

The Practice Of Public Flogging In The Perspective Of International Human Rights In Nanggroe Aceh Darussalam – Indonesia

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**THE PRACTICE OF PUBLIC FLOGGING
IN THE PERSPECTIVE OF
INTERNATIONAL HUMAN RIGHTS IN
NANGGROE ACEH DARUSSALAM – INDONESIA**

**Praktik Pencambukan di Depan Umum
dalam Perspektif Hak Asasi Manusia
(Studi atas Praktik di Nanggroe Aceh Darussalam –
Indonesia)**

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Abstract

Indonesia is a unitary state on which national law applies in all the provinces. The national law applied throughout Indonesia regulates civil, criminal, commercial, and other aspects of Indonesian society. However, an exception to the national law application exists in the Province of Nanggroe Aceh Darussalam, especially in the type of sanctions applicable towards the convicts who have committed or violated criminal law in Nanggroe Aceh Darussalam. Nanggroe Aceh Darussalam implements a different criminal law from the national criminal law applicable to other regions in Indonesia. This is due to the issuance of Law No. 11 of 2006 on Aceh Government, which gave the Aceh Province special authority to adopt and practice Islamic law to its people. One form of punishment applied in Nanggroe Aceh Darussalam is the practice of flogging carried out in public (public flogging). This form of sanction has attracted the attention of the UN Special Rapporteur who recommended that the sentence be abolished, due to its practice which is contrary to international conventions that have been ratified by Indonesia. This article will discuss the legalization

of public flogging practice in Indonesia following the international conventions on which Indonesia is its member.

Keywords: Public Flogging, Human Rights, Nanggroe Aceh Darussalam.

Abstrak

Indonesia adalah negara kesatuan yang memiliki hukum nasional yang berlaku di seluruh provinsi. Hukum nasional yang berlaku di seluruh Indonesia mengatur tentang perdata, pidana, niaga, dan aspek-aspek kehidupan masyarakat Indonesia lainnya. Namun, terdapat pengecualian terhadap penerapan hukum nasional di Provinsi Nanggroe Aceh Darussalam, terutama dalam jenis sanksi yang berlaku terhadap terdakwa yang telah melakukan atau melanggar hukum pidana di Nanggroe Aceh Darussalam. Nanggroe Aceh Darussalam menerapkan hukum pidana yang berbeda dari hukum pidana nasional yang berlaku di daerah lain di Indonesia. Hal ini dikarenakan lahirnya Undang-Undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh yang memberikan kewenangan khusus kepada Provinsi Aceh untuk mengadopsi dan mengamalkan syariat Islam kepada masyarakatnya. Salah satu bentuk hukuman yang diterapkan di Nanggroe Aceh Darussalam adalah praktik pencambukan di muka umum. Bentuk sanksi ini menarik perhatian Pelapor Khusus PBB yang merekomendasikan agar hukuman tersebut dihapuskan, karena praktiknya yang bertentangan dengan konvensi internasional yang telah diratifikasi oleh Indonesia. Artikel ini akan membahas tentang legalisasi praktek pencambukan di muka umum di Indonesia sesuai dengan konvensi internasional dimana Indonesia menjadi anggotanya.

Kata Kunci: *pencambukan di depan umum, hak asasi manusia, Nanggroe Aceh Darussalam*

Introduction

Indonesia is a unitary state where the central government creates the law and applies it nationwide. An exception to the application of the national law is Nanggroe Aceh Darussalam Province (hereafter referred to as “**Aceh**”). Aceh is the only province, out of 34 provinces in Indonesia, based on Law No. 11 of 2006 on Aceh Government, that

attained the authority to practice Islamic law.¹ The law allows Aceh to legally adopt bylaws based on *Sbaria* known as *Qanun*, derived from the Islamic religion precept of Qur'an, Sunnah, and Hadith² (“**Qanun**”). Through the implementation of *Qanun*, Aceh has legalized the practice of corporal punishment for the Islamic criminal law's (*jinayat*) offender in the form of public flogging as the primary sanction. Aceh practices of public flogging have invited controversy from the public, both nationally³ and internationally⁴. However, the Indonesian Government, even in the light of the protest, has made the justification that the practices of the public flogging were consistent and made with consideration to the Human Rights Regulations.⁵ This paper will discuss

¹ Anton Widyanto, “*Implementasi Fiqh In Concreto, Sebuah Reorientasi Metodologis Pelaksanaan Syariat Islam di NAD*”, Dinas Syariah Islam Provinsi Banda Aceh, 2007. p. 70.

