

# MODELS OF CANING IN ACEH AND MALAYSIA: A COMPARISON

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## *Abstract*

*One of the punishments imposed on the offender in Aceh is caning based on Qanun Jinayah. This study compares the implementation of caning in Aceh and Malaysia. This study uses qualitative research methods with normative and empirical juridical approaches by applying prescriptive-analytic methods. The implementation of caning punishment in Aceh is the responsibility of prosecutor's office, the executor of wilayatul hisbah. The execution in an open place witnessed by the public according to the purpose of punishment and provides deterrence effect for the community and the convict. Based on regulation, implementation of caning punishment may not be accessible to children, but this cannot be fully implemented due to different district/city government policies. Caning in Malaysia is carried out in prison and witnessed by a few Muslims to achieve the purpose of punishment. In accordance with the conditions of local wisdom in Aceh and Malaysia. The Aceh government needs to provide a deterrent effect on convicts, caning is carried out at the convict's domicile and in accordance with applicable laws and committed to supporting Islamic law, including budget contributions.*

**Keywords:** Model; Caning; Aceh and Malaysia

## 1. Introduction

Over the centuries, Islamic law has developed into a 'very sophisticated' legal system, covering all areas of human life, which is known in contemporary law<sup>1</sup>, including caning. This paper looks at the model of caning in Aceh and Malaysia. Some researchers who have written about caning punishment are M.M Marpaung,<sup>2</sup> Abdul Jalil Salam Iskandar, Mizaj and Azhari Yahya<sup>3</sup>, M.S. Armia<sup>4</sup> and P.M. Lubeck.<sup>5</sup> This research is important, because International crime

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<sup>1</sup> Ro'fah Setyowati, Lastuti Abubakar, and Nunung Rodliah, "Sharia Governance On Islamic Banking: Spiritual Rights Perspective On Consumer Protection In Indonesia," *Diponegoro Law Review* 2, no. 1 (2017): 227–244.

<sup>2</sup> Marina Mary Marpaung and Heru Susetyo, "Canning: Syariah Law Versus Human Rights in Aceh, Indonesia," in *Challenges of Law and Governance in Indonesia in the Disruptive Era II* (Nova Science Publishers, Inc., 2021), 117–128.

<sup>3</sup> Mizaj Iskandar, Azhari Yahya, and Abdul Jalil Salam, "From the Public Space to the Prison Space: Regulation Polemic and the Implementation of Caning Law in Aceh," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 1 (2022): 216–241, <https://ejournal.iainmadura.ac.id/index.php/alihkam/article/view/5646>.

<sup>4</sup> Muhammad Siddiq Armia, "Public Caning: Should It Be Maintained or Eliminated? (A Reflection of Implementation Sharia Law in Indonesia)," *Qudus International Journal of Islamic Studies (QIJIS)* 7, no. 2 (2019): 301–328, <https://journal.iainkudus.ac.id/index.php/QIJIS/article/view/4974>.

<sup>5</sup> P. M. Lubeck, "Nigeria: Mapping a Shari'a Restorationist Movement," in *Shari'a Politics: Islamic Law and Society in the Modern World*, 2011.

statistics indicate that in Islamic countries crime rates are lower than in other countries.<sup>6</sup> This feature of Islamic countries is most often explained by two factors: a) the relatively low level of development, which has a positive effect on crime rates, and b) the strictness of Islamic penal law.<sup>7</sup> Caning was carried out in Aceh after the enactment of a specific law by the central government, namely Law Number 11 of 2006 concerning the Government of Aceh to implement Islamic law. Article 125 of the Law of the Republic of Indonesia Number 11 of 2006, specifies that the implementation of Islamic law in Aceh is regulated through qanun.<sup>8</sup> Qanun is equated with local regulations in other provinces, but the content of these local regulations is different from qanun. Qanun must be based on Islamic principles.<sup>9</sup> One form of this specificity can be seen by the implementation of Islamic law where the community is obliged to obey regulations that precipitate Islamic values. One of the regulations regulated in Aceh is regarding Islamic crimes or those who are better known as *Qanun Jinayah*, namely *Qanun Aceh Province Number 6 of 2014 concerning the Jinayat Law*.<sup>10</sup> In the qanun one of the punishments imposed on the offender is caning. Caning is a type of corporal punishment imposed on a convicted person by flogging his body. The implementation of caning in Aceh is the authority and responsibility of the prosecutor while the executor is *wilayatul hisbah*. At the beginning of the presence of *Wilayatul Hisbah* in Aceh, its authority was first regulated in the decision of the Governor of Nanggroe Aceh Darussalam Number 01 of 2004 about the Organization and Work Procedure of *Wilayatul Hisbah* which was subject to the Islamic Sharia Agency. The status of this institution continues to be improved both in terms of organizational structure and authority with the issuance of Law no. 11 of 2006, which combines the existence of *Wilayatul Hisbah* with the Municipal Police in *Qanun No. 5 of 2007 about Organizational Structure, Work Procedures of Service, and Technical Institutions*. In its duties, *Wilayatul Hisbah* carries out the function of direct enforcement and surveillance in people's

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<sup>6</sup> Abdurrahman Raden Aji Haqqi, "Religiosity In Criminal Law: Islamic Perspective," *Diponegoro Law Review* 4, no. 1 (2019): 1–20, <https://ejournal.undip.ac.id/index.php/dlr/article/view/24129>.

