

Whipping Tools According to Syariah and Civil Crimes in Malaysia

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Abstract

Whipping is one of the forms of punishment that has existed for a long time. Provisions relating to whipping are found in civil law nor Sharia law. However, there are no clear and specific guidelines related to the type of whipping tool used. This article aims to discuss related to whipping tools according to the perspective of sharia and current legislation. Methodology used in this study is qualitative with the data obtained through content analysis of the texts of the Qur'an, al-Hadith, books and articles, journals and related laws. Then it is analyzed with descriptive methods. The result of this study is that the authors were able to identify the types of rattan and twigs used to carry out whipping especially in terms of type and the size of the whipping tool. The author suggests that a line be created guides and modules of Special Whipping Tools appropriate in empowering execution of whipping while achieving the purpose of the whipping.

Keywords: Whipping Tools, Syariah and Civil Crimes, Takzir.

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Introduction

Whipping is a punishment that has long existed in various civilizations since time immemorial. This whipping has also been shown to occur in the past as written on the Terengganu inscription stone with respect to punishment for adultery offenders (Mohd Sanusi & Nor Muhamad 2021). In general, the punishment of whipping is mandatory punishment for three hudud offenses, namely one hundred lashes for adultery committed by an offender who has never been legally married (*ghayr muhsan*), eighty lashes to those who committed the offense of accusing the person of adultery (*al-Qazaf*) without sufficient witnesses and forty lashes to those who drinking alcohol. The judge can also impose a whipping sentence on the offender committing the offense of takzir (Md. Hashim 2000). The best example of whipping can be seen in Aceh, Indonesia. Qanun No. 14 of 2003 has provided for the punishment of whipping 9 times whipping (maximum) and 3 times whipping (minimum) on the offender of the crime of solidite (Mohamad 2015).

Definition of Whip

According to the dictionary of Dewan Bahasa and Pustaka (2017) whipping is defined as whipping or hitting with a small but hard object such as a cane and so on. While whipping in the English-Malay dictionary Dewan is referred to as "whipping" or "lashing" which means whipping or beating using a lash, whipping rope.

The word whip or in Arabic *al-jald* is taken from the word *al-jald* which carries the meaning of skin. According to Ibn Manzur Rahimahullah, the word *al-jild* is a word a derivative of its original word which carries the meaning of beating or torture (Mohammad Al Bakri, 2018). There are many differences between Islamic whipping and civil whipping. Whipping in Islam not in the nature of torture but in educating the perpetrators and giving teaching the community to be afraid to do wrong.

It can generally be stated that whipping is hitting a limb with using canes and other tools that can hurt the battered party. But the shot must not use something as hard as a stick which can result in injury and death or destroy the body with a few strokes only (Embong 2006).

Whipping Tools According to Civil Perspective

According to the law in Malaysia in general, whipping can be expressed as an act of beating a criminal for a particular offense which has been prescribed by using certain tools that have been specified by law such as rattan (Embong 2006). The punishment of whipping or caning in Malaysia is a law that is a punishment weight after the death penalty. Under the Criminal Procedure Code, there are two types of cane namely thin type rattan used for offenders for corruption cases, breach of trust offenses and white-collar crime which is a crime committed by a person of high status in in work. While the second rattan is the type of thick rattan used for offenders who commit serious criminal offenses such as rape and sexual harassment cases. Whipping in the Civil Court is provided for in national law but shall not apply to female and male prisoners over the age of 50 years (Hussin 2019).

In carrying out whipping, tools play a major role in evoking feelings pain and remorse to the offender. Based on the laws of this country, tools shall be of the same type and made of rattan or small twigs with no books or segments. However, the tool in use now is like a cane as found in prison procedures. The size of the tool also considered so that the goal of the shot to give awareness can be achieved. Among them for civil criminal offenses, canes are used to carry the whipping punishment should have a diameter of about 1.25 centimeters for the offender common crime while breach of trust offense is the size of a cane less than 1/2 inches diameter while juvenile offenders use a cane. Offenders charged whipping for offenses under sections 403, 404, 405, 406, 407, 408, 409 and 420 of the Penal Code or young offenders shall use a fine cane (Embong 2006). Pursuant to Article 131 (5) of the Prisons Act 1995 states that for offenders or prisoners' young should be whipped with a light cane.