² Drs. H. Muslim Zainuddin, “*Problematika Hukum Cambuk di Aceh*”, Dinas Syariat Islam Aceh, 2011. p. 10. (hereon stated as Zainuddin Aceh); The Qur'an is a religious text for Islam, a Word of God revealed to the Prophet Muhammad, which by His order, was compiled into a book; Sunna is a way of life and how Muhammad as a prophet did things in his life; Hadith is the answer to a question that is posed in a particular situation to the Prophet Muhammad. See *Quran (Koran), Hadith and Sunnah*, available online on http://iclky.org/Visitors/Quran_Hadith.htm, last accessed on April 9, 2019, at 08.00 P.M.

³ The Commission for the “Disappeared and Victims” of Violence, Indonesia NGO has requested for the public flogging practice to be abolished on the basis of the violations of Human Rights. Aceh Syar'iyah Court, Monday May 23, 2011 at 07.00 P.M.; *Kontras: Hentikan Hukum Cambuk di Aceh*, accessible on: <https://www.ms-aceh.go.id/berita/item/1042-kontras-hentikan-hukum-cambuk-di-aceh.html> accessed on April 7, 2019 at 04:52 P.M.; National Commission on Violence Against Women, “*Issues for Discussion with the Committee Against Torture*”, (hereon stated as KOMNAS Perempuan) Jakarta, April 8, 2008, accessible on https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fNGO%2fIDN%2f40%2f9018&Lang=en , downloaded on April 2, 2019 at 11.34 A.M.

⁴ Committee Against Torture [Concluding Observations, 2008, U.N. Doc. \(CAT/C/IDN/CO/2\)](#) (hereon stated: CAT Committee); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Mission to Indonesia (A/HRC/7/3/Add.7) (hereon stated as CAT Rapporteur.)

⁵ Human Rights Research and Development Centre, “*Evaluation of Public Flogging Application in Nanggroe Aceh Darussalam Province*”, Republic of Indonesia's Law and Human Rights Department, 2007. p. 27.

the perspective of international human rights to the validity and legality of the public flogging practice in Aceh – Indonesia.

Analysis

The fundamental and universal freedom of humans, stated in the Universal Declaration of Human Rights (“UDHR”) as an aspirational and non-binding treaty, is the primary source of persuasive authority in international human rights law which provides a foundation to human rights treaties.⁶ The freedom stated in the description of human rights in the United Nations treaty documents about freedom of religion and freedom of marriage is said to contradict Islamic teachings stated in Qur’an.⁷ Scholars in Aceh have been very defensive in arguing the legality of corporal punishment for Islamic people⁸ living in Aceh. The argument to justify the application of corporal punishment under the *Sharia* law in Aceh is that the description of human rights should not be accepted universally, since it was not formulated with the participation of Muslim scholars following Qur’an. Therefore, it was not a universally accepted idea and refused to be adhered to by Aceh.⁹ An expert in International Law and Human Rights in Syiah Kuala University, Saifuddin Bantasyam, stated that the application of corporal punishment in Aceh is not a violation of human rights as the suffering and pain felt by the convicted is a manifestation of the sanction imposed on them, which is in adherence to the existing legal administration procedure.¹⁰ The statement of corporal punishment as cruel, inhuman, and degrading to the dignity of human beings could be argued on the fact that all such kinds of punishment can be considered as torture,

⁶ See Facts sheets, available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>, last downloaded at April 12, 2019.