<sup>7</sup> Ibid.

<sup>8</sup> Ria Delta and Erina Pane, "The Implementation of Islamic Qanun Law in the Modern Aceh Society," in *Proceedings of the 1st Raden Intan International Conference on Muslim Societies and Social Sciences (RIICMuSSS 2019)* (Atlantis Press, 2020), <https://www.atlantis-press.com/proceedings/riicmuss-19/125946221>.

<sup>9</sup> Damien Kingsbury, "Devotional Islam and Democratic Practice: The Case of Aceh's Qanun Jinayat," in *Culture, Religion and Conflict in Muslim Southeast Asia: Negotiating Tense Pluralisms*, 2012.

<sup>10</sup> Hudzaifah Achmad Qotadah, Ali Abdul Wakhid, and Is Susanto, "Problems With the Implementation of Qanun Aceh Number 6 of 2014 Concerning Jinayat Law," *Analisis: Jurnal Studi Keislaman* 22, no. 1 (2022): 111–131, <http://www.ejournal.radenintan.ac.id/index.php/analisis/article/view/6556>.

lives. Consequently, this agency has the authority and power to enforce *jihad*, justice, and *amar ma'ruf nahi munkar*.<sup>11</sup>

*Wilayatul Hisbah* is an authorized agency that is formed with the intention of reminding the public about the existing rules, rules that must be followed, how to obey the rules, and actions that must be avoided in order to not to violate the rules. *Wilayatul Hisbah* is one of the implementing bodies of judicial power in Islam which is tasked with enforcing goodness and preventing injustice, such as dealing with criminals that need immediate settlement, overseeing the law, regulating public order, resolving criminal problems, and punishing people who violate sharia law.<sup>12</sup>

The execution of the flogging is carried out after the decision of the shari'a court / court which has permanent legal force. Caning is carried out based on the provisions stipulated in Qanun Number 7 of 2013 concerning the jinayah procedural law/formil law and Aceh governor Regulation Number 5 of 2018 concerning the Implementation of the Jinayat Procedural Law.<sup>13</sup>

In Malaysia<sup>14</sup> sharia caning is imposed under the provisions of the constitution (Perlembagaan Persekutuan Jadual ke-9 Senarai Negeri dan Akta Parlimen, Deed of Sharia Court (Amendment 1984). The constitution states that the Sharia Court in Malaysia may only decide the punishment of perpetrators of Jinayah Syariah violations with a maximum fine of RM 5000, three years' imprisonment and six lashes. In Malaysia, the crimes subject to sharia caning differ from state to state. Relating to caning is regulated under Articles 125 and 126 of the Sharia Jinayah Procedure Act (Guild Areas) 1997 (Act 560), concerning the Methods and Procedures for implementing Sharia Whipping in the Guild Area. The punishment of caning for perpetrators of violations of provisions in sharia law has been carried out after being decided by a sharia court that has permanent legal force. The authority to carry out canings in Malaysia is under the responsibility of the prison chief. In Malaysia there is such a thing as sharia caning and caning in general criminal penalties, so in this research it only discusses sharia caning. This study will see whether the model of caning implementation in Aceh and Malaysia is in accordance with the model of implementing caning in sharia and local wisdom and community culture in both places.

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<sup>11</sup> Arfriani Maifizar, "Wilayatul Hisbah's (WH) Strategy to Enforce the Law against Khalwat Case in Ujung Karang West Aceh Regency," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (2022): 37–52, <https://ijtihad.iainsalatiga.ac.id/index.php/ijtihad/article/view/7077>.

<sup>12</sup> Ibid.

<sup>13</sup> Iskandar, Yahya, and Salam, "From the Public Space to the Prison Space: Regulation Polemic and the Implementation of Caning Law in Aceh."

<sup>14</sup> Harsh Mahaseth and Shifa Qureshi, "The Legality Of Caning In Singapore," *UUM Journal of Legal Studies* 13, no. 2 (2022): 51–76, <https://e-journal.uum.edu.my/index.php/uumjls/article/view/15215>.

Sharia caning has been implemented and practiced both in Aceh and in Malaysia, so the issue that arises in research is what is the model of implementing sharia caning in Aceh and Malaysia? Whether the caning model implemented is in accordance with the values of local wisdom in Aceh and Malaysia.

## **2. Method**

This research uses qualitative research methods with normative juridical and empirical juridical approaches by applying prescriptive-analysis methods. Data collection is carried out through primary data and secondary data. Primary data collection was carried out by conducting in-depth interviews with informants and respondents in Aceh. Meanwhile, the comparison with Malaysia was carried out through literature studies.

