

Legality of Punishment in Malaysia: Educating Malaysians on Syariah Caning Punishment

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Abstract: The issue of Syariah caning punishment is nothing new. However, the recent constant criticism in Malaysia propagating against its enforcement has prompted the researchers to conduct a brief study on the issue of Syariah caning and its rejection by a portion of the public. Throughout this study, the researchers observe that there is a minor non-compliance to the original method of caning as suggested by the Syariah. However, such minor non-compliance could definitely hamper effectiveness of punishment, deterrence and education on the society. This study also identifies the problem of ignorance on the actual fact and truth on Syariah caning among the general public. Last but not least, this study suggests that the Syariah caning procedures should be strictly adhered to if the desired effectiveness and result are to be achieved. As such the relevant authorities should be educated on the best and proper way of enforcing the said punishment so as to achieve the desired result. The researchers also feel that concerted efforts by all parties should be put in to educate the public more on the actual facts of this punishment.

Key words: Syariah caning punishment, Syariah caning procedures, punishment, deterrence, education

INTRODUCTION

Perception of Malaysian public towards syariah caning punishment

A brief insight: The general Malaysian public has always had mixed opinions on Syariah caning punishment. The loyalists have always defended the said punishment saying that Syariah caning should be differentiated from the contemporary caning carried out by the prison department under the man-made federal legislations. They are of the view that Syariah caning, if carried out in strict compliance with the Syariah principles, would definitely be able to punish, deter as well as educate the convict and the general society. With such desired aims and result, Syariah caning punishment would be able to achieve what the normal contemporary caning fails to achieve all these while that is effective decrease of national crime rate. Meanwhile, the sceptics have always perceived the said punishment negatively. Syariah caning punishment has always been claimed as impractical, ineffective and barbaric. These ignorant muslims and non-muslims often used the above claims as basis of their criticism.

Hence, this study aims to highlight the actual method of caning punishment as propagated by the Quran and the Sunnah. This is important as such enlightening could help to dispel all the myths and misconceptions surrounding this punishment.

CANING PUNISHMENT: LEGAL BASIS IN SYARIAH

Basically caning or whipping punishment is of hadd in nature. Some call it caning punishment, referring to the use of cane in whipping up the convict. Others refer it as whipping punishment in reference to the nature of whipping in its enforcement. Such punishment is applied in hadd criminal offences such as adultery and liquor drinking (Abu Zahrah, 1974).

It must always be remembered that an accused can only be convicted of a Syariah criminal offence and be sentenced to whipping or caning if the prosecution are able to prove the two elements beyond reasonable doubt:

- That the accused has committed criminal offence. The Prophet SAW once said that the punishment of hudud is lifted in matters of doubt (Rushd, 1995)

- That the accused has deliberately and intentionally committed the offence. Allah SWT says in the Quran in Al Ahzab, verse 5 which means:

But, there is no blame on you if ye make a mistake therein: (What counts is) the intention of your hearts. And God is Oft returning, most Merciful (Ali, 1938)

The Prophet SAW once said in a hadis which means:

There is no obligation on my ummah in matters of mistake, forgetfulness and everything which is forced on him (Al Nubhan, 1988)

Caning or whipping punishment in adultery offence is mentioned in both the Quran and the Sunnah. Indeed adultery is considered in al Isra', verse 32 as heinous and immoral (Ali, 1938). Hence, it warrants heavy punishments such as stoning and whipping (Qawiy, 2003). Stoning punishment is meted out to an accused who is married at the time of commission of adultery (Siddiqi, 1985; Rushd, 1995). Meanwhile, whipping punishment is meted out to an accused who is a bachelor at the time of commission (Rushd, 1995; Qawiy, 2003). Such whipping punishment is generally mentioned in al Nur, verse 2 (Ali, 1938). The Sunnah of the Prophet SAW, meanwhile explains further about whipping in adultery cases. The Prophet SAW said to the following effect which means:

An unmarried adulterer with an unmarried adulteress, both will be punished with a hundred whippings and a year in banishment. A married adulterer with a married adulteress, both will be punished with a hundred whippings and stoning

Eventhough caning punishment is originally of hadd in nature, the ulama' is of the opinion that it could also be a punishment in ta'zir offences (Mehat, 1991). The only difference is that the number of caning is much lesser as compared to the number in hudud offences (Mehat, 1991). In one of the hadith in Sahih Muslim, Sharh al Nawawi, it was reported by Abu Barda Ansari that the Prophet SAW once said to the following effect which means:

Whipping punishment (in ta'zir cases) is not supposed to exceed more than ten strokes, except in hudud cases which is under the rights of Allah (Sahih Muslim, Vol. 3, Hadis No.: 4234) (Mehat, 1991)