⁷ Amelia Putri Akbar, “Pelanggaran HAM dalam Pemidanaan (Perbandingan Cambuk dengan Penjara)”, Law-Faculty, Islam Public University Ar-Raniry Darussalam, Banda Aceh, 2017. p. 53.

⁸ The Application of Sharia Law in Aceh was supposed to be practiced only to Muslim, Accessed at April 14, 2016. First Non-Muslim Women was Sentenced to Public Flagellation, news available on: <https://news.detik.com/berita/d-3187827/dinas-syariat-aceh-hukuman-cambuk-untuk-non-muslim-atas-dasar-sukarela>, last accessed on: April 9, 2021 at 01:18 P.M.

⁹ Al Yasa’ Abu Bakar, *Metode Istislahiah*, Jakarta: Kencana, 2016. p.113.

¹⁰ *Op.Cit.*, Amelia Putri Akbar. p. 55.

which is cruel and painful.¹¹ Compared to imprisonment as a form of punishment allowed by Indonesia's national law, the application of corporal punishment contains more merit as it does not violate the essential rights of human beings for freedom (not being thrown into jail). Corporal punishment is more efficient than imprisonment with the reason of the cheaper execution cost¹² and the ability of the convicts to be able to continue their obligations to society and their families right after the execution of the punishment.¹³ In addition, public flogging is also said to provide a deterrent effect which can also be found in the application of prison sentences¹⁴. The shaming, enacted by the execution of flogging in a public area, is purposely carried out to provide the convicts a respectful way to integrate back into society without the worry of being branded as a criminal.¹⁵ Manfred Nowak, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, during his visit to Indonesia in 2010, has rejected the justification used by the Aceh Government based on research conducted by the Agency of Islamic Sharia, Human Rights Research, and Development Centre, and Scholars.¹⁶

¹¹ See Al Yasa' Abu Bakar.

¹² *Op.Cit.*, Zainuddin Aceh, p. 89.

¹³ The idea was that the convicts would be able to continue their obligations to their families once the public execution was done. Their duty to their families would not be stopped by the sanction imposed to them, different from when imprisonment was sanctioned to them which prevents them from their duty to their families. Al Yasa' Abubakar, Pengantar "*Membumikan Hukum Tuban Perlindungan HAM Perspektif Hukum Pidana Islam*" in the book of Ridwan Syah Beruh, Pustaka Ilmu, Yogyakarta, 2015. p. viii.

¹⁴ Ferdiansyah, "*Efektivitas Penerapan Sanksi Pidana Cambuk terhadap Pelanggaran Qanun di Bidang Syari'at Islam di Wilayah Hukum Kota Banda Aceh Propinsi Nanggroe Aceh Darussalam*", Thesis not published, Law Faculty North Sumatra University, 2008.; See also Zainuddin Aceh, p. 1 (stating that flogging is considered as a punishment that could give better deterrent effect compared with other type of punishment, for the example: imprisonment, fine, or exile from the society which the criminal activities has been committed).

¹⁵ See Reintegrative Strategy Theory by John Braithwhite, "*Crime, Shame and Reintegration*", Cambridge University Press, 1989. p. 65.

¹⁶ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Manfred Nowak – Follow-up to the recommendations made by the Special Rapporteur: Visit to Indonesia, UN. Doc. (A/HRC/13/39Add.6), (hereon stated as: Visit to Indonesia

1. Corporal Punishment As A Manifestation Of Torture And Human Degrading Treatment

Corporal punishment is considered a form of torture that violates the rights of a person to submit to such punishment to have their physical, mental, and moral integrity respected.¹⁷ Aside from the possibility that the application of public flogging could constitute wounds on the body of the convicted, having the execution of the punishment in front of the public would also constitute pressure from the society onto the convicts. Convicts who went through the public flogging execution tend to experience persistent stigmatization that lasts far beyond the execution of flogging. They come to be viewed as immoral by their community, families, and spouse.¹⁸ Contradictory to the argument stated by the Scholar in Aceh, regarding public (flogging) execution being intended to create an honorable way for the convicts to return to society, it, in fact, traumatizes and creates a negative impression or negative labeling that results in the exile of the convicts from society.¹⁹

2. Indonesia's Legal Framework Against Torture And Human Degrading Treatment

2.1. International Law

Indonesia ratified the UN Convention Against Torture (CAT) on October 28, 1998²⁰, with a reservation and declaration concerning the

Manfred Nowak) available at <https://daccess-ods.un.org/TMP/1180507.76422024.html> downloaded on April 5, 2019 at 06:02 P.M.