Whipping Tools According to Syariah Perspective

Imam Ibn Qudamah Rahimahullah explained that *al-jald* can be understood as hit with a whip (Mohamad Al-Bakri 2021). Scholars agree that the tool used to whipping in every hudud? offense except for the offense of drinking alcohol is *al-sawt*. Ibn Qudamah stated: "Indeed, the whipping is with a whip (al-sawt), we never knew of any disagreement among scholars about this matter except in the offense of drinking alcohol. For the offense of drinking alcohol, scholars have different views on the tools that can be used in executing whipping.

Most of them (*jamhur*) are consist of Hanafi scholars, Maliki and some Shafie and Hanbali scholars argues that the tools allowed in the execution of the sentence is a whip only, which is the same tool used to whip offenders inside other hudud offenses. This opinion is based on the words of the Prophet s.a.w which means: "When it is found that they are drinking alcohol, then shall you whipping them" Ibn Qudamah states that what can be understood in a directly from the whipping command absolutely (without mentioning the tool) is by use a whip, as this is a commonly used tool. This opinion is reinforced with the practice of the companions using the whip as a tool for whipping the formulated as consensus among them.

However, the proposition based on the consensus of the companions was not agreed by al-Nawawi and al-Mawardi who stated that it is not qualified to be formulated as consensus because it is contrary to the authentic hadiths (which show that Rasulullah also used other tools to whip alcohol drinkers). As for them, the practice of the companions is based on their own ijtihad after seeing the presence of those who mock the punishment (when the tool is used apart from whips).

The authentic opinion in Mazhab al-Shafie states that apart from whips, other tools can also be used to whip alcohol drinkers. This too is the view of some of the Hanbali scholars. Among the intended tools are the ends of the cloth (*atraf al-thiyab*), the shoes (*al-ni'al*) and the fronds of the tamar (*al-jarid*). This opinion is based on several hadiths which narrate that alcohol drinkers were whipped in the time of the Prophet using tools that mentioned above. Among them is a hadith narrated by Abu Hurayrah who meaning: "A man has come to the Prophet SAW who has been (convicted) drinking alcohol. Hence, Rasulullah SAW ordered that he be beaten. Abu Hurayrah said: some of us hit him with our hands, some even hit him with shoes and clothes". This hadith and the like indicate that the drinker alcohol was beaten in the time of the Prophet SAW with various tools other than whips and not there are propositions to suggest that this sentence was abolished. Hence the law must hit with such tools is permanent. The third opinion in this matter is that one should not hit the drinker with whip. The tools allowed are only as mentioned above. This is opinion of Abu Tayyib, a scholar in the Shafi'e school. This opinion is based on to the hadiths that give a picture of what happened in the times Rasulullah SAW, which is not mentioned in it that the drinker of alcohol was whipped by using a whip. Jumhur fuqaha 'views the whipping tools used during the time of the Prophet SAW was al-sawt or rattan. This view is lean to the hadith of the Prophet SAW reported by Muawiyah which means: "Whoever drinks alcohol (intoxicating liquor) then beat him" (Sunan Tarmizi, book of Al-hudud no. 1444 p. 466)

However, there are also hadiths that mention other equipment other than rattan that can used to whip offenders of sharia crimes as hadith by Anas RA who means: "The Prophet SAW

has beaten alcohol drinkers with whips and shoes” *Sahih al-Bukhari*, book of Al-hudud, no. 6776 p.933)

The fuqaha 'do not specify the type or form of tools used in the case of hudud? and takzir. However, the fuqaha's explanation of the characteristics of whipping such as not specifying the type of tools that can be used during the execution of a sentence. This means, whips or any tools currently used are allowed if it does not deviate from the real purpose of the punishment (Siti Amalina 2014). After researching the opinions presented, it can be concluded that the strongest opinion is that stated that alcohol drinkers should be whipped with whips and with the other tools mentioned above. This is because they have a very strong argument that is hadiths that talk about what happened in the time of the Prophet.

