FLOGGING IN NUMBERS AND COMPLICATIONS

Series of Monitoring and Documentation on Human Rights Violations in Indonesia
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INTRODUCTION

The local government has received full mandate under the Constitution of 1945 to govern itself in accordance with autonomy principle and assistance duty. By the autonomy, the local government has the right, authority, and obligation to maintain its government especially in certain sectors, i.e. education, health, public work, spatial planning, public housing, settlement area, public order, and social issues. Aside to the prevailing autonomy in all territories, certain area has special autonomy to regulate and manage the local communities’ interests based on their own initiatives. One of the examples of special autonomy is Aceh Province, pursuant to Law Number 44 of 1999 on Special Autonomy of Aceh Special Region in conjunction with Law Number 11 of 2006 on Aceh Government.

Aceh has the autonomy to conduct religious life based on Islamic Sharia in worship, ahwal al-syakshiyah (family law), muamalah (civil law), jinayat (criminal law), qadha’ (judiciary), tarbiyah (education), proselytizing, syiar (sharing the greatness of Islam), and the defense of Islam. The entire conduct of religious life is regulated under the Aceh Qanun. One of the qanuns that acquired many controversies on legality and its implementation is Qanun Aceh No. 6 of 2014 on Jinayat (criminal) Law (Qanun Jinayat). Qanun Jinayat regulates the forbidden act by Islamic sharia (jarimah) and the application of law (‘uqubat) for the perpetrator. One of the types of penalty is flogging.

The application of flogging punishment has triggered criticism because it is against the human rights principles. The special rapporteur for Torture, Manfred Nowak, stated that the flogging penalty applied in Aceh is a violation of state obligation to prevent corporal punishment. Amnesty International has stated that flogging penalty is a backward movement for human rights enforcement in Indonesia. The Network of Concerned Civil Society for Sharia (Jaringan Masyarakat Sipil Peduli Syariah, JMSPS) also boldly refuses the application of flogging penalty in Aceh because of its inhumanity. The appeal on Qanun Jinayat to the Supreme Court had also been appealed by the Institute for Criminal Justice Reform (ICJR), which categorized flogging penalty as torture, cruel inhumane punishment and it degraded human dignity. Whilst the criminal system in Indonesia has strictly banned flogging punishment. The Supreme Court rejected the appeal because Law Number 12 of 2011 on the Establishment of Legislation that has become the legal basis for
the material test of the objection petition is being processed for its testing in the Constitution Court.

Upon the flogging punishment, the Legal Aid (LBH Masyarakat) stands in the same position with the critics of flogging punishment. Legal aid states that flogging punishment is perpetuating corporal punishment that is obsolete for the direction of modern punishment. Based on this belief, we performed monitoring and media documentation during 2016 to now further about the human rights violations of flogging punishment in the life of Aceh society.
DOCUMENTATION AND MONITORING METHODS

Documentation of flogging penalty implementation is conducted by using content analysis, recording the elements of text (words, sentences) to data categorization and variables. This method enables analysis on the writer, receiver, and the intention of the texts. The analyzed text in the documentation are online news texts. The online news are able to record what the report analyzed, i.e. the actual situation of the flogging penalty implementation under the Qanun Jinayat in Aceh. Aside to that, the selection of online news is also based on two technical reasons, i.e. access facility and news computation. Text selection for the online news is produced by local media, may also be able to respond the lack of local news proportion, especially on Aceh, in the national newspaper.

To acquire the correct data on Qanun Jinayat implementation in Aceh, we keyed in varies of keyword in www.google.com search engine. The keywords that are used: “cambuk (flogging)”, “qanun”, “jinayat”, “Aceh”, and et cetera. After finding the right news, we recorded the quoted texts to the set of tabulation, such as when was the news published, who experienced flogging, how many were the lashes, what was the crime categorized for flogging punishment, et cetera. By this variable categories, we are able to conduct statistics calculation on the flogging legal practise pursuant to Qanun Jinayat in Aceh.

**Method Documentation:**

The documentation was started in the beginning of January 2016 until end of 2016. During that period, we managed to screen 87 online news. Not all of those screened news can be used in recording the data for analysis because some news had similar content, the news had no complete content, therefore
the truth was questionable, as well as there were news uncorrelated with the flogging punishment in Aceh (for example, news about Indonesian migrant worker in other country). The following diagram shows the news sites where we collected the news:

**Type of Online Media with the news recorded**

<table>
<thead>
<tr>
<th>Name of Media</th>
<th>Frequency of news</th>
<th>Name of Media</th>
<th>Frequency of news</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aceh Kita</td>
<td>1</td>
<td>MetroTV News</td>
<td>3</td>
</tr>
<tr>
<td>Antara News</td>
<td>4</td>
<td>Okezone</td>
<td>4</td>
</tr>
<tr>
<td>BBC Indonesia</td>
<td>1</td>
<td>Pikiran Merdeka</td>
<td>1</td>
</tr>
<tr>
<td>Berita Satu</td>
<td>1</td>
<td>Pos Kupang</td>
<td>1</td>
</tr>
<tr>
<td>Berita Sore</td>
<td>1</td>
<td>Redaksi.co</td>
<td>1</td>
</tr>
<tr>
<td>Go Aceh</td>
<td>8</td>
<td>Republika</td>
<td>6</td>
</tr>
<tr>
<td>Harian Aceh</td>
<td>1</td>
<td>Rimanews</td>
<td>1</td>
</tr>
<tr>
<td>Jawapos</td>
<td>2</td>
<td>Serambi Indonesia</td>
<td>21</td>
</tr>
<tr>
<td>Juang News</td>
<td>1</td>
<td>Tempo</td>
<td>2</td>
</tr>
<tr>
<td>Kabar Gayo</td>
<td>1</td>
<td>Tribrata News</td>
<td>1</td>
</tr>
<tr>
<td>Klik Kabar</td>
<td>1</td>
<td>Tribun News</td>
<td>8</td>
</tr>
<tr>
<td>Kompas</td>
<td>11</td>
<td>Viva News</td>
<td>2</td>
</tr>
<tr>
<td>Merdeka</td>
<td>1</td>
<td>Waspada</td>
<td>2</td>
</tr>
</tbody>
</table>

**Total N = 87**

Of course, there is weakness in the selection of online news text. The online news site competition forces a site to publish as many news as possible so that the quick writing eventually sacrifice the data accuracy. If we found unclear information in the news, such as there is no explanation on the type of violation which causes flogging, we will re-check it by comparing it to other online news. This method is the sole method that we can apply, even though it
is clear that it is not a qualified method to maintain data reliability. Besides its several weaknesses from the monitoring activity, we continue hope that the monitoring shall provide perspective and new illustration upon the reality of flogging punishment executed in Aceh.
DATA RESULT AND ANALYSIS

Execution and Threat of Flogging

Most news found which published information on execution of flogging in many provinces in Aceh. This can be understood, noting that the flogging execution is easy to cover because it is executed in a public area. But there are also news indicating that someone who is not yet executed and there criminal act just started to be processed. Therefore we differentiate the text’s substance to two sides: i.e. people who already received the flogging execution and people who are threatened with flogging punishment.

From the media search that we have acquired, during 2016, 332 people experiences flogging punishment, and 66 people are threatened by flogging execution. It is important to note that there is high likelihood that those 66 people will eventually become the first group.

From the entire case that we had documented, there was a