¹⁷ See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN. Doc. (A/60/316), August 30, 2005. p. 8. (hereon stated as UN Rapporteur Report)

¹⁸ *Op.Cit.*, KOMNAS Perempuan, p. 4.

¹⁹ See Civil Society Network for the Advocacy of Qanun Jinayat, "Pelanggaran Konstitusi dan Hukum: Refleksi Satu Tahun Penerapan Qanun Jinayat", October 24, 2016, (hereon stated as: Civil Society Network), available online on: <http://www.solidaritasperempuan.org/pelanggaran-konstitusi-dan-hukum-refleksi-satu-tahun-penerapan-qanun-jinayat/> last visited on April 9, 2019 at 06.00 P.M.

²⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention was Incorporated into Domestic Law No. 5 of 1998.

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clause on dispute resolution under Article 30(1)²¹ of the Convention and Paragraphs 1 to 3 of Article 20, which refer to the remit of the Committee to investigate allegations of systematic torture and the responsibility of states to cooperate.²² Indonesia also acceded to the International Covenant on Civil and Political Rights (ICCPR) on February 23, 2006, and further² UN Conventions on Children's Rights,²³ and Racial Discrimination.²⁴ While Indonesia is said to have cooperated in the past with international monitoring bodies, such as the Special Rapporteur on Torture²⁵ and the Committee Against Torture,²⁶ the Special Rapporteur on Torture noted in 2010 that it had failed to implement critical recommendations that had made in 2008.²⁷ Both ICCPR and CAT prohibit the use of cruel, inhuman or degrading treatment or punishment.²⁸

Nigel S. Rodley, The UN Special Rapporteur on Torture, acknowledged the existence of a wrong idea that may lead to the exemption of lawful sanctions. He then explained the provisions for the national law not to influence the effectiveness of the CAT.²⁹ Rodley

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²¹ Art 30 provides that in event of dispute between States regarding the interpretation of the Convention, one of the parties can ultimately refer the dispute to the International Court of Justice. The Indonesian Government's position is that disputes "may be referred to the International Court of Justice only with the consent of all [involved] parties." See http://treaties.un.org/P.s/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec.

²² The Indonesia Government accepted those provisions with the qualification that they shall be "implemented in strict compliance with the principles of the sovereignty and territorial integrity of the states."²

²³ Convention on the Rights of the Child, Ratified by Indonesia on September 5, 1990.

²⁴ International Convention on the Elimination of All Forms of Racial Discrimination. Indonesia acceded to the Convention on June 25, 1999.

²⁵ *Op.Cit.*, CAT Rapporteur, p. 2.

²⁶ *Op.Cit.*, CAT Commission, Point No. 2.

²⁷ *Op.Cit.*, Visit to Indonesia Manfred Nowak, Point No. 32 – 37.

²⁸ Article 7 of ICCPR and Article 16 of CAT.

²⁹ See Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37 B, Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, In Particular: Torture and Other¹ Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1997/7. The Special Rapporteur on Torture examines questions relevant to torture with respect to all countries whether they have ratified the CAT or not. The Rapporteur's mandate is to transmit urgent appeals on

1 concluded that the term 'lawful sanctions' refers to practices that the international community widely accepts as permissible sanctions, such as imprisonment. He cited the Standard Minimum Rules for the Treatment of Prisoners as an example of international standards that may guide determinations of acceptable practices."³⁰ Rodley concluded that, specifically, the practice of corporal punishment may be equal to torture.