## **3. Results and Discussion**

### **3.1. Sharia Caning Model**

Flogging is a form of punishment in Islamic criminal law<sup>15</sup> that aims to provide lessons to recipients and people who see. This is in line with the hadith narrated by Malik of Zaid bin Aslam that at the time of the Prophet Muhammad, that someone claimed to have committed adultery. He was brought a whip from a strong but rather soft tree trunk then ordered to whip it.<sup>16</sup> This means that the whipping device should be as simple as possible. An-Nawawi said, if a person is punished with a whip, then the whip should be medium in size between the size of the stick and the thigh, not too big or too small. If using date palm fronds, then the date palm fronds should be between wet and dry.<sup>17</sup> Caning also seeks to prevent and cleanse society of despicable deeds and customs. Meanwhile, in the case of drinking alcoholic beverages, beatings with hands, shoes and clothes can be carried out based on the history of Abu Hurairah that the Prophet Muhammad SAW asked Abu Hurairah to beat people who drank alcohol with their hands, shoes and clothes."<sup>18</sup>

Blows in caning must be carried out continuously. When flogging, the person in charge of flogging is not allowed to lift the whipping device above the height of his head. Saidina Umar bin

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<sup>15</sup> Muhammad Mutawali, "Customary Law of Dou Donggo Bima from the Perspective of Islamic and Indonesian Positive Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 1 (2022): 1–27, <https://ejournal.iainmadura.ac.id/index.php/alihkam/article/view/6007>.

<sup>16</sup> Imam Malik, *Al-Muwaththa*, n.d., 516; Muhammad Az-Zuhaili, *Al-Mu'tamad Fiqih Imam Asy-Syafi'i* (Puchong-Selangor: Berlian Publication Sdn. Bhd, n.d.), 618.

<sup>17</sup> Muhammad as-Sayyid Sabiq, *Fiqh As-Sunnah, Dar Al-Fath Al-I'lam Al-'Arabi* (Kuala Lumpur: Al-Hidayah Publication, 2009).

<sup>18</sup> Wahbah M. Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu II* (Damascus: Dar Al-Fikr, 2002).

Khattab once punished the whipping of lawbreakers in her time. He said to the whipper: "whip him and don't raise your hand until you see his armpits." When Umar saw that the blow was a little stronger than it should have been, he said: "You did not punish but killed him."<sup>19</sup> The part that should be avoided to be hit is the face and areas that can be harmful such as the genitals. According to the history of Hunaidah ibn Khalid Al-Kanadi, that he had witnessed Ali ibn Abi Talib had imposed limits on a man. At that moment Ali said to the whipper: "Hit him and every body has the right to feel the pain of the whip. Avoid hitting his face and pubic area."<sup>20</sup> A history from Saidina Umar bin Khattab that he found a *ja'riah* who had violated the limits in his time, then he said, "You go to him, beat him and do not tear his skin."<sup>21</sup>

At the time of whipping, the offender must be in good health and strong and the time and weather favorable and wear modest clothing. In practice, the shirt of the person to be punished with the punishment of *hadd* should not be opened and the person who was convicted should not be spread out on the ground and should not tie his hands behind the shoulders. Proof of this is the words of Ibn Mas'ud that the Prophet Muhammad said: "does not apply at all to Muslims, self-opposition on the earth by tugging hard at him, stripping naked without clothes, tying his hands together and shackling himself."<sup>22</sup>

For a convict who is pregnant, then the execution must be carried out after the woman gives birth to her child and if she is still ill the execution should be postponed until she is completely healthy under the pretext of the hadith of *Jahniyah*, of Umran bin Hashin, "if she has given birth to her child, then bring her to me."<sup>23</sup> Then if the perpetrator is sick and there is no hope of recovery, then punishment must be carried out immediately on the condition that the tools used for whipping do not injure him. In a history the Prophet Muhammad once ordered a whip to be carried out against adultery and had to be whipped 100 times.<sup>24</sup> In this case it means that there is no reason to delay the implementation of the caning under any circumstances except for women who are pregnant and breastfeeding.

Flogging must be carried out at the right time and conditions, that is, not in very hot and cold weather because it can cause losses. Its implementation should be in front of a group of Muslims. In the Qur'an Allah Almighty says in Surah an-Nur verse 2: "... and let (the execution of) their

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<sup>19</sup> Ibid.

<sup>20</sup> Az-Zuhaili, *Al-Mu'tamad Fiqih Imam Asy-Syafi'i*.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Sabiq, *Fiqh As-Sunnah, Dar Al-Fath Al-I'lam Al-'Arabi*.

punishment be witnessed by a group of believers."<sup>25</sup> The execution of the caning must be witnessed by the public or witnessed by a group of believers because the execution of the caning is a lesson and prevention for those who witness the punishment.

