

LASHING IN QANUN ACEH AND THE CONVENTION AGAINST TORTURE: A CRITICAL APPRAISAL

ⁱFajri Matahati Muhammadin, ⁱⁱDian Agung Wicaksono, ⁱⁱⁱAlmonika Cindy Fatika Sari, ^{iv}Ola Anisa Ayutama

ⁱ Department of International Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.

ⁱⁱ Department of Constitutional Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.

ⁱⁱⁱ Djojodigoeno Research Institute for Adat Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.

^{iv} Secretariate of the Daerah Istimewa Yogyakarta Regional House of Representatives, Indonesia.

(Corresponding author) email: fajrimuhammadin@ugm.ac.id

ABSTRACT

While considered archaic to some, the Islamic Shari'ah applies lashing as punishment for a number of penal offences. Aceh is a special province in Indonesia with the privilege to apply some level of Islamic Shari'ah. Among them is to apply lashing as punishment for crimes such as fornication, gambling, consuming alcoholic beverages, and many others. Some have criticised this punishment as a violation of the prohibition against torture and cruel treatment. Based on a mix of normative and empirical research, this article explores the relevant sources of international law and examine whether or not such critique is valid. It is found that the Islamic Shari'ah version of lashing as applied in Aceh does not violate this prohibition, except in a very narrow-minded view of international law which may be an intellectual legacy of colonialism towards the world.

Keywords: Aceh, Lashing, Torture, International Human Rights Law, Islamic Law

Introduction

The Aceh Special Region is a special region with special autonomy to apply the Islamic Shari'ah in a number of items, which includes matters of worship, *ahwal al-syakshiyah* (family law), *muamalah* (civil law), *jinayat* (criminal law), *qadha'* (the judiciary), *tarbiyah* (education), *syiar and da'wah* (propagation), and Islamic defence pursuant to Article 125(2) of Indonesian Law No. 11 of 2006 on the Governance of Aceh or Aceh Governance Law. The matter is further regulated via Qanun Aceh.

Qanun Aceh No. 6 of 2014 concerning *Jinayat* or *Qanun Jinayat* became a controversy for multiple issues, particularly regarding lashing as one of the sanctions the judge may choose to impose which is executed before a public audience. Article 1(15) of *Qanun Jinayat* lists the items punishable with lashing, including *inter alia*: *zina* (adultery and fornication), *shurb al-khamr* (alcohol consumption), and *maisir* (gambling).

There have been claims that lashing is cruel, torturous; therefore constitutes a violation of human rights (Feroza, 2007, p. 9) including by Indonesian human rights groups such as KontraS (Okezone, 2011). They do seem to have basis for such claim, as Article 28I (1) of the Indonesian Constitution of 1945 includes freedom from torture as a non-derogable right. Further, Indonesia has ratified the Convention Against Torture or CAT via Law No. 5 of 1998 regarding the Ratification of the CAT. This article will explore the punishment of lashing as implemented in the Qanun Aceh and examine whether it can be considered as torture and cruel treatment in international law. There are indeed discourses in international law concerning lashing as an act of torture and/or inhumane treatment. However, the claim lacks merit and is logically flawed because it is based on a mindset which is an intellectual legacy of colonialism.

Research Method

This article is part of a larger research which applies a normative-empiric method, utilising both field as well as literature research (Soekanto & Mamudji, 2007, p. 23). However, the part of research written here is mainly normative, obtaining data from secondary sources such as positive laws especially international conventions, literature, as well as in-depth interviews with:

- a. The *Ulama* who drafted and was involved in guiding the legislation and implementation the *Qanun Jinayat*, Al-Yasa Abubakar from Universitas Islam Negeri Ar-Raniry, Aceh.
- b. The Investigation and Enforcement Division of the *Wilayatul Hisbah* (enforcer of *Qanun Aceh*), Marzuki Ali.
- c. Registrars from the Shari'ah Court of Banda Aceh, Aklima Djuned and Salichin, and
- d. Judges from the appeals level Shari'ah Court in Aceh, Rafi'uddin, and Abdul Manan Hasyim.

Islam, Lashing, and Torture

Islam as a Legislative Religion

Islam is more than a religion as understood in a Western conception that it is “the belief in and worship of a superhuman controlling power, especially a personal God or gods” (Oxford Dictionary, 2017). Islam, as mentioned in Surah Al-Imran verse 19, is a *deen*. The word ‘religion’ is usually translated into Arabic as ‘*deen*’ despite having a very different meaning. The word ‘*deen*’, derived from the word *dal-yaa-nuun*, has a number of derivative meanings which include not just ‘religion’, but also ‘a way/course/manner of conducting/ acting’ and –relevant to our discussion—as ‘a particular law/statute’ (Lane, 1968, pp. 942–947; Mukhtār, 2008, p. 796). This is why Islam prescribes not just acts of worship, but also a comprehensive and sophisticated legal system.

The Qur’an in Surah An-Nisa verse 59 mentions that we should obey not just Allah and Rasulullah s.a.w., but also the *uli al-amri* (Muslim rulers, ruling under Islamic law). This is why the scholars have ruled out that having an *imamah* (Islamic leadership) is *farḍ al-kifayah* or a collective obligation (Al-Mawardi, 2014, p. 2). The duties of an *imam* include to enforce the law, and they may appoint governors to rule over regions to also enforce the law within their jurisdiction (Al-Mawardi, 2014, p. 23 and 52).