In another hadith in Bayhaqi, Sunan, reported by Ibn Abbas, the Prophet SAW said to the following effect which means:

Those who raised the punishment of non-hudud offences to such a degree that it reaches the degree of hudud punishment, are indeed, transgressors (Bayhaqi, Al Sunan al Kubra, Vol. VIII) (Mehat, 1991)

In the last 2 years, caning punishment has come under close scrutiny. The Malaysian public is divided on the issue. While some are in favour of its enforcement, a substantial portion of the society are clearly against it. Those who are against enforcement of Syariah caning often claim it to be barbaric, ineffective and impractical. This research hence aims at dispelling the above-said misconceptions against the punishment. In its explanation, reference will be made to Syariah principles and relevant legal provisions under the Syariah Criminal Procedure (Federal Territories) Act 1997 on whipping.

RESEARCH METHODOLOGIES ADOPTED IN THIS RESEARCH

Being purely legal and qualitative in nature, this research is built mainly on library research as well as field research. As such methodologies such as critical analysis as well as content analysis are used. In addition, information from surveys and interviews are gathered as well.

Library research was conducted on relevant materials on caning punishment. Several materials such as books and articles written by scholars on contemporary and Syariah caning were reviewed and scrutinised. Legal provisions on whipping under the Syariah Criminal Procedure (Federal Territories) Act 1997 were also examined. The main objective of the study was to obtain a clear fact on the concept of whipping punishment under Syariah criminal law. The methodologies of critical as well as content analysis were used in digesting all information. This research also adopted a comparative approach by comparing the basic Syariah caning principles with provisions on whipping under the Syariah Criminal Procedure Act (Federal Territories) 1997. It also drew comparisons between the above legal provisions and the provisions under Pakistan's Execution of The Punishment of Whipping Ordinance, 1979 (Ordinance No.: IX of 1979). The above comparisons were made to obtain a clearer picture of enforcement of caning or whipping.

Interviews were also being carried out to gauge the level of understanding of Malaysians on various issues related to Syariah caning. Several officers from the Malaysia Prison Departments as well as officers from several states' Syariah Enforcement Agencies were interviewed. In addition, the general public were also interviewed as well. Some 235 respondents have been

interviewed. These respondents came from all walks of life. They came from urban, sub-urban as well as rural areas. Specific questions were asked to test and gauge their understanding on Syariah caning punishment as well as their perceptions toward it. These respondents were chosen from the states of Kuala Lumpur, Johor, Penang and Pahang. The data and findings obtained were later used to support the discussions and arguments on legal provisions pertaining to Syariah whipping punishments.

ENFORCEMENT OF SYARIAH CANING: LEGAL PROVISIONS AND METHODOLOGIES UNDER SYARIAH CRIMINAL PROCEDURE (FEDERAL TERRITORIES) ACT 1997

Legal provisions pertaining to execution of caning or whipping could be found in most Syariah Criminal Procedure Enactments in Malaysia. Section 125 of the Syariah Criminal Procedure Act (Federal Territories) 1997, for instance, spells provisions pertaining to whipping punishment. These provisions are indeed almost identical to that of sections 4-7 of the Execution of The Punishment of Whipping Ordinance, 1979 (Ordinance No.: IX of 1979), Islamic Republic of Pakistan.

Section 125(2) provides specifications for the actual whip to be used for caning. It must be made of skin or rattan, smooth and even. It must be not >1.22 m in length and not >1.25 in diameter. The main reason of determining the length and diameter of the whip is to ensure that the objectives of punishment, reform and deterrent are achieved without causing unnecessary injury to the convict. Section 125(3) meanwhile provides for other additional guidelines to be followed in enforcement of caning punishments such as:

- Before the caning is carried out, the convict must be medically examined by a certified medical officer (section 125(3)(a)). This is to ensure that the convict is in good health to undergo such punishment. The Shafie and Hambali schools of thought give a guideline on this:
 - Medical officer must be present to ensure that the caning does not cause death to the convict
 - Should the convict is too old or weak, the punishment must be carried out in the manner and in intervals so as to avoid death
 - Should the convict is sick, the enforcement should be delayed until he is certified healthy to undergo such punishment
- Should the convict is a pregnant female, the whipping should be postponed to a date which should be of two months after delivery or abortion (section 125(3)(b))