### **3.2. Model of Caning in Aceh**

The execution of caning in Aceh is carried out based on qanun or regulations and their implementation after going through a judicial process that obtains permanent legal force. This shows that caning in Aceh is carried out not contrary to the law and human rights, because the implementation process is in accordance with the provisions of the legislation and constitutions.<sup>26</sup> The implementation of caning in Aceh was initially based on the 2005 Aceh Governor's Regulation on Technical Guidelines for Whipping Uqubat then based on Qanun Number 7 of 2013 concerning the Jinayat Procedural Law and Aceh Governor Regulation Number 5 of 2018 concerning the Implementation of the Jinayat Procedural Law. In Article 247 the execution of caning is the authority of the prosecutor.<sup>27</sup> The implementation of the 'Uqubat whipping is carried out by the prosecutor by preparing the flogging site in coordination with the Chief Justice of the Sharia Court, the Head of the Health Office, and the Agency in charge of *Wilayatul Hisbah* (Article 252 paragraphs 1 and 252 paragraphs 2). At the request of the prosecutor, the Head of the Health Service will prepare a doctor to examine the sentence before and after flogging (Article 254).

In Governor Regulation Number 5 of 2018, it is stated that female convicts will be whipped by female executors as stated in article 48 paragraph 2. In the jurisdiction of Idi Regency, Aceh province, there was a female convict who was caned by a male executor, so in this case an objection was raised by the female convict's attorney during the third caning who objected to the male executor who was caning. female convict, so that the caning sentence against the woman was postponed. This happened because there were no female whippers in Idi Regency, Aceh Province.<sup>28</sup> So the Idi prosecutor's office requested an application and coordinated with the

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<sup>25</sup> Muhammad Noor Haji Hashim and Abdullah Basmeh, *Tafsir Pimpinan Ar-Rahman Kepada Pengertian Al-Quran : (30juz)* (Kuala Lumpur: Darul Fikir, 2010).

<sup>26</sup> "The Preamble to the Aceh Qanun Number 7 of 2013 Concerning the Jinayat Procedural Law," 2013; "The Governor's Regulation Number 5 of 2018 Concerning the Implementing Regulation of the Jinayat Procedural Law," 2018.

<sup>27</sup> Helmi Helmi et al., "Implementation Place of 'Uqubat Canings in Fiqh Perspective (Analysis of Aceh Governor Regulation Number 5 of 2018)," *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)* 2, no. 4 (2019): 65–73, <https://bircu-journal.com/index.php/birci/article/view/553>.

<sup>28</sup> Yogi Febriandi, Muhammad Ansor, and Nursiti Nursiti, "Seeking Justice through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *Qudus International Journal of Islamic Studies (QIJIS)* 9, no. 1 (2021): 103–140, <https://journal.iainkudus.ac.id/index.php/QIJIS/article/view/8029>.

provincial *Wilayahul Hisbah* to send a female executor so that the implementation of the delayed caning could be continued on the upcoming schedule.<sup>29</sup> Therefore, in this case, it is necessary in the execution of caning to be attended by attorneys, supervisory judges and related parties so that the implementation of caning is in accordance with standard operating procedures (SOP). In this regard, in the jurisdiction of Langsa City, there is also no female executor so that the implementation of caning punishment against women is carried out by the male whipper executor. In this case, there is no objection either from the convict himself or the supervisory institution so that the execution of the caning can be carried out until it is completed, but in the future the caning will be carried out in accordance with the procedures and applicable laws and regulations.<sup>30</sup>

Article 262 states that caning shall be carried out in an open place and be visible to the person present, must not be attended by children under the age of 18. The implementation of caning is carried out on a pedestal measuring 3 X 3 meters which can be witnessed by the crowd. The distance between the penalized standing place and the spectator society is 12 meters. Prosecutors, supervising judges, appointed doctors and flogging officers stand on top of the flogging site or around it during flogging. Flogging sites in Aceh canings are carried out in an open place that can be witnessed by the general public, it is in accordance with the purpose of the punishment itself, which is to teach lessons to the convicted convict and the people who witnessed the caning carried out.<sup>31</sup>

The place where the execution of punishments is carried out in Aceh, some are permanent such as in Bustanussalatin Park, Banda Aceh City<sup>32</sup>, While in Aceh Besar<sup>33</sup>, North Aceh<sup>34</sup>, and East Aceh<sup>35</sup> in the courtyard of the Mosque where the defendant came from so that there is no permanent place, while in Langsa City the execution of caning was carried out in the courtyard of the office of the Islamic Sharia Service which was previously carried out in Merdeka Square. The

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<sup>29</sup> Harri, "The Public Prosecutor of the Idi District Attorney's Office, Interviewed on August 1, 2022," 2022.

<sup>30</sup> Mastura, "Head of Wilayahul Hisbah Division of the Langsa City Islamic Sharia Service, Interviewed on August 1, 2022," 2022.

<sup>31</sup> Fauzi, "Head of the General Criminal Section of the Lhoksukon District Attorney's Office, Interviewed on July 26, 2022," 2022.

<sup>32</sup> Yudha, "Head of the General Criminal Section Interviewed on July 13, 2022," 2022; Fitriani, "Head of the Civil and State Administration Section, Kejaksaan Negeri Banda Aceh, Interviewed on July 13, 2022," 2022; Nasrullah, "Head of the Civil Service Police Unit Agency and Wilayahul Hisbah Banda Aceh Interviewed on July 13, 2022," 2022.

<sup>33</sup> Muhajir, "Head of the Evidence Section at the District Attorney's Office in Jantho Interviewed on July 13, 2022," 2022.