Islam and the Prescription of Lashing

Islamic criminal law prescribes two kinds of punishment, i.e. those which are static i.e. fixed such as *uqubat hudud* (criminalization prescribed in the Qur’an and Sunnah), *qisas-diyat* (retaliation and blood money), and *kafarat* (other religious sanctions), or ‘elastic’ ones known as *uqubat ta'zir* which are prescribed not explicitly in the Qur’an or Sunnah but via authority of the government (Abubakar, 2011, p. 36).

Lashing is a type of sentencing known in Islamic law, provided explicitly in the Qur’an, Surah An-Nur verse 2:

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ

“The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes...”

The Arabic word used for ‘lashing’ is *جَلَدَ*, does not only also means ‘skin’, or to beat the skin, but also may not break the skin (Rahman, 1982, p. 794). Lashing, in Islamic law, regulates the following crimes:

- Three among the *uqubat hudud*: *zina ghayru muhsan* or fornication (Surah An-Nur verse 2), *Qazf* or falsely accusing someone of *zina* (either fornication or adultery, as per Surah An-Nur verse 4), and *shurb* or drinking alcohol (Zainuddin, 2012, p. 35).
- *Uqubat ta'zir*, since it is up to the governmental authority, which should be guided by the principles of *maslahat* (welfare) for the society (Abubakar, 2011, p. 56).

As the Hadith and practice of the Companions of Prophet Muhammad s.a.w. show, it is important to note that the application of lashing must observe a few conditions (Anas, 1992, Chapter 41/12; Rahman, 1982, p. 794):

- the lash must not be too hard or too soft,
- the arm conducting the lashing must not show armpits (as to reduce the angle of striking and therefore reduce the pain), and
- the lashes must be distributed to different parts of the body (except the face and genitals) as to distribute the pain to not focus on one spot.

Islam, Torture, and Humane Treatment

There is always some level of pain and humiliation inflicted in any kind of punishment in any legal system, and this is not necessarily considered as 'inhumane'. The limitation towards what is humane or not will depend on what is 'human' in the first place. Islam teaches that a human is of a dual nature: soul and body, and the ultimate knowledge of it is known best by Allah (Al-Attas, 1993, pp. 139–142). Therefore, the standard of humaneness in Islam is determined by what Allah prescribes.

Islam teaches that humans are bestowed upon with an inherent dignity. In Surah At-Tin verse 4, the following is mentioned:

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ

“We have certainly created man in the best of stature.”

Further in Surah Al-Isra verse 70 it is said:

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا

“And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.”

Specifically, there seems to be no way around the prohibition of torture in Islam. Prophet Muhammad s.a.w. specifically and unequivocally said:

إِنَّ اللَّهَ يُعَذِّبُ الَّذِينَ يُعَذِّبُونَ النَّاسَ فِي الدُّنْيَا

“... Allah would torment those who torment people in the world” (Muslim, 2007, p. ḥadīth no.6657-6658).

It is even forbidden explicitly to torture animals, because Prophet Muhammad s.a.w. also said:

عَذِّبَتْ امْرَأَةٌ فِي هِرَّةٍ سَجَنَتْهَا حَتَّى مَاتَتْ، فَدَخَلَتْ فِيهَا النَّارُ، لَأَ هِيَ أَطْعَمَتْهَا وَلَا سَقَتْهَا إِذْ حَبَسَتْهَا، وَلَا هِيَ تَرَكَتْهَا تَأْكُلُ مِنْ حَشَاشِ الْأَرْضِ

“A woman was tormented because of a cat which she had confined until it died and she had to get into Hell. She did not allow it either to eat or drink as it was confined, nor did she free it so that it

might eat the vermin of the earth.” See: (Al-Bukhari, 1997, p. ḥadīth no.3482; Muslim, 2007, p. ḥadīth no.6675-6679)

However, this is a general rule. Sometimes Allah disgraces a man and instructs pain to be inflicted towards them. After elevating mankind in the best of statures in Surah At-Tin verse 4, the next verse (i.e. verse 5) mentions:

ثُمَّ رَدَدْنَاهُ أَسْفَلَ سَافِلِينَ

“Then We return him to the lowest of the low.”

In many places Allah threatens punishments towards those who disobey Him, such as Surah An-Nur verse 63:

فَلْيَحْذَرِ الَّذِينَ يُخَالِفُونَ عَنْ أَمْرِهِ أَنْ تُصِيبَهُمْ فِتْنَةٌ أَوْ يُصِيبَهُمْ عَذَابٌ أَلِيمٌ

“... So let those beware who dissent from the Prophet’s order, lest *fitnah* strike them or a painful punishment.”

Considering all the basis of rulings from the Qur’an and Sunnah, one can conclude that there prohibited and permissible kinds of torture. There is a general impermissibility of torture, while there are some exceptions such as the inevitable pain as result of the Islamically prescribed punishments such as *qisas*, *hudud*, and those imposed based on *ta’zir*. This is the opinion of ‘Ali Al-Qari (Al-Qārī, 1422, p. 76) and Imam Al-Nawawi (Al-Nawawī, 1416, p. 128).

Lashing In Qanun Aceh and The Convention Against Torture

As an extension of Article 7 of the ICCPR, the prohibition against torture –as regulated in the CAT— is seen to safeguard human dignity in an international human rights law context. This section will examine whether the practice of lashing breaches the CAT.

