Justice Reform (ICJR) in 2014 the Ministry of Home Affairs has sent notes to the Government and Aceh DPRD (Ministry of Home Affairs No. 188.34/1655/SJ) regarding Qanun Jinayat. Based on the results of the study by the Ministry of Home Affairs Team together with the relevant Ministries, some of the substances of Qanun Aceh No. 7 of 2013 concerning Jinayat Procedural Law is contrary to: (1) Law no. 8 of 1981 concerning the Criminal Procedure Code, (2) Law no. 31 of 1997 concerning Military Justice, (3) Law no. 2 of 2002 concerning the Indonesian National Police, (4) Law no. 16 of 2004 concerning the Attorney General of the Republic of Indonesia, (5) Law no. 5 of 2004 concerning Amendments to Law no. 14 of 1985 concerning the TNI, (6) Law no. 11 of 2006 concerning the Government of Aceh, (7) Constitutional Court Decision No. 006/PUU-IV/2006 and Constitutional Court Decision No. 34/PUU-XI/2013. [19]

The study of penal law policy is a study of legal politics in the field of penal law. This study cannot be separated from the legal politics chosen based on the 1945 Constitution which regulates respect for the state to recognize special and special local government units regulated by law. The state also recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic.[20] This constitution served as a guideline for the issuance of Law Number 11 of 2006 concerning the Governance of Aceh, and became the basis for the issuance of Qanun No.6 of 2014 concerning Jinayat Law (Islamic Criminal Law). Based on this legal politics, the implementation and imposition of caning in Aceh has become a special law that overrides general laws (lex specialis derogate lege generali). Consequently, the rule of law, legal structure and even legal culture actually embody the legal politics mandated by the 1945 Constitution. Moreover, the Constitution also directs a political law that positions the state to recognize and respect customary law community units and their traditional rights as long as they are still alive as determined. in Article 18 B paragraph (2). On this basis, the study of sentencing policies embodies the 1945 Constitution. In fact, it also embodies a sentencing policy that is built on the basis of the cultural values that underlie it, namely Islamic law. This study also reflects the punishment policy based on Pancasila which places the Teachings of Belief in One and Only God as one of the foundations chosen as political law for the people of Aceh which places Islamic Law as the basis for strengthening their culture. This is in accordance with an Acehnese expression, namely *ngon adat hantom cre, lagee zat ngon sipeut*, which means: *customary law and Islamic law cannot be separated*. This is also found in the discussion of adat basandi syara', syara' basandi the Holy Scriptures (adat based on Shari'a (Islam), Shari'a based on the Scriptures.

The placement of the teachings of God Almighty in the legal structure of Pancasila ideology aims to form civilized, unified human beings, guided by the values of wisdom in a dialogical atmosphere in order to realize social justice. These values can be an option in sentencing policies that embody human rights. This sentencing policy is often seen

[19] https://icjr.or.id/dilema-putusan-mk-terkait-kewenangan-pusat-untuk-membatalkan-perda/

[20] Pasal 18 B UUD 1945 ayat (1) dan ayat (2)

as not materializing when caning is considered to be contrary to human rights. [21] This view was conveyed by the Institute for Criminal Justice Reform (ICJR), [22] and the use of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which has been ratified into Law Number 5 of 1998. This convention is clearly against torture, other cruel treatment or punishment , inhuman or degrading to human dignity.

Penal policy in the protection of human rights is a consequence of the development of the individualization of penal law. Legal politics with human rights dimensions must be placed in a comprehensive study. Precisely the provision of caning punishment in the positive law in Aceh creates a political law that is in accordance with the Convention on Economics, Social and Culture, in which all nations have the right to self-determination. By virtue of this right they are free to determine their political status and freely carry out their economic, social and cultural development. The right of the people of Aceh to develop a political law that is built to strengthen culture is a human right that is related to economic, social and cultural rights. Culture built on the basis of Islamic values has become the cultural identity of Aceh. As specified in Article 28 I paragraph (3) it states that cultural identity and traditional community rights are respected in line with the times and civilization. This legal politics is also specified in Article 6 of Law no. 39 of 1999 concerning Human Rights.

The view that caning is a form of torture and other degrading treatment is usually based on the Convention Against Torture, other cruel, Inhuman or Degrading Treatment or Punishment which was ratified by Law Number 5 of 1998. Against Torture, other treatment and punishment This cruel thing is also determined in the 1945 Constitution, and Law no. 39 of 1999 concerning Human Rights. On this basis, caning is considered to be contrary to human rights. This opinion is more speculative in nature, considering that Article 1 of the Convention stipulates that It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". This means that the suffering inherent in the criminal sanctions specified in the law is not included in the category of torture. This is also specified in Article 7 paragraph (2e) of the Rome Statute which reads "….except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions" which is essentially in terms of pain or suffering arising from the imposition of applicable legal sanctions is not included in the definition of torture. The qanun on Jinayah Law also includes the principle of protecting human rights in its implementation, namely that there is a guarantee that the formulation of jarimah and 'uqubat will be in line with efforts to protect and respect human nature, dignity and dignity, in accordance with the understanding of the Indonesian Muslim community about human rights. Saufiah and Budi Sastra Panjaitan (2022) argue that the imposition of caning can cause perpetrators to feel ashamed so they don't want to repeat their actions, as well as being a lesson for other people who see this punishment. In carrying out this sentence, the perpetrator's health is still considered by carrying out medical records and presenting medical personnel as a form of attention to the physical and mental health and safety aspects of the perpetrator. As was the execution of the ER woman who had intercourse with MU at the Meulaboh Class II Penitentiary on January 24 2023. The execution was witnessed by health workers, and post-execution examinations were carried out. After receiving treatment from the medical team, ER regained consciousness and was declared free, and handed over to the family. The physical pain is stated to be temporary and does not cause permanent injury.

CONCLUSIONS

1. The imposition of the caning punishment imposed in Aceh is based on the view of life of the Acehnese people which is based on Islamic law to strengthen culture within the unitary state of the Republic of Indonesia. The foundation of Islamic law which is incarnated in culture creates a punishment policy based on the religious outlook of the community.
2. The imposition of caning creates a rational sentencing policy because it is built on the basis of the culture of the people who are religious in nature as stated in the expression
3. The rationality of the imposition of caning to realize the purpose of punishment which contains general and special deterrence, re-socialization, restoring balance, and upholding legal norms,

[21] Syarifah Rahmatillah, "Formulasi Hukuman Cambuk Dalam Qanun Provinsi Aceh Menurut Tinjauan Kebijakan Hukum Pidana Dan Hak Asasi Manusia," Universitas Islam Indonesia, 2012.

[22] Qanun Jinayat has strengthened the legitimacy of the use of corporal punishment in Indonesia. In fact, the criminal system in Indonesia strictly prohibits the use of caning. The use of caning is torture, cruel, inhuman and degrading punishment. Violating international laws on torture and other cruel, inhuman or degrading treatment contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Indonesia is one of the ratifying countries. https://icjr.or.id/praktek-hukuman-cambuk-di-aceh-meningkat-evaluasi-atas-qanun-jinayat-harus-dilakukan-pemerintah/ diakses tanggal 13 Juni 2023.

4. The rationality of imposing caning to realize the respect for the human rights of the Acehnese people to the values of religious-legal wisdom is embodied in practice and formulated in lex specialist legal norms.

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