<sup>34</sup> Fauzi, "Head of the General Criminal Section of the Lhoksukon District Attorney's Office, Interviewed on July 26, 2022"; Mulyadi, "Head of the Evidence Section at the Lhoksukon District Attorney's Office Interviewed on July 26, 2022," 2022.

<sup>35</sup> Harri, "The Public Prosecutor of the Idi District Attorney's Office, Interviewed on August 1, 2022."

execution of caning in Lhokseumawe City was carried out at Tunas Bangsa Stadium which was previously held at Hiraq Square beside the Islamic Centre Mosque.<sup>36</sup>

The model of implementing a short, fast and low-cost caning should be carried out at the place where the convict lives which is only attended by village officials and priests and witnessed by the local community in accordance with the purpose of the punishment in qanun which is to provide shame and deterrent effect to the convict who also teaches a lesson to the people who see the caning sentence.<sup>37</sup> The whipping law implemented in Aceh, which can be witnessed by the community and involves many institutions, is a unique model and creates a close relationship between the institutions involved as a sense of responsibility for the implementation of Islamic law.<sup>38</sup>

According to the theory of punishment, the purpose of punishment itself is to scare people not to commit crimes either by scaring the crowd (general preventive) or frightening certain people who have committed crimes so that in the future they do not commit crimes again (speciale preventive). The purpose of punishment is also to educate or correct people who commit crimes to become good people in character so that they benefit society.<sup>39</sup> The implementation of caning in Aceh is in accordance with the theory of punishment, namely, to frighten the crowd who witnessed the punishment being carried out and educate the convicted person to change for the better.

The whipper executor was present at the flogging site wearing a cloth face covering. Lashing is performed on the back (shoulders to hips) of the convict. The distance between the prisoner and the whipper executor is between 0.70 meters to 1 meter with the position where the whipper executor stands on the left or right side of the convict. Whipper executors can make horses with a distance of the left and right legs of at most 50 cm. The whipper can bend the hand as well as swing to the side or back and the position of the tip of the hand is not higher than the shoulder. In the flogging process, if the whipper executor is unable to complete the work, then the flogging will be continued by the other whipping executor. The whipping carried out the flogging by order of the prosecutor and the lashing that has been carried out cannot be reversed (Article 264).

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<sup>36</sup> Kardono, "Head of the General Crimes Section of the Lhokseumawe District Attorney's Office, Interviewed on July 25, 2022," 2022.

<sup>37</sup> Harri, "The Public Prosecutor of the Idi District Attorney's Office, Interviewed on August 1, 2022"; Fauzi, "Head of the General Criminal Section of the Lhoksukon District Attorney's Office, Interviewed on July 26, 2022."

<sup>38</sup> Fitriani, "Head of the Civil and State Administration Section, Kejaksaan Negeri Banda Aceh, Interviewed on July 13, 2022."

<sup>39</sup> Wirjono Prodjodikoro, *Hukum Acara Pidana Di Indonesia* (Bandung: Sumur Bandung, 1981), 16.



Under Article 265, the convict is required to wear the clothes provided by the prosecutor and be in a free standing position without support. Then at the request of the convict or doctor<sup>40</sup>, the convict can be whipped while sitting cross-legged or standing on a support but must remain in a free state. Furthermore, flogging will be temporarily stopped if ordered by the doctor on medical considerations, or because the convict escaped from the flogging site before the 'Uqubat whipping was completed (Article 266).

The flogging was postponed due to the doctor's order due to medical considerations or because the convict fled at the time the flogging was carried out, the convict would be returned to the detention center, then the prosecutor will determine the time of the new flogging after the convict is declared healthy and the convict is transferred in accordance with the procedure contained in article 252.

Article 270 states that if three months after the decision of the Court which has the force of law is still handed over to the prosecutor, the sentence has not been carried out without a valid reason, then the prosecutor is deemed to have shirked his duties and may be subject to punishment in accordance with the applicable laws and regulations. In the event that the execution of caning has not been carried out due to constraints in the budget as in North Aceh it is only budgeted in a year 3 schedules for flogging executions. This will create obstacles in the implementation because it must be possible to arrange the schedule of prisoners who will be whipped. Likewise, in Idi in a year, the budget is only budgeted 3 times. Relating to the budget is because inmates within a period of 30 days must be executed. So if it is not executed, there will be a cut in the caning and what if the caning sentence will be exhausted by the detention period.<sup>41</sup>

Meanwhile, in Langsa City, the budget approved by the local government for the execution of caning is 6 schedules in a year so that in 2 months it can be carried out 1. For prisoners on the waiting list, if they have not been whipped, they will be reduced by lashes according to the period of detention and this matter will be coordinated by the prosecutor as the person in charge of the execution with the supervising judge.<sup>42</sup> So in this case at every execution of the caning sentence will be attended by the judge.

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<sup>40</sup> Abdul Halim, "Non-Muslims in the Qanun Jinayat and the Choice of Law in Sharia Courts in Aceh," *Human Rights Review* 23 (2022): 265–288, <https://link.springer.com/article/10.1007/s12142-021-00645-x>.