Lashing as an Act of Torture

The CAT provides a very comprehensive definition to classify an act of torture in Article 1 which reads the following:

“[...] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

This definition can be broken down into a number of elements, i.e.:

- The ‘severe pain’ element, as the nature of the act,
- Intention, meaning that negligence does not count,
- Purpose, i.e. to punish, intimidate, discriminate, etc,
- Involvement of public officials, or the consent or acquiescence of them, acting in official capacity,
- The lawful sanction exception,

However, not all elements of the definition above are fulfilled by the lashing conducted by *Qanun Jinayat*. While the second, third and fourth elements are easily fulfilled, the first and fifth are not.

The easiest element of torture to be unfulfilled would be the last, element i.e. ‘the lawful sanction exception’. It is very obvious as to why this element is not satisfied, and it does not require any comprehensive analysis. As mentioned earlier, lashing is sanctioned for certain crimes which are

regulated in *Qanun Jinayat* which is an official law issued by NAD as given authority by the Aceh Governance Law. The pain as result from lashing is easily inherent to the sanction itself.

The other element of torture unfulfilled would require a more thorough observation, which is the first element i.e. ‘the severe pain’ element. While there are no definite standards of pain to qualify, we have some precedents and reference to illustrate:

- The Case of *Aksoy v. Turkey* in the European Court of Human Rights: heavy beating, electrocuting, resulting in numerous injuries including *bilateral brachial plexus* (*Application No. 21987/93, Judgment of 18 December 1996, para.60*).
- The Case of *Sergio Euben Lopez Burgos v. Uruguay* in the Human Rights Committee in 1981 (Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40), 176, at Para 2.3.): beating over long periods of time, minimum description of actual damage but cites jaw fracture and eardrum damage.
- Report by UN Special Rapporteur (Koojimans, 1985, para. 119): wounds, internal bleeding, fractures, cranial traumatism, falanga, *etc.*

There is so much more precedents but all of them mention very severe damage and pain with possible long term implications, along the same line as the precedents already mentioned above. However, lashing in Qanun Aceh is not even close to any of that.

As observed at the *Wilayatul Hisbah* office, the lash used is not too thick and not too hard as to limit the pain inflicted, as displayed in Fig.1 below.

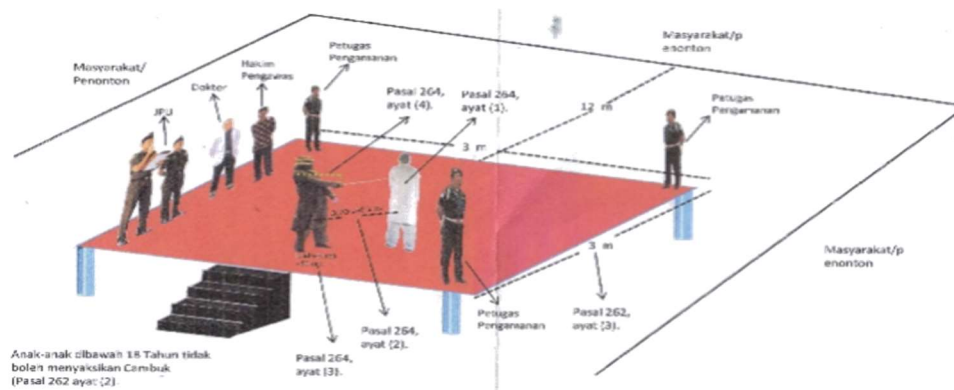
Fig. 1. Size of the lash used



(Source: Research Documentation)

Further, by regulation the location of lashing is set in such a way to prevent too much pain and certain people must observe the process, as displayed in Fig. 2 below.

Fig. 2. Location Setting for Lashing



Source: Satpol PP & Wilayatul Hisbah Document

Two items need to be highlighted in Fig. 2. First, the distance and positioning of the executioner which is intended to inflict enough but not causing too much pain. Second, there are doctors observing the lashing, and they can intervene when they see the convict is under the risk of severe injury or even if they seem to be unable to hold the pain. When the doctors intervene, the lashing will be halted and will be continued after the convict has undergone medical treatment as needed as per Article 266(3) of Qanun Aceh No. 7 of 2013 regarding Jinayat Procedural Law or *Qanun Acara Jinayat*.

To further limit the pain inflicted, a specific technique of lashing is set out. This includes limiting the angle and distance from which executioner may lash against the convict, only the back may be lashed and the convict must be clothed, lashes are done on different parts of the back to distribute the pain. It was described that the lash must not be too strong as to break cardboard. The research did not manage to make a proper documentation of the implementation of lashing, but there are footages which may show how it is done (SerambiTV, 2017, male convicts at 0:26-0:45, female convicts at 1:02-1:09).

This is not to mention the aforementioned role of doctors, which –according to Articles 254(1) and 259(1) of *Qanun Acara Jinayat*—the doctors must examine the convict before and after the lashing and can order a suspension if the convict is not fit enough.

While Article 1 of the CAT also opens room for psychological pain as an element of torture, this is hardly satisfied. While there is no known research examining the psychological impact of lashing, there may be some clues. Prison is known to cause psychological stress (Haney, 2002) yet it is practised throughout the world and generally not considered as torture. On the contrary, interviews at the Shari’ah Courts of Aceh shows that people prefer and opt for lashing rather than imprisonment, including Non-Muslims who are normally not under the jurisdiction of the Qanun except by their own choice as per Article 5(b) of *Qanun Jinayat*. Having that said, lashing cannot qualify as an act of torture.