- The caning or whipping should be carried out in the attendance of a certified medical officer. It must also be carried out at a public premise ascertained by the ruling government (section 125(3)(c)). The Shafie, Maliki, Hanafi and Hambali schools of thought are in consensus that such whipping punishment be carried out in public. This according to the ulama' is in line with injunction in al Nur verse 2 which means and let the punishment (of whipping) be witnessed by a group of those who have faith
- The executor performing the caning must be of just and matured in nature (section 125(3)(d))
- Every stroke of caning performed by the executor must be of moderate in nature (section 125(3)(e)). The executor, in every stroke, must not raise his hand higher than his head. He must also ensure that the skin of the convict does not bleed or blistered from every given stroke
- For every stroke on the body of the convict, the executor holding the whip must avoid any pulling motion so as to avoid unnecessary injury to the skin and flesh (section 125(3)(f))
- The caning should be given evenly to the whole convict's body (so as to avoid unnecessary injury to any particular part) (section 125(3)(g)). However, certain body parts should be avoided such as the head, face, stomach, chest and private parts (Mehat, 1991)
- The convict should be allowed to wear clothes which cover his aurah (section 125(3)(h)) as ordained by the Syariah principle
- The whipping should be performed on a standing male convict or a sitting female convict (section 125(3)(i))
- At any stage of the punishment, should the certified medical officer certifies that the convict is medically unfit or unable to bear the whipping punishment, the punishment should be postponed until he certifies otherwise (section 125(3)(j))

Section 125(4) meanwhile provides that in cases whereby the convict is punished by whipping only, he must also be detained in the same manner as if he is undergoing a jail sentence. The convict is to be detained until he has received all whippings sentenced. Section 125(5) provides that at any stage of the punishment, should a certified medical officer certifies that the convict, by reason of old age, sickness or others is unable to undergo the whipping punishment, in whole or in part, such case should be referred to the sentencing court. The said court will then issue a special order which it deems fit.

It is to be observed that the above Syariah caning punishment is just and effective as it sets out to punish and reform the convict while deterring the public from committing the crime. However, in order for the above legal provisions on whipping to have such a just and effective effect, their application must conform strictly to the above basic Syariah principles. Only then that the three objectives of punishing the convict, reforming him and deterring the public from committing the crime could be achieved. And only then that the Syariah caning punishment will prove to be just and effective. This vision is shared by Datuk Wan Mohammad Sheikh Abdul Aziz, the Director General of JAKIM and Datuk Ismail Yahya, the Chief Syarie Judge of Terengganu.

It should also be noted by all that the Syariah caning or whipping punishment clearly differs from that of the normal criminal whipping as carried out by Malaysia's Prison Department in terms of application and enforcement. This is because, the whipping punishment carried out by the prison department only focuses on punishing the offender. On the other hand, the Syariah caning aims at punishing the convict, reforming him and deterring the public from crime commission.

SYARIAH CANING PUNISHMENT IN MALAYSIA: PROBLEMS AND FINDINGS

This research has identified a few problems relating to the scenario of Syariah caning in Malaysia.

The first problem relates to its enforcement. Specific interviews and surveys were carried out among prison officers under the prison departments as well as religious officers under the states' Religious Departments. While 99.8% of the respondents agreed to the fact that Syariah caning should conform strictly to the Syariah methods and procedures, it is a worrying fact that 69% of them felt that the carrying out of caning punishment in prison compounds has adhered to the Syariah procedure. The actual fact is that when such caning is carried out in the compound prison and witnessed by only a group of people comprising of some prison officers as well as selected members of the public, the requirement set forth in the Quran that the punishment be carried out in public has not been fulfilled. Consequentially, such Syariah caning will not be able to achieve the desired aims of punishing, deterring as well as educating the convict and the general society. This effectively means that such caning is not much different than that of the normal caning done by the prison officers under the other federal laws. Ultimate the aim of effectively decreasing the national crime rate will not be achieved.

Syariah caning punishment is indeed just and effective as it sets out to punish and reform the convict

while deterring the public from committing the crime. However in order for it to be just and effective, their application must conform strictly to the Syariah Method of enforcement. This includes the fact that the caning need to be enforced publicly in front of the general public. Only then that the three objectives of punishing the convict, reforming him and deterring the public from committing the crime could be achieved. And only then that the Syariah whipping punishment will prove to be just and effective.

The second problem relates to the lack of basic understanding on issues pertaining to Islamic caning or whipping. In Malaysia, the public at large is not well informed of the nature and enforcement of such punishment. This has affected their poor perception towards it.

Some are of the opinion that Syariah caning is barbaric, ineffective and impractical. Interviews had been conducted on various respondents from various internet websites such as Facebook, Hi5 and Tagged. The respondents were asked on their personal understanding and perception on Syariah whipping punishments. From these interviews, 53% of them claimed that whipping punishment is barbaric, another 67% claimed that it is ineffective while a staggering 77% claimed that such punishment is impractical.