<sup>41</sup> Harri, "The Public Prosecutor of the Idi District Attorney's Office, Interviewed on August 1, 2022"; Fauzi, "Head of the General Criminal Section of the Lhoksukon District Attorney's Office, Interviewed on July 26, 2022"; Mulyadi, "Head of the Evidence Section at the Lhoksukon District Attorney's Office Interviewed on July 26, 2022"; M. Lufti, "Judge at the Lhokseumawe Sharia Court, Interviewed July 25, 2022," 2022.

<sup>42</sup> M. Daut, "Head of the General Criminal Section of the Langsa District Attorney's Office, Interviewed on July 14, 2022," 2022; Syahril, "Head of the General Criminal Section of the Langsa District Attorney's Office, Interviewed

In terms of the commitment of local governments to the implementation of Islamic law, especially the *jinayah* law<sup>43</sup>, the local government only budgets for the execution even with a very minimal amount. Local governments should also budget for the level of investigation, prosecution, trial as mandated in the legislation.

With regard to the obstruction of caning penalty, it is stated in Article 271 that the execution of *'uqubat* does not become expired in the event that the person is not detained or in a state of illness so that the punishment cannot be carried out. Likewise, if the sentence is not carried out or is not completed, then if a new sentence is imposed, a sentence will be carried out at once.

After the execution of the caning sentence, the prosecutor will make a proclamation of the execution of the caning which will then sign it together with the supervising judge and the doctor as witnesses. The minutes regarding to the flogging that has not been fully implemented and the reasons for the delay and temporary suspension and the number of lashes that have been carried out and that have not been implemented must be written in the minutes. Then the prosecutor takes the the convict to the place provided for release or return to his family or to the detention center to complete the rest of the detention period or wait for the time of further enumeration. Then the prosecutor handed over a copy of the minutes to the convict or his family as evidence of having served all or part of the sentence as mentioned in Article 273. Furthermore, based on Article 276, at the request of the prosecutor, escort and security guard in the implementation of caning is ensured by the Police or *Wilayahul Hisbah* regency /city.

The model of caning in Aceh when viewed from an easy mechanism, short time and light costs, then from cases of caning within 30 days after a court decision that has legal force that must be implemented immediately. Regarding the place of execution, there is a permanent one, especially in the city government, while in the district government the place of execution of the caning is not permanent depends on the policies of each region according to the conditions and situation of the field and the purpose of the punishment itself. Security is not a problem because it only involves *Wilayahul Hisbah* as well as the local police. In terms of the costs required for the execution of the caning penalty is very minimal in one very light execution schedule.

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on July 14, 2022,” 2022; Juwaini, “Judge and Deputy Chief Justice of the Syar’iyyah Banda Aceh Court Interviewed on July 14, 2022,” 2022.

<sup>43</sup> Haqqi, “Religiosity In Criminal Law: Islamic Perspective.”

### **3.3. Model Caning in Malaysia**

In Malaysia, Islamic crimes leading to caning differ from state to state. This is due to the fact that many states do not use uniform laws that have been approved by the King's Council in relation to Islamic criminal law. However, the maximum caning penalty that can be imposed is no more than six lashes, then the violation of sharia threatened with caning by state is Federal Territory: (Islamic Criminal Offences Act (Federal Territory) 1997. Offences of perverted teachings, incest deeds, prostitution, *munchikari*, adultery, sodomy and *musahaqah*, may be fined no more than RM5,000 or imprisonment for not more than three years or flogging no more than six lashes or a combination sentence.

Each state in Malaysia has its own Islamic Criminal Offences Act that has been enacted in its respective states. According to Ahmad 'Azam Mohd. Syariff, most of the Islamic Criminal Acts of the states throughout Malaysia all contain legal provisions that emphasize on value and moral aspects in particular such as Islamic crimes<sup>44</sup> regarding *khalwat* (seclusion)<sup>45</sup>, adultery, *musahaqah* and improper behavior in public places.<sup>46</sup> All the criminal acts mentioned in the Islamic Penal Code are intended to prevent the public, especially Muslims in Malaysia, from committing crimes and heinous acts prohibited by the Islamic religion. Then regarding the form of punishment, it is more about the punishment of *takzir* (types of offence in Islamic law).<sup>47</sup>

With regard to caning, Malaysia has been applied for a long time in general crimes, only against adult men. Islamic Penal Law is imposed against Muslims based on state constitutions authorizing religious courts to punish with imprisonment of not more than three years or a fine of not more than RM 5000 or flogging of not more than six lashes or a combination of the three. In the implementation of sharia caning in Malaysia will look at provisions including the Islamic Criminal Procedure Law (Johor State) 2003, Article 125; Islamic Criminal Procedure Law (Selangor State) 2003, Article 125; Sharia Criminal Procedure Law (Penang State) 1996, Article 125; Enactment of Sharia Criminal Procedure (Negeri Sembilan State) 2003, Article 125. Enactment of the Islamic Criminal Procedure Law (Kelantan State) 2002, Article 125; Islamic

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<sup>44</sup> Halim, "Non-Muslims in the Qanun Jinayat and the Choice of Law in Sharia Courts in Aceh."