Lashing as Cruel and Inhumane Treatment

The Human Rights Committee, commenting on Article 7 of the International Covenant on Civil and Political Rights (ICCPR), mentions that there is no need to distinguish and therefore never separate “Torture” and “Cruel and Inhumane Treatment” or CIT (HRC, n.d., para. 4). However, the CAT separates the two.

Providing a standard for CIT is even a more difficult task. Article 16 of the CAT mentions the following: “...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I...”. Hence, CIT has a broad scale and Torture is at the top with strict requirements. This would also mean that – below torture — so many things can be claimed to fall under the category of CIT –including, to some extent, prison.

Manfred Nowak in his report (Nowak, 2006, para. 60) mentioned that CIT, needs be distinguished from torture, must as the former involves:

- a. Infliction of severe pain or suffering at the level of torture, but failing to fulfil the ‘purpose’ element in Article 1 of CAT (i.e. interrogating, punishing, and intimidating), or
- b. Actions intended to humiliate but not inflicting severe pain or suffering.

We can trace the following examples or standards for reference:

- European Commission of Human Rights [*The Greek case (Application No. 3321/67, Denmark vs. Greece; No. 3322/67, Norway vs. Greece; No. 3323/67, Sweden vs. Greece; No. 3344 Netherlands vs. Greece)*, 5 November 1969 Report, 186.] defines CIT as the following:
“ [...] covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable [...] Treatment or punishment may be said to be degrading if it grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience.”
- The case of *Essono Mika Miha v. Equatorial Guinea*, by the UN Human Rights Committee in 1994 (Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990, Para 6.4): Food and drink deprivation for a week, torture for two days, and denial of medical assistance for several weeks –note how “torture” is in the evidences for CIT, which may blur the difference between the two.
- The case of *Nathaniel Williams v. Jamaica*, by the UN Human Rights Committee in 1997 (Communication No. 609/1995, U.N. Doc. CCPR/C/61/D/609/1995, Paras 6.4-6.5): Prolonged detention during deathrow –mentioned to not *per se* be CIT—but made worse by denial of medical treatment for the convict’s mental condition causing severe deterioration in this mental condition.

Lashing does not inflict severe pain or suffering as to qualify it as torture. Therefore, it should clarify the point (b) above is also consequently not fulfilled. On the other hand, this may face two alternative answers because the intention of the implementing lashing differs between the drafters of Qanun Aceh and the Shari’ah Court.

The first alternative is the information from the interviews to the Shari’ah Courts (district and appeals), which shows that the intention of lashing is indeed to inflict some level of humiliation. However, it is also found that the convicts prefer lashing than prison. Further, after the lashing, the convicts actually return normally to the society as if ‘cleansed’ from their sins. They can even have coffee together with the audience and sometimes with the officers. Certainly, this is not a kind of humiliation that would classify as CIT. The second alternative seems to bring more merit. The *Ulama* who drafted *Qanun Jinayat* explained that the primary goal of lashing is to inflict (controlled and limited) pain, and not to humiliate.

The Curious Case Of International ‘Soft Law’

Some ‘soft laws’ have been issued and some scholars claim that Islamic law of lashing constitutes as torture and CIT; hence a violation of human rights. This is explained in the next sub-section.

Boyle and Chinkin explain ‘soft law’ as international legal documents which are formally non-binding (Boyle & Chinkin, 2007, p. 213). Examples of this includes resolutions or decisions or codes of conducts issued by international organizations, reports by treaty bodies, *etc.* Traditionally, ‘soft law’ is not considered as a formal source of international law as it cannot be found in Article 38(1) of the Statute of the International Court of Justice. However, some legal constructivists have observed that –despite not formally binding—the states usually refer to ‘soft law’ as source of law anyways (Shaffer & Pollack, 2010, p. 713). For example, a non-binding resolution of the UN General Assembly was cited in the ICJ in the *Military and Paramilitary Activities in and against Nicaragua (1986)*, paras 191-193, and 195, as basis to declare the United States in breach of customary international law. Further, relevant to this case, some scholars including Boyle and Chinkin note that when treaty bodies

issue resolutions or comments regarding their relevant treaty, states usually consider these interpretations as authoritative (Boyle & Chinkin, 2007, p. 213).

Questioning the Power of Soft Laws

Association for the Prevention of Torture and the Center for Justice and International Law (APT & CEJIL, 2008), cited reports of the Committee Against Torture as authoritative sources of law. However, it is always be the universal case. For instance, Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women or CEDAW. When the preamble and early articles of CEDAW use the term 'equal rights', Article 16 regarding family rights uses the term 'same rights' to describe the relation between the rights of women and men. The Committee of the Elimination of Discrimination Against Women (CmEDAW) Committee declared that reservations to Article 16 of CEDAW would defeat the objects and purposes of CEDAW (CmEDAW, 1994, paras. 41–45). Clearly, they are on the “not same means not equal” side of the “can we be equal but not the same” debate.

Records show that over 20 states (including Pakistan, Singapore, Israel, Thailand, Ireland, and many more) made reservations towards Article 16, either in part or in full (“Reservations to CEDAW,” 2006). This is not yet to mention the numbers of states who mention that they do reservations, not explicit to what article is it directed but in practice does reserve Article 16 (e.g. Saudi Arabia) or states who do not make reservations but has “equal but not the same” family laws (e.g. Indonesia).