Furthermore, there is no strong proposition to suggest that the use of tools for whipping apart from the whip has been abolished. In addition, this group also recognizes the views and *ijtihad* of the companions who used whips to whip after the age Rasulullah SAW. With this they endorse both forms of proposition (using whip and other tools) which is better (*awla*) than doing good deeds only with one form of proposition and leaving the other without solid reason. However so, to standardize the method of whipping carried out, it is proposed that selected the whip as a whipping tool without denying that the use of other tools as well is a must.

Specifications of Whip Used in Whipping

Among the tools used to whip offenders is a community practice the earliest Islam was the whip (*al-sawt*) which was a permanent whipping tool in execution whipping. The use of whips is bound by various conditions that it is not a dry rope so as not to injure the whipped body part. The end part whips that hit the body of the offender are not knotted or tied with small grains that will bring the same effect as a dry whip and not wet so as not to hurt. In addition, it is stated that the whip is single without any fragments and not branched. Meanwhile, the size of the whip should not be too large and not too small (Embong 2006). Among the hadiths that describe the specifications of whip are which is narrated that a man had come to the Prophet SAW and confessed to having committed adultery. So, the Prophet SAW asked for a whip to be brought to him. Then came the old whip that had been smashed. Rasulullah SAW then ask for another newer whip. Brought came another newer whip and the surplus has not been discarded. Rasulullah then asked for another whip that was longer. Then brought to him *cemti* which is not too new or old, then Rasulullah SAW ordered the offender to be whipped with the whip. Anas bin Malik narrates that he was once instructed in the time of Saidina Umar to prepare whips then he looked for a whip, discarded the leftovers and squeezed between two stones so that it becomes a little soft.

From the hadith and *athar* above it can be concluded here that the size (circumference) the whip should be medium, not too big, and not too small. It is nor is it from too new skin that can injure the offender, or from skin that is too old (rotten) that does not give pain to offenders when whipped. It should also be ensured that the whip feels inside good condition, not split, torn, or having excess (*atraf*) which has not been discarded and smoothed.

Briefly, Al-Syaukani explains the characteristics of the whip used for whipping as a medium-sized twig, not too new or old. The length is one its cubit and girth is one finger (Ismail.

E. 2018). Pursuant to section 125 of the Syariah Criminal Procedure (Federal Territories) 1997 (Act 560), stated that the tool lashes excluding the handle shall be of the same type and made the same some of rattan or small twigs of trees which have no segments or books and no length exceeding 1.22 meters and its thickness not exceeding 1.25 centimeters.

Whipping in Aceh

Aceh's Syariah Criminal Procedure Law is more specific, detailed, and neat gazette in 2013. This law details the rules execution of sentences decided by the Syariah Court such as Clause 252 of the Qanun Aceh No. 7 of 2003 (Husein Ismail & Sulong 2016). The Government of Indonesia through Presidential Decree No. 11 of 2003 has recognizing the sovereignty of Aceh and granting autonomy to implement Islamic law in Aceh. To implementing Islamic law in Aceh, the government has established *Wilayat al-Hisbah*. As in the case of *khalwat*, adult offenders will be charged whipping, bathing or being paraded around the village for the purpose of deterrence they from repeating mistakes in addition to causing repentance in society.

The Syariah Court of Aceh has the power to impose a sentence when found the accused guilty. Tools used when carrying out whipping is a simple rattan meaning not too big and not too small. Insulation is carried out using rattan with a circumference of 0.70 cm to 1 cm with a rattan length of 1 meter and has no split ends. Rattan the moderate is used so as not to injure the offender (Ritonga 2013). This is also stated in Clause 28 which outlines the procedure for the execution of whipping, which is the punishment of whipping carried out in front of a crowd and the rattan used was of medium diameter 0.7 cm and 100 cm, one meter long and not broken at the tip (Hamid, Syed Nong Mohamad, & Mohd Jamil, 2015).