<sup>45</sup> Yasrul Huda, "Islamic Sharia In Aceh And Its Implications In Other Regions In Indonesia," *PETITA: Jurnal Kajian Ilmu Hukum dan Syariah* 5, no. 2 (2020): 189–201, <https://petita.ar-raniry.ac.id/index.php/petita/article/view/98>.

<sup>46</sup> Ahmad 'Azam Mohd Shariff, "Prosedur Pendakwaan Jenayah Syariah: Analisis Ke Atas Peruntukan Undang-Undang Di Bawah Akta Prosedur Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 Dan Akta Keterangan Mahkamah Syariah (Wilayah-Wilayah Persekutuan) 1997," *Jurnal Undang-Undang Dan Masyarakat* 15 (2011): 1–18.

<sup>47</sup> Janina Wiszniewska et al., "The Tajno Ultramafic-Alkaline-Carbonatite Massif, Ne Poland: A Review. Geophysics, Petrology, Geochronology and Isotopic Signature," *Geological Quarterly* 64, no. 2 (2020): 402–421.

Criminal Procedure Law (State of Malacca) 2002, Article 125; Islamic Criminal Procedure Law (Pahang State) 2002, Article 125 and Islamic Criminal Procedure Law (Perak State) 2004, Article 125.

Furthermore, based on Articles 125 and 126 of the Sharia Criminal Procedure Law (Federal Territory) 1997 (Law 560), the model for implementing caning is as follows: 1) The tool used for whipping, excluding the handle, must be of the same kind and be made of rattan or small branches without joints and the length does not exceed 1.22 meters and the thickness does not exceed 1.25 centimeters; 2) Examination, Before serving the sentence, the offender must be examined by a government health officer to certify that his health is in good condition to serve the sentence; 3) The offender is pregnant, If the offender is pregnant then the sentence is suspended until the expiration of the two-month period after delivery or miscarriage, depending on the case; 4) Place of conviction, The conviction shall be carried out in front of a government medical officer in any place ordered by the court or at a place designated by the government; 5) Caning officer, The person appointed to carry out the sentence must be "fair and mature"; 6) Flogging method, The person should use a whipping device of medium strength without raising the hand above the head so as not to injure the skin of the offender. After one whipping, he had to lift the whipping device up and not pull it. Whipping can be done to all parts of the body except the face, head, abdomen, chest or parts of difficult tools<sup>48</sup>; 7) Clothing, the convict shall wear clothing in accordance with Islamic law; 8) The state of the offender, If the perpetrator is male, then the caning should be carried out while he is standing and for the woman, while sitting; 9) Postponement of the implementation of flogging, If at the time of the implementation of the flogging the health officer declares that the offender can no longer receive the whip, then it should be postponed until his body is declared healthy. Then, if the medical officer declares that the offender-due to old age (over 50 years old)<sup>49</sup>, disability or other reasons - cannot serve the sentence in whole or in part, then the case should be referred to a court that can order the sentence to be carried out in a manner deemed reasonable; and, 10) The time of the whip, in the event that the offender is only whipped, then he must be treated as if sentenced to imprisonment until the sentence is carried out. Then if the defendant is sentenced to caning other than imprisonment, then the caning cannot be carried out if an appeal is made and as soon as the appellate court upheld.

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<sup>48</sup> Ramizah Wan Muhammad and Mohamed Affan Shafy, "Constructing An Islamic Criminal Law System In Malaysia," *Mimbar Hukum* 32, no. 3 (2020): 333–345, <https://journal.ugm.ac.id/jmh/article/view/56217>.

<sup>49</sup> Mahaseth and Qureshi, "The Legality Of Caning In Singapore."

**Table 1.**  
**Differences the Implementation of Caning Punishment in Aceh and Malaysia**

	<b>Aceh</b>	<b>Malaysia</b>
Place	implementation in an open place that can be witnessed by the public	Implemented in prison
Executor entry	Its implementation is the responsibility of the prosecutor's office, the executor is the Wilayatul Hisbah police	The executor is a prison officer who has been appointed and who has been trained
Legal basis and tools used	Aceh Qanun number 7 of 2013	articles 125 and 126 of the sharia criminal procedure law (federal territories) 1997 (UU560)
position when executed	the male perpetrator during the caning stood; woman sitting barefoot (squatting)	The female perpetrator sits on a pedestal or some kind of chair where the convict sits Infirm convicts or over 50 years old have their own arrangements
Perpetrator's age	There are no regulations governing convicts over 50 years of age. while young convicts or children will follow national law	The whip can be applied to all parts of the body except the face, head, stomach, chest or sensitive places
Area that can be caned	caning can only be done on the back: from the back to the shoulders	The convict who will be caned must wear clothing that covers the private parts
clothes	Law enforcement officers have provided thin clothing that covers the private parts for convicts who are being caned	as retaliation so that the condemned person feels the punishment himself and gives him conscience so that he does not repeat the prohibited act again
punitive purposes	As guidance and learning for all convicts	

The implementation both in Aceh and Malaysia, there are differences and similarities. Caning in Malaysia is carried out in prisons and the officers who perform flogging are prison officers who have been appointed and trained to perform flogging. While in Aceh the implementation of caning is the responsibility of the prosecutor's office, the executor is wilayatul hisbah. The place of implementation is in an open place that can be witnessed by the public or crowds.