*I cannot accept the notion that the administration of such punishments as stoning to death, flogging, and amputation – acts which would be unquestionably unlawful in, say, the context of custodial interrogation – can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules, or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State.*³¹

The exception that would otherwise undermine the purpose of the CAT by defining the legal sanction through the context of international practices rather than national laws have been reduced by Rodley's interpretation.³²

2.2. 4 National Law

The Constitution of Indonesia guarantees the citizens the right to be 'free from torture or inhumane and degrading treatment' and provides that the said right 'cannot be limited under any circumstances'.³³ Besides, Indonesia's Human Rights Law provides a comprehensive definition of torture³⁴ and affirms the right of all

1 individuals at risk of torture, undertake fact-finding visits, and submit reports. See UN Commission on Human Rights, Resolution No. 1985/33. (hereon stated as Rodley).

³⁰ *Ibid*, p. 85.

³¹ Office of the United Nations High Commissioner for Human Rights, Human Rights Fact Sheet: No. 4 Combating Torture 33 (May 2002), available at <https://www.refworld.org/docid/4794774b0.html>, downloaded at April 7, 2019 at 22:13 P.M.

³² See Rodley p. 85.

³³ 1945 Constitution of Indonesia, Fourth Amendment of 2002, Art 28G (2) and 28I (1), Available at: <https://www.wipo.int/edocs/lexdocs/laws/en/id/id048en.pdf>, downloaded at April 5, 18:25 P.M.

³⁴ "Torture means all deliberate acts that cause deep pain and suffering, both physical or emotional, inflicted on a person to obtain information...by punishing an individual for an act...or suspected to have been carried out by an individual or third

persons to freedom from torture and cruel, inhuman or degrading punishment or treatment.³⁵ In accordance with Law No. 12 of 2011 on The Order of Regulations in Indonesia, the Constitution is the most powerful law that supersedes other contradicting regulatory sets by Decree of People's Consultative Assembly, National Law, Government Law, Presidential Decree, Provincial Regulation, and City Regulation. Therefore, the regulations that negate any protection of human rights to the citizens of Indonesia would be superseded by the Constitution.

3. Public Flogging Is Incossistent With Indonesia International Obligations

The infliction of corporal punishment is sanctioned by Sharia law in the Aceh Province for vaguely defined 'morality offenses'.³⁶ The punishment by public flogging, done in the public area that could be visited freely by the citizens who live in that province, constitutes inhumane treatment and violation of the fair trial standard. The morality offenses under Sharia law are normally tried in public hearings, at which the audience can shout at the defendant, which renders the presumption of innocence meaningless.³⁷ Although the UN Convention Against Torture (CAT) and other human rights instruments do not contain a specific prohibition on corporal punishment, it has been considered as 'cruel, inhuman or degrading treatment or punishment' in several leading cases.³⁸ Concerning Indonesia, the UN Special Rapporteur on Torture has considered the practice to be incompatible with the CAT and expressed his concern with the use of punishments introduced under Sharia law in Aceh.³⁹ Amnesty International and Institute for

party...by threatening or coercing an individual or third party...for reasons based on discriminative considerations, should this pain and suffering arise as a result of provocation by, with the approval of, or with the knowledge of any person or public official whatsoever." – Article 1(4) of Law No. 39 of 1999 on Human Rights.

³⁵ *Ibid.*, Law No. 39 of 1999, Article 4, The right not to be tortured "cannot be diminished under any circumstances whatsoever."

³⁶ *Ibid.*, CAT Rapporteur, Point 17.

³⁷ *Ibid.*

³⁸ See e.g. *Osbourne v. Jamaica* (Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 [2000]; *Caesar v. Trinidad and Tobago* in *Inter-American Court of Human Rights* ([Ser.C] No. 123', 2005); *Tyrer v. United Kingdom*, Application No.5856/72, judgement from April 1978.

³⁹ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak –

Criminal Justice Reform (“ICJR”) also stated that the public flogging practice in Aceh would humiliate and have long-term suffering effect as the impact of the cruel, painful, degrading punishment.⁴⁰ Not to mention, the public stigmatization and social sanctioning that last beyond the execution of the punishment.⁴¹ As a State party that has signed and ratified the international instrument listed in the sections below, Indonesia is legally bound by the instrument which constitutes legal obligations based on the instrument the country has signed and ratified.