These states are a minority but a large one, which is all the more evidence on how not universal this rule is and how treaty bodies are not always followed. All the CmEDAW could do is to mention that they regret these reservations.

This is not the only case where ‘soft laws’ issued by treaty committees are not always followed, and therefore cannot always be considered as authoritative. In the end, it makes no sense that a treaty which is subject to ratification to have any legal effect to have its interpretation limited by a very small committee (Muhammadin, 2017b).

There are only a handful ‘soft laws’ which speak of lashing, particularly those relevant to this case i.e. for religious laws. Two of them will be explored here.

Manfred Nowak’s 2005 Report

The UN Special Rapporteur on Torture, Manfred Nowak, in 2005 issued a report to the UN General Assembly. In this report, Nowak specifically expressed his concern over the fact that some states implement corporal punishment as legal penalty. By mentioning Shari’ah punishments, they argue that it is not torture since it falls under the ‘lawful sanction’ exception (Nowak, 2005, para. 18). Nowak argues that the ‘lawful sanction’ exception in Article 1(1) of the CAT definition of torture must not be understood to only mean national laws but also international laws (Nowak, 2005, para. 27).

[1]

This argument is logically flawed for several reasons. The first flaw is on the consensus of the meaning of torture. It has been widely accepted that the prohibition against torture is a *jus cogens* (Bassiouni, 1996, p. 68). To satisfy *jus cogens*, the States practice must be universally recognised as having a higher status in international law, as mentioned in Article 53 of the Vienna Convention on the Law of Treaties 1969. Indeed, the CAT has a large number of state parties, and a seemingly universal acceptance. However, one may legitimately question whether Nowak’s understanding of the ‘lawful sanction exception’ in Article 1(1) of the CAT is part of the universal agreement on the CAT. The fact is that a noticeable number of states including Saudi Arabia, Yemen, *etc*, have ratified the CAT while preserving the prescription of lashing in their national laws shows that such an understanding is not a universally agreed one.

The second flaw is in Nowak’s substantiation of his claim. Let us for now put aside the fact that the ‘lawful sanction exception’, when understood to mean both national and international laws, would be

redundant. Even when the ‘lawful sanction exception’ is understood in such a way, surely the ‘severe pain’ element should still remain.

The report cited a number of cases as basis to show that corporal punishment in whatever situation was unlawful, among them are as follows (Nowak, 2005, para. 20, 25, and 22.):

- The case of *Osbourne v. Jamaica* (Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997’ [2000], paras. 3.3-3.4). This case also shows, if highlighted at paras 3.3-3.4 of the decision, that Osbourne was subjected to very awful detaining conditions, beaten up very severely, and also suffered from sexual harassment.
- The case of *Caesar v. Trinidad and Tobago*, at the Inter-American Court of Human Rights ([Ser. C] No. 123’, 2005, para 44(d)). If this precedence is examined further, the judgment explained that Caesar –like Osbourne—was kept under very awful detaining conditions, and beaten up very hard that he fainted, and suffered from depression as well as trauma.
- Saudi Arabia and Yemen cases which will be examined deeper later.

The reality is that Nowak’s report just used these precedents as basis to conclude a blanket prohibition of corporal punishment which lashing is included in. There seems to be only two possibilities as to how Nowak came to such a conclusion. The first possibility is that the ‘severe pain’ requirement is ditched altogether. This makes very little sense as ‘severe pain’ is still an element of torture – not to mention that it is the very first element.

The second possibility is that there is an assumption that all corporal punishments would inflict ‘severe pain’. If common sense is not a sufficient means to deduce that corporal punishment does not always inflict severe pain as the CAT requires and as displayed in the Osbourne and Caesar cases, then the Aceh practice could and should be one of the concrete evidences of it. As an illustration of the logic used in this possibility, a corporal punishment in form of ‘lightly tweaking the ear’ would fall under torture (this is a hypothetical scenario).

Either ways, there is a severe lack of substantiation in Nowak’s argument. It is bewildering as to why Nowak insists to argue that these corporal punishments constitute as torture with the very high standard of proof, rather than CIT which has a lower one. At least the ‘severe pain’ element can be set aside a little, and the ‘lawful sanction exception’ is out of the picture. Although, as argued earlier, it is possible that even the requirements of CIT are not satisfied in the case of lashing in Aceh –meaning at least that one cannot pass a blanket judgement that lashing constitutes CIT.

Saudi Arabia and the Committee Against Torture

Nowak’s report, as mentioned before, cites the case of Saudi and Yemen. This paper will explore the case of the former, as the proceedings were exceptionally interesting (and detailed data on the Yemen case was difficult to obtain also).

The Committee Against Torture (CmAT) in their concluding observation towards Saudi Arabia The CmAT in 2002 (Doc. No. CAT/C/CR/28/5) and 2016 (Doc. No. CAT/C/SAU/CO/2) mentions a number of concerns, i.e. that some sanctions in Saudi Arabian Law –which is based on the Shari’ah— would constitute ‘torture and inhumane treatment’. Among them would be stoning, amputation of limbs, and relevant to this paper: lashing. .