Analysis Case in Terengganu

This case is a syariah criminal case related to the *musahaqah* offense below section 30 of the Syariah Criminal Offenses (Takzir) (Terengganu) 2001 read together with section 59 (1) of the same enactment. In this case, OKT who were women aged 32 and 24 respectively were charged under section 59 (1) which is read in conjunction with section 30 of the Syariah Criminal Offenses takzir (Terengganu) 2001. Both OKTs were arrested for trying to have sex in a tinted car and parked suspiciously. Both OKT has pleaded guilty, and the Court has sentenced the two offenders with a fine of RM3,300.00 and whipping as many as 6 lashes. The execution of whipping was done in private in the Council 2 Kuala Terengganu Syariah High Court which was attended by 100 people from representatives of the media, non -governmental organizations (NGOs) and representatives of law associations without any permission is given to bring cameras and cell phones. OKT fully clothed (Baju kurung) and (veil) tudung all white provided by the Terengganu Syariah High Court and then OKT was instructed to sit on the chair provided and tuck the lid to shoulder level (Mohammad Al Bakri 2018).

The whipping tools used in this case are of the same type and its length does not exceed 1.22 meters and its thickness does not exceed 1.25 centimeters. Tools this whipping has fulfilled the conditions set out in section 125 of the Syariah Criminal Procedure (Terengganu) Enactment 2001. Meanwhile, if seen in Aceh, whipping tools used in carrying out whipping was a simple

cane means not too big and not too small. The circumference of the rattan is between 0.70 centimeters to 1 centimeter and has no split ends (Rintonga 2013). Rattan which does not have a split end is to conform to the specifications of a rattan or whipping tool according to Islamic law.

Suggestions

Based on the research that has been done, the authors suggest a guideline shall be established by an authorized body namely the Department of Syariah Judiciary Malaysia to facilitate Syariah judges in sentencing syariah criminal offenders. Judges can refer to those guidelines when making decision in a case. The guidelines should contain important matters, especially in detailing the types of whipping devices including the size of the measurement and the thickness of the whipping tool allowed to be used when whipping is carried out. With these guidelines in place, then it can assist judges as well as legal practitioners in understanding matters related to the whipping tools used in whipping. This thing is also all at once be able to dispel allegations and imputation of public misunderstandings related to punishment flogging which is said to be cruel and detrimental to the offender.

Conclusion

In conclusion, the author argues that whipping is carried out in the prisons in this country do not comply with the laws contained in Islamic Law. The most obvious difference is the type of cane used by the inner prison perform whipping punishment on which there is a type of caning used based on certain errors. This contrasts with the rattan used inside implementation of the law in the Syariah Court which is the same type of cane. According to Islam. It is understandable that the tool used to whipping offenders is a whip. Although little leniency is given for the offense of drinking alcohol, is it is recommended that the same tools be used to standardize execution of whipping. The nature of the whip used should not be too new or old, being in good condition, not torn or having excesses that have not been removed and smoothed. It can also be understood that lashes in Islam is a blow using a specific and specialized tool without penetrate the flesh as well as the bones by using the same moderate amount of energy once in contrast to civil whipping which is a powerful blow resulting from the high swing of the serfta is focused on only one part of the body certainly into penetrating the skin (Mohammad Al Bakri 2018).

The method of enforcement and execution of whipping according to Syariah principles is far different from the manner of enforcement and execution of whipping under civil law. This is because, whipping according to sharia is not intended to punish merely, even to treat the offender internally to give repentance to be able to educate the mental as well as the nature of his personality which remains an inner fortification as not to repeat such criminal behavior. Whipping can also prevent the community as well as the public from witnessing whipping done in this public place from committing the same offense (Abdul Rahim & Abdul Manap 2012).

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