3.1. Violation of International Covenant on Civil and Political Rights (“ICCPR”) Obligations

Article 7 of ICCPR states that ‘no one shall be subjected to ... cruel, inhuman or degrading treatment or punishment’. Under the General Comment of Article 7 of ICCPR, the prohibition is extended to the practice of corporal punishment, including excessive punishment meant to be educative or disciplinary. The application of flogging also violates people’s right to be free from any form of physical violence, as stated in Article 9 of ICCPR, which states that ‘everyone has the right of liberty and security’. Article 24 of ICCPR provides that ‘every child shall have, without any discrimination as to race, color, sex ... the right to such measures of protection as are required by his status as a minor’, and Article 2 states that the rights in the ICCPR must be recognized ‘without distinction of any kind’.⁴² Article 3 and Article 9 prohibit the application of corporal punishment and must be upheld in a non-discriminatory manner regarding age, race, religion, and other

⁷ Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Doc. A/HRC/13/39/Add.5, Point 212–219, available at: <https://www.un.org/ga/search/viewmdoc.asp?symbol=A/HRC/13/39/Add.5>, downloaded at April 3, 2019 at 02.13 P.M.

⁴⁰ Amnesty International and Institute for Criminal Justice Reform, “*Indonesia: End Caning as a Form of Punishment in Aceh*”, ASA 21/3853/2016, April 19, 2016, available on: <https://www.amnesty.org/en/documents/asa21/3853/2016/id/>, last accessed on: March 29, 2019. (hereon stated as Amnesty).

⁴¹ *Op.cit.*, CAT Rapporteur, Point 46; *Op.cit.*, KOMNAS Perempuan, Point 15.

⁴² Human Rights Watch, “*A violent Education: Corporal Punishment of Children in US Public Schools*”, August 2008, available online at <https://www.hrw.org/reports/2008/us0808/>, last accessed at April 9, 2019 at 09:05 P.M. (hereon stated as HRW Violent Education).

discriminatory aspects. Therefore, the legalization of the application of corporal punishment in the form of public flogging in the Aceh Province, based on Sharia law to Muslim citizens, constitute the violation of Article 7, 9, and 24 of ICCPR.

3.2. Violations of the Convention Against Torture (“CAT”) Obligations

CAT Article 1 provides that ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’ do not constitute torture. Under the provisions stated in Article 1 of CAT, the acts that inflict severe harm are allowed and acceptable in an inappropriate situation. The broad interpretation of these provisions would allow the State to bypass the prohibition on torture by applying a law sanction that involves extremely harsh treatment.⁴³ The term ‘lawful sanctions’ must be interpreted as referring both to domestic and international law and case law.⁴⁴ Followed by the international cases regarding corporal punishment, as confirmed in *Winston Caesar v. Trinidad and Tobago*⁴⁵, *Higginson v. Jamaica*⁴⁶, and in 2004 in *Errol Pryce v. Jamaica*,⁴⁷ the practice of flogging as a form of corporal punishment cannot be considered as ‘lawful sanction’ as stated in the Article 1(1) of CAT.

The exercise of the practice of public flogging by the Government of Aceh in Indonesia violates Article 16 of CAT that states that the ‘State party shall undertake to prevent...acts of cruel, inhuman or degrading treatment or punishment...not amount to torture...committed by instigation...of a public official...’. Through the ratification of CAT to Law No. 5 of 1998, the State should ensure the fulfillment of the right to prevent cruel and inhuman punishment that degrades human dignity. The validation made by the Aceh

⁴³ See Fajri Matahati Muhammadin, Dian Agung Wicaksono, Almonika Cindy Fatika Sari, Ola Anisa Ayutama, “*Hukum Cambuk dalam Qanun Aceh dan Convention Against Torture: Suatu Penilaian Kritis*”, Jurnal Media Syariah, Vol.20 No.1, 2018. p. 8.