Towards the first conclusion by the CmAT, Saudi Arabia has submitted replies in 2015 (Doc. No. CAT/C/SAU/2) and 2016 (CAT/C/SAU/Q/2/Add.2) rejecting the CmAT conclusion. Their arguments include not only that Saudi Arabia has no body with authority to revise the lashing laws which is in their constitution (i.e. the *Qur’an* and the *Sunnah*), but also that it was a legal punishment sanctioned by State law and that it does not fulfill the criteria for CIT either. These arguments, especially the second and third, are valid and strong as mentioned in the previous sub-sections.

Very intriguing but unfortunately, at the end of the day, the CmAT in their 2016 conclusions did not reply the arguments submitted by Saudi Arabia at all. The CmAT curiously merely reiterated the same

conclusion and nothing more, so that all they have are claims which lack not just authority for anyone to follow but also any merit in such claims.

A proper research is needed to verify the practice of lashing in Saudi Arabia to see how it compares to the practice in Qanun Aceh. Some footage may indicate that the practice of lashing in Saudi Arabia may actually inflict less pain than in the practice of Aceh, as shown in some video footage (AJ+, 2015; Yasser, 2014). However, the conclusion is obvious. Nowak's report and the CmAT report on Saudi Arabia provide a general and blanket condemnation towards lashing as implementation of the Shari'ah anyways.

It has been shown in this section how these soft laws cannot become legitimate basis to rule against lashing under Islamic law, be it under Qanun Aceh or other Islamic jurisdictions. This is, as is explained under this section, due to two reasons: (1) that they are not binding anyway, and (2) those 'soft laws' were erroneous in reaching their conclusions.

International Human Rights Law: Colonialists Reborn?

Something does not seem to feel right. The errors in these 'soft laws' (i.e. Nowak's report and the CmAT observations towards Saudi Arabia) seem too obvious. The lack of severity of pain as well as the 'lawful sanction' exception are too large to miss, yet they were nonetheless overlooked and ignored.

This question may lead to a more insidious questions towards the trend of scholarship as well as UN practice of international law: are we witnessing more evidence the 'West regime of international law' trying to reinforce its colonialism-based intellectual hegemony in a postcolonial world? The truth is that there are compelling arguments explaining the colonial origins of this 'Eurocentric international law' (Anghie, 2004). Wan Mohd Nor Wan Daud further notes that it is very essential to understand that physical colonialism came inevitably with intellectual hegemony (including the epistemology of 'truth' and 'knowledge'), and this was enforced through colonialism and preserved through neo-colonialism (Daud, 2013, pp. 6–7).

Such hegemony started by an imposition of the Western worldview in the medieval era. The European nations claimed to be the only ones aware of the universal natural law, and as the only 'civilised' nations they have a mandate to 'civilize the uncivilized' world (Anghie, 2004, pp. 250–251). That was the position of Fransisco de Vitoria, who is known as one of the fathers of modern international law. Another father of modern international law, Emer De Vattel, also said the same (De Vattel & Chitty, 1835, p. 35). History notes that these were the legal basis from which to justify colonialism. This was preserved through the era of legal positivism (19th century) and further after World War II through the 'decolonialism' period which further enforces the European version of international law to the newly emerging states at the time (Anghie, 2004).

In context of international human rights law, has developed into today's regime of a falsely-claimed 'universal human rights' regime. Human rights has never been truly universal, but it is always claimed to be universal as a means for the Western powers to push their intellectual hegemony to the rest of the world (Muhammadin, 2017a). The CmEDAW example in Sub-Section V.A. mentioned earlier serves as a good evidence for this. Another evidence is the UNDP funds for LGBT movements ("Kalla requests UNDP to not fund LGBT groups," 2016), despite such a right not being recognized globally yet (Kania et al., n.d.). This is very likely the train of thought behind the unjust claims against Islamic law as Nowak and CmAT's 'soft laws' have made.

Al-Attas accurately describes this mindset as follows:

"[The] Western man is always inclined to regard his culture and civilization as man's cultural vanguard; and his own experience and consciousness as those representative of the most 'evolved' of the species, so that we are all in the process of lagging behind them, as it were, and will come to realize the same experience and consciousness in due course sometime" (Al-Attas, 1993, p. 25).

The problem is that such a mindset, originating from a Western historical trauma and intellectual confusion, is imposed upon the rest of the world including Muslim world (Al-Attas, 1993, Chapters 1–2, 4). Even Muslims start to question lashing and succumb to the claims that Islam is ‘inhumane’. They start being more ‘Western-minded’, and consider Islam needing to be ‘re-interpreted in the light of modern developments’. This claim is even backed by some alleged ‘Muslim scholars’, such as Fouad Zakaria (Zakaria, 1986), Ebrahim Afsah (Afsah, 2000) and Abdullahi An-Na‘im (An-Na‘im, 1987).

This mindset of thinking is multifaceted, which Al-Attas has spent numerous books to explain (Al-Attas, 1993, 2001). Particularly on the alleged ‘Islamic scholarship’ which are in fact ‘un-Islamic’, they base their methodology on hermeneutics. In a nutshell, hermeneutics consider texts as man-made texts which are subject to limitations and may only be interpreted in accordance with the limitation of the socio political and historical context of the author (Husaini & Al-Baghdadi, 2007, p. 12). Hermeneutics have numerous streams or methods but fall under the same assumption which violates Islamic teachings up to the epistemology, and is discussed in detailed through works of scholars such as Adian Husaini, Abdurrahman Al-Baghdadi (Husaini & Al-Baghdadi, 2007) and Fahmi Salim (Salim, 2010).