The whipping tools used, in Malaysia are regulated in Articles 125 and 126 of the Sharia Criminal Procedure Law (Federal Territory) 1997 (Law 560), as well as in Aceh it has been clearly regulated about the tools used for whipping. The male perpetrator at the time of the flogging stands while the female one sits, the difference is that in Malaysia the female perpetrator sits on a fulcrum or some kind of chair that is the convict sitting. Meanwhile, in Aceh, female perpetrators sit without a pedestal.

The further difference between Articles 125 and 126 of the Sharia Criminal Procedure Law (Federal Territory) 1997 (Law 560), in Malaysia there are provisions regarding convicted persons who are weak or over the age of 50, but there are no special provisions. Regarding young convicts

or those committed by children. Currently in Aceh there are no rules governing convicts over the age of 50 but young or child convicts will follow the national law on the juvenile justice system.

Meanwhile, the similarities in the implementation of the caning law both in Aceh and Malaysia are seen in several ways, including: Perpetrators who will be whipped will be checked for health first before being whipped. Before serving a sentence, the offender must be examined by a government medical officer to certify that his health is in good condition to serve the sentence. Medical examinations before being whipped have provisions in these two areas but the mechanisms are different. Another similarity is how to whip, then the whip uses a whip tool of medium strength without raising the hands above the head so as not to injure the skin of the perpetrator. After one whipping, he had to lift the whipping device up and not pull it. In Malaysia lashing can be done to all parts of the body except the face, head, abdomen, chest or sensitive places. While in Aceh flogging can only be done on the back from the back to the shoulders.

The implementation of sharia caning in Malaysia is carried out behind closed doors in prison and punishment is carried out by prison employees. The punishment carried out was witnessed by only a few people. This is in accordance with the purpose of punishment, namely punishment only in retaliation. So that the objective of his punishment is achieved where by the execution of the punishment against the conviction he will feel the consequences of his deeds and will be punished. Furthermore, if we look at the theory of retaliation, then criminal penalties are imposed solely because people have committed crimes or criminal acts. The theory of retribution or absolute theory is based on the idea that the criminal does not aim to be practical, such as fixing the prisoner but the criminal is an absolute prosecution, not just something that needs to be imposed but becomes a necessity, in other words the nature of the criminal is retaliation (revenge). In addition, the absolute theory<sup>50</sup> emphasizes that punishment is retribution for the wrongs that have been committed so that it is oriented towards the act and lies in the occurrence of the crime itself. This theory puts forward that sanctions in criminal law are imposed solely because people have committed crimes that are an absolute consequence that must exist as a retaliation to the person who committed the crime so that the sanctions aim to satisfy the demands of justice.

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<sup>50</sup> Ainul Azizah, "Criminal Sanctions for Insider Trading: Comparison with Singapore," *Jurnal Dinamika Hukum* 19, no. 2 (2019): 484–502, <https://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/2405>.

#### **4. Conclusion**

The model of caning implementation both in Aceh and Malaysia, there are differences and similarities in its implementation. Caning in Malaysia is carried out in prisons while in Aceh the executor is wilayatul hisbah and take place in public or crowds. In Malaysia as well as in Aceh, the male perpetrator at the time of the flogging stands while the female one sits, the difference is that in Malaysia the female perpetrator sits on a fulcrum or some kind of chair that is the convict sitting. Meanwhile, in Aceh, female perpetrators sit without a pedestal. The further difference, in Malaysia there are provisions regarding weak or over the age of 50 convicted persons. In contrast, in Aceh there are no such regulation but young or child convicts will follow the national law on the juvenile justice system.

The similarities in the implementation of the caning law both in Aceh and Malaysia are perpetrators will be checked for health. Medical examinations before being whipped. Another similarity is the whip uses medium strength without raising the hands above the head not to injure the skin of the perpetrator. After one whipping, he had to lift the whipping device up and not pull it. In Malaysia lashing can be done to all parts of the body except the face, head, abdomen, chest or sensitive places. While in Aceh flogging can only be done on the back from the back to the shoulders. The next similarity is the perpetrator must wear clothes that cover the aurat. The difference is in Aceh, law enforcement officials have provided thin. The whip officer in Aceh was covered in the face to protect the safety. The caning in Aceh take place in public space to create the convict shame meanwhile in Malaysia it is carried out in a closed place.

The Aceh government must have a commitment, especially in budgeting starting from investigations, prosecutions and trials as well as the implementation of caning. Caning is carried out in Aceh as a form of punishment in qanun as mandated by law as a form of specificity in Aceh. In Malaysia, the implementation of Islamic law should be expanded again not only to the extent of takzir but all of them in accordance with Islamic law.

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