⁴⁴ *Op.Cit.*, UN Rapporteur Report, p. 8.

⁴⁵ Punishment by the lashes using ‘cat of nine tails’ is considered as a corporal punishment that was incompatible with the standards of human treatment, available on: <https://iachr.lls.edu/cases/caesar-v-trinidad-and-tobago> , last accessed on April 8, 2019.

⁴⁶ *Ibid.*, Vol.II, annex IX, sect. Q, communication No. 792/1998, *Higginson v. Jamaica*.

⁴⁷ *Ibid.* Fifty-ninth Session, Supplement No. 40 (A/59/40), Vol. II, annex IX, sect. B, communication No. 793 of 1998, *Pryce v. Jamaica*.

Government towards the practice of public flogging implies the legalizations of the element of torture towards the convicted person, as such kind of act would leave scars on the flogged area on the convict's body and can even cause physical disability.⁴⁸

3.3. Violations of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") Obligations

Indonesia acceded to the Convention on the Elimination of All Forms of Racial Discrimination on June 25, 1999. Article 5(b) of ICERD, to which Indonesia is also a party, provides for non-discrimination in the enjoyment of 'the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual groups or institutions'. The Government of Aceh has now extended the application of the Sharia law and corporal punishment to non-Muslims that conducted a violation of law in that province⁴⁹. The problem that will be covered by ICERD is the equal rights for all of the citizens of the Republic of Indonesia, in all provinces, regardless of the religion to be free from the corporal punishment that is legal in Aceh. The practice of public flogging that is not applicable in other provinces should not be practiced on a certain group of people that live in the Aceh Province. The citizens of the Aceh Province deserve and have the very same rights as other citizens of Indonesia in other provinces, not to suffer public flogging as a form of corporal punishment. The application of corporal punishment should not be subjected to a particular group of people, and it should be abolished to ensure equal protection from the subjectification of corporal punishment to all citizens of Indonesia.

3.4. Violations of Convention on the Rights of the Child ("CRC")

The Aceh criminal records on the application of public flogging as corporal punishment never show that it was ever conducted on children below 18 years old.⁵⁰ However, Qanun No. 6 of 2014 Article 67(1) states

⁴⁸ *Op.cit.*, Zainuddin Aceh, p. 110.

⁴⁹ *Op.Cit.*, Amnesty, the application of public flogging has also been practiced to a non-Muslim on 2018.

⁵⁰ CNN World, February 1, 2019, "Indonesian Teens Publicly Flogged for Cuddling", available at: <https://edition.cnn.com/2019/02/01/asia/indonesia-teens-publicly-flogged-for-cuddling-intl/>, last accessed at March 2, 2019; Detik News, January 31, 2019, "Teens Couple Publicly Flogged for Flirting", available at:

the possibility for the action of *jarimah*, which is the prohibited deeds by Sharia law, performed by children between the age of 12 to 18, provided that they are unmarried, to results in flogging for the maximum of 1/3 of the original punishment inflicted to adult.⁵¹ The CRC includes the fundamental recognition of a child's right to be free from any form of physical or mental violence, and the special capacity of children to learn from their mistake and rehabilitate themselves.⁵² The General Comments of Article 19 of CRC states '[do] not leave room for any level of legalized violence against children' and that 'corporal punishment and other cruel or degrading forms of punishment are forms of violence and the State must take all appropriate legislative, administrative, social and educational measures to eliminate them'.⁵³ Furthermore, the public execution of convicts fosters a culture of violence especially with the executions that could be seen by children.⁵⁴

3.5. Prevention of Torture as *Jus Cogens*

Under customary international law, the prohibition of torture is *jus cogens*—a peremptory norm that is non-derogable under any circumstances.⁵⁵ It is binding on all nations. The action of torture is never permissible or justifiable under any circumstances. The CAT also reaffirms this principle, providing that 'no exceptional circumstances

<https://news.detik.com/berita/4408842/bermesraan-di-halaman-masjid-roya-aceh-sepasang-kekasih-dicambuk>, last accessed at March 2, 2019.