However, the main point that needs to be highlighted on this hermeneutics problem is that it is also a colonial legacy. This kind of secular method to ‘reinterpret’ religion was a legacy of the European historical trauma and was used to ‘reinterpret’ Christianity (Al-Attas, 1993, Chapters 1–2; Husaini & Al-Baghdadi, 2007, pp. 10–11). Therefore, at this point it is clear that there is a relation between colonialism, international law, and human rights discourses and how it is interfering into Islam and the Muslims in a negative way.

Conclusion

The claim lamenting lashing as an act of torture easily lacks merit. The required severity of pain is not fulfilled, while the exception (i.e. to lawful sanctions) is instead met. Lashing does not qualify as CIT either, also due to the lack of the severity of pain as well as –according to some opinions—lack of intent to humiliate.

However, the trend of international law and human rights seem to move in a direction to which it has always been moving. It seems that Aceh in particular has not been specifically commented on by any *soft law*. Yet, the existing instruments seem to indicate that, if the UN were to comment on Aceh, it will do so negatively. The UN claims universality, but they seem to only include those within their ‘magic circle’ (i.e. the Westerners, as an exclusive group) from which to consider what is universal (Mayer, 2014, pp. 198–200).

Having that said, more researches of international law using critical approaches are essential. If a critical and more honest research of international law is not mainstream, then scholars of international law –especially from the Muslim world—should endeavor to make it so. People who ask these questions are ‘confrontational’, ‘radical’, and even ‘left-ist’, because they are a dissent towards the mainstream scholarship of international law (Singh & Mayer, 2014, p. 4). However, more Muslim scholars must step up and take this challenge as it is their field of duty. It may not be an easy task, rather it is a long term investment, but it is one that must be done.

Acknowledgement

This article was presented at the Aceh Development International Conference, International Islamic University of Malaysia, 2017. It is part of a larger research titled “Hukuman Cambuk Sebagai Implementasi Syariat Islam pada Qanun Aceh dalam Perspektif Konstitusi dan Convention Against Torture” funded by the Research and Community Service Unit, Faculty of Law, Universitas Gadjah Mada, Indonesia, 2016.

We would also like to especially thank Prof Dr Al-Yasa Abubakar (UIN Ar-Raniry), Dra. Hj. Aklima Djuned and Salichin, S.Ag., S.H., (Mahkamah Syar’iyah Aceh), Hon. Justice Drs. H. Rafi’uddin, M.H.

and Hon. Justice Dr. Drs. H. Abd Manan Hasyim S.H., M.H., (Makhamah Tinggi Syar'iyah Aceh), Marzuki Ali, S.Ag., M.H. (Satpol PP and Wilayatul Hisbah), whom we have interviewed to collect data for this research. Special thanks go to Dr Heribertus Jaka Triyana for providing valuable feedback and Komunitas Muslim Fakultas Hukum UGM and the Islamic Law Forum UGM for their cooperation during the research grant presentation.

REFERENCES

- Abubakar, A.-Y. (2011). *Hukum Pidana Islam di Aceh: Penafsiran dan Pedoman Pelaksanaan Qanun tentang Perbuatan Pidana*. Banda Aceh: Dinas Syariat Islam Aceh.
- Afsah, E. (2000). Islamic Exceptionalism: How valid is the concept of 'Islamic human rights. *Kennedy School Review*, 1(1), 5–15.
- AJ+. (2015, January 14). Saudi Blogger Lashed 50 Times For Insulting Islam (Video). Retrieved July 9, 2018, from <https://www.youtube.com/watch?v=sIa6RiNSfIY>
- Al-Attas, S. M. N. (1993). *Islam and Secularism*. Kuala Lumpur: ISTAC.
- Al-Attas, S. M. N. (2001). *Risalah Untuk Kaum Muslimin*. Kuala Lumpur: ISTAC.
- Al-Bukhari, I. (1997). *Sahih Al-Bukhari* (Vol. 4). Riyadh: Darussalam.
- Al-Mawardi, I. (2014). *Al-Ahkam As-Sultoniyyah: Hukum-Hukum Penyelenggaraan Negara dalam Syariat Islam*. Jakarta: Darul Falah.
- Al-Nawawī, I. (1416). *Sharḥ Al-Nawawī 'Ala Muslim* (Vol. 16). Dar al-Khayr.
- Al-Qārī, 'Alī. (1422). *Mirqah al-Mafatih Sharh Mishkah al-Mashabih* (Vol. 7). Beirut: Dar al-Kutub al-'Ilmiyyah.
- An-Na'im, A. A. (1987). Islamic Law, International Relations, and Human Rights: Challenge and Response. *Cornell Int'l LJ*, 20(2), 317–335.
- Anas, M. bin. (1992). *Muwatta Al-Malik*. Granada: Madinah Press.
- Anghie, A. (2004). *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press.
- APT, & CEJIL. (2008). *Torture in International Law, A Guide to Jurisprudence*. Geneva-Washington DC: [19] The Association for the Prevention of Torture and the Center for Justice and International Law.
- Bassiouni, M. C. (1996). International Crimes: Jus Cogens and Obligatio Erga Omnes. *Law & Contemporary Problems*, 59, 63.
- Boyle, A., & Chinkin, C. (2007). *The Making of International Law*. New York: Oxford University Press.
- CmEDAW. (1994). *General Recommendation No. 21: Equality in Marriage and Family Relations, A/49/38*.
- Daud, W. M. N. W. (2013). *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization*. Johor Baru: UTM Press.
- De Vattel, E., & Chitty, J. (1835). *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*. PH Nicklin & T. Johnson.
- Feroza, C. (2007). *HAM dan Penerapan Sanksi Hukum Pidana Islam*. Universitas Indonesia.
- Haney, C. (2002). From Prison to Home: The Effect of Incarceration and Re-entry on Children, Families, and Communities. In *National Policy Conference*. Washington: U.S Department of Health and Human Services and the Urban Institute. Retrieved from <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf>