Separate interviews were also conducted on 235 respondents in the streets of Kuala Lumpur, Johor Bharu, Penang and Kuantan. Their views represent the views of the residents of Wilayah Persekutuan Kuala Lumpur, Johor, Penang and Pahang. These respondents were randomly chosen from urban, sub-urban and rural areas. They were asked the same exact questions as their online counterparts. The result of these interviews were equally shattering. Total 69% of these respondents claimed that whipping punishment is barbaric, another 64% claimed that it is ineffective while 71% claimed that such punishment is impractical.

A closer look at the various reasons given by the respondents to support the above claims revealed the serious lack of understanding on the said punishment. Such lack of understanding has clearly influenced their misconceptions on the matter. As such, this study maintains that there is an urgent need to educate the public well on the true Islamic caning or whipping. Such effort should be made through various channels and mediums of information.

In addition, some Malaysians feel that the prison department will not be able to carry out the Syariah caning punishment impartially. This is due to the fact that the prison department is bound by regulation 131(2) of the

Prison Regulations 2000 (enacted under the Prison Act 1995) which forbids the department from performing caning punishments on male and female convicts aged 50 and above. Hence, they argue that the scenario will lead to partiality as convicts who are aged 50 years and above are conveniently exempted from the punishment whereas those aged below 50 will be punished. Such a perception is clearly wrong. This is because regulation 131(2) of the Prison Regulations 2000 only applies to convicts convicted by the civil courts. For convicts convicted by the Syariah courts, the department is bound by section 125 and 126 of the states' Syariah criminal procedure enactments which allows the Prison Department to perform Syariah whipping punishments on male and female convicts regardless of their age subject to declaration of medical fitness to undergo such punishments by a certified medical doctor. Thus, the issue of partial punishment will never arise.

There is another misconception among some members of the Malaysia public relating to Syariah caning punishment. These sceptics argue that the prison department is only empowered to carry out the normal caning procedure under the federal legislations. As such they argue that the department is powerless in enforcing Syariah caning procedures as such procedures come under the jurisdiction of a state body and not the federal. Such argument is clearly baseless as the Prison Department is indeed empowered to carry out any caning procedure be it under the federal laws or the Syariah state enactments.

EDUCATING MALAYSIAN AUTHORITIES AND PUBLIC ON TRUE NATURE OF SYARIAH CANING: SOME SUGGESTIONS

The researchers feel that Malaysians must be generally educated on the true nature of Syariah caning or whipping.

First of all, relevant authorities such as officers of the prison departments as well as Syariah religious officers at the states' Syariah religious agencies should be well educated on its enforcement. They should be well educated and trained to perform the caning in strict adherence to the Syariah procedures. This also includes the fact that the caning should be carried out in front of the general public outside the prison.

The rest of the public need to be educated as well on every aspect of Syariah caning punishment. The Malaysian public in general should be continuously educated through campaigns, seminars and workshops. A more concerted effort should be put in to organize such

programmes. It is extremely important to organize such programmes in urban, sub-urban and rural areas. This is to ensure that clear and correct information on Syariah whipping punishment is well disseminated among people from all walks of life.

The internet can also serve as an invaluable tool in this effort to communicate that information across a wider audience. Information can be disseminated through the use of websites, social network services and relevant blogs designed to promote information relating to caning or whipping for members of the public.

The ability to disseminate and promote Islamic whipping punishment is an important component of communicating true information about whipping. By disseminating information, both JKSM (Jabatan Kehakiman Syariah Malaysia) and JAKIM (Jabatan Kemajuan Islam Malaysia) can reach members of its focus group to educate them properly.

CONCLUSION

This study concludes by saying that the above whipping punishment under the Syariah Criminal Procedure (Federal Territories) Act 1997 generally conforms to the Syariah principles. Ultimately, Syariah caning is an ideal and effective method of punishment which is more than capable of solving the problem of rising crime rate in the society. This argument is based on its effective achievement of punishment, deterrence and education of convicts and members of public. However, this study argues that such aims are only possible if the Syariah method of caning embodied in the Quran is strictly adhered to.

It is felt that concerted effort should be put in to educate the ignorant parties. This responsibility is not only shouldered by the relevant agencies but also by responsible and concerned individuals as well. Various parties need to be educated here. The relevant authorities need to be well trained and educated on the true effective method of Syariah caning. The problem of poor public perception towards the punishment must also be addressed urgently. Such negative perception and misconception are caused by lack of correct and accurate information. As such it is pertinent and significant to educate the public on the true nature and effectiveness of this punishment. Serious and concerted effort should be made to educate the public. Various campaigns, seminars as well as workshops could be organized for this purpose. Alternative media such as the internet, could be extremely effective in disseminating correct and clear information on true Syariah caning procedures.

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