⁵¹ Munandar, "A Child's Status As a Perpetrator in *Qanun Aceh No.6/2014 Regarding Criminal Islamic Law*", *Syiah Kuala Law Journal*, Vol. 1(1) April 2017. pp. 209-228.

⁵² *Id.*, HRW Violent Education.

⁵³ UN Committee on the Rights of the Child, General Comment 8, Point. 18. Available online at: hrlibrary.umn.edu/crc/comment8.html, last accessed at April 3, 2019.

⁵⁴ See Civil Society Network.

⁵⁵ *Prosecutor v. Furundija*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T, at 9, December 10, 1998; The jus cogens nature of the prohibition of torture is widely accepted. See United Kingdom House of Lords: *Regina Bartle and the Commissioner of Police for the Metropolis and Other Ex-Parte Pinoche*, 38 I.L.M. 581, 589, March 24, 1999) (opinion of Lord Browne-Wilkinson); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-717, 9th Cir. 1992, cert. denied, 507 U.S. 1017 at 1993.

whatsoever . . . may be invoked as a justification of torture'.⁵⁶ Other ill-treatment does not hold this special legal status.⁵⁷

Conclusion

The legalization of the practice of corporal punishment in the Islamic criminal law, such as the practice of public flogging (flagellation), is said to be under the regulations of International Human Rights by the Scholars in Indonesia, done in a manner that considers human dignity as regulated on Governor Regulation No.10 of 2005. Faqih, an expert in Sharia law in Aceh, also stated that the practice of flogging will be carried out in a manner that will not cause any pain or harm. However, in contradiction to the statement, Governor Regulation No.10 of 2005 provides clauses that will halt or postpone the execution of public flogging when the convicted is harmed in the process.⁵⁸ In fact, there is a record about the pain inflicted by the practice that ends up with the convicted fainted.⁵⁹ The Human Rights Committee and the Committee Against Torture have demanded the annulment of rules that legalize the practice of corporal punishment⁶⁰. The extension of the prohibition of torture and ill-treatment under Article 7 of ICCPR reached the practice of corporal punishment, which includes 'excessive chastisement' that is used as a punishment for the convicted.⁶¹ 'Irrespective of the nature of the crime that is to be

⁵⁶ CAT Article 2, Note 1. Unlike the CAT's treatment of the term torture, the CAT does not provide a definition for cruel, inhuman or degrading treatment.

⁵⁷ ICCPR Article 6 & 7, However, the International Covenant on Civil and Political Rights does not allow for exception in emergency situations for either torture or cruel, inhuman or degrading treatment or punishment.

⁵⁸ See Zainuddin Aceh, pp. 101-106.

⁵⁹ Record of the convicted that fainted in the middle of the execution of the public flagellation, some resulted in wounds. The flagellation was then postponed to a latter date instead of being cancelled. News can be found on: <https://icjr.or.id/setahun-qanun-jinayat-penggunaan-hukuman-cambuk-yang-semakin-eksesif-di-aceh/>, last accessed on April 3, 2019; 3 out of 6 convicted fainted on the execution of public flogging, available on: <https://waspadaaceh.com/2018/11/15/6-pelaku-mesum-dicambuk-di-pidie-3-pingsan/>, last accessed on April 3, 2019.

⁶⁰ See Official Records of the General Assembly, Fiftieth Session, Supplement No.40 (A/50/40), Paragraph 467; Official Records of the General Assembly, Fifty-Second Session, Supplement No.44 (A/52/44), Paragraph 250.

⁶¹ See UN Rapporteur Report, p. 6.

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punished', however brutal it may be, it is the firm opinion of the committee that corporal punishment constitutes cruel, inhuman, and degrading treatment.⁶² Special Rapporteur concluded that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and therefore calls upon states, including Indonesia to abolish all forms of Judicial and administrative corporal punishment without delay.⁶³

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⁶² *Ibid.*

⁶³ *Ibid.*, p. 9.

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