- HRC. (n.d.). *General Comments No. 20, UN Doc. HRI/GEN/1/Rev.7.*
- Husaini, A., & Al-Baghdadi, A. (2007). *Hermeneutika & Tafsir Al-Qur'an*. Jakarta: Gema Insani Press.
- Kalla requests UNDP to not fund LGBT groups. (2016, February 15). *The Jakarta Post*. Retrieved from <https://www.thejakartapost.com/news/2016/02/15/kalla-requests-undp-not-fund-lgbt-groups.html>
- Kania, D. D., Hilipito, M. R., Ayuni, Q., Soebagio, R. H., Muhammadin, F. M., Bachtiar, T. A., ... Ulfa, A. (n.d.). *Transformasi Menuju Fitrah: LGBT dalam Perspektif Keindonesiaan*. Jakarta: Aliansi Cinta Keluarga and Dompot Dhuafa.
- Koojimans, P. (1985). *Report by the Special Rapporteur, Mr. P. Koojimans, appointed pursuant to Commission on Human Rights Res. 1985/33.*
- Lane, E. W. (1968). *An Arabic-English Lexicon: In Eight Parts* (Vol. 3). Bayrūt: Librairie du Liban.
- Mayer, B. (2014). The “Magic Circle” of Rights Holders: Human Rights’ Outsiders. In P. Singh & B. Mayer (Eds.), *Critical International Law: Post-Realism, Post Colonialism, and Transnationalism* (pp. 198–219). Oxford–New Dheli: Oxford University Press.
- Muhammadin, F. M. (2017a). Universalitas Hak Asasi Manusia Dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial. In Al-Khanif, H. P. Wiratraman, & M. K. Wardaya (Eds.), *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme di Indonesia* (pp. 1–20). Yogyakarta: LKiS.
- Muhammadin, F. M. (2017b, May 16). Vonis Ahok dan Rezim HAM Internasional. *Republika Online*. Retrieved from <http://www.republika.co.id/berita/jurnalisme-warga/wacana/17/05/16/oq1px6291-vonis-ahok-dan-rezim-ham-internasional>
- Mukhtār, A. (2008). *Mu'jam Al-Lughah Al-'Arabiyyah Mu'aşirah*. Cairo: 'Alam al-Kutub.
- Muslim, I. (2007). *Sahih Muslim* (Vol. 6). Riyadh: Darussalam.
- Nowak, M. (2005). *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (No. A/60/316).*
- Nowak, M. (2006). *Report of the Special Rapporteur on the question of torture, Manfred Nowak, UN. Doc E/CN.4/2006/6.*
- Okezone. (2011, June 25). Kontras: Hukuman Cambuk di Aceh Langgar HAM. *Okezone News*. Retrieved from <http://news.okezone.com/read/2011/06/25/337/472648/kontras-hukuman-cambuk-di-aceh-langgar-ham>
- Oxford, D. (2017). Religion. Retrieved from <https://en.oxforddictionaries.com/definition/religion>
- Rahman, A. (1982). *Muhammad: Encyclopaedia of Seerah* (Vol. 2). London: The Muslim Schools Trust.
- Reservations to CEDAW. (2006). Retrieved October 26, 2017, from <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>
- Salim, F. (2010). *Kritik Terhadap Studi Al-Qur'an Kaum Liberal*. Jakarta: Perspektif.
- SerambiTV. (2017, March 20). Turis Saksikan Hukum Cambuk Di Aceh. Retrieved July 9, 2018, from <https://www.youtube.com/watch?v=ilf0uNfpsWY>
- Shaffer, G. C., & Pollack, M. A. (2010). Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance. *Minnesota Law Review*, 94, 706–799. <https://doi.org/10.1017/CBO9781107415324.004>
- Singh, P., & Mayer, B. (2014). Introduction: Thinking International Law Critically - One Attitude, Three Perspectives. In P. Singh & B. Mayer (Eds.), *Critical International Law: Post-Realism,*

Post Colonialism, and Transnationalism (pp. 1–26). Oxford–New Dheli: Oxford University Press.

Soekanto, S., & Mamudji, S. (2007). *Penelitian Hukum Normatif Suatu Tinjauan Umum*. Jakarta: Raja Grafindo Persada.

Yasser, P. (2014, July 15). Lashing in Islam. Retrieved July 9, 2018, from https://www.youtube.com/watch?v=dYS_ндуLkdU

Zainuddin, M. (2012). *Problematika Hukum Cambuk di Aceh*. Banda Aceh: Dinas Syariat Islam.

Zakaria, F. (1986). Human Rights in the Arab World: the Islamic Context. In UNESCO (Ed.), *Philosophical Foundations of Human Rights*. Paris: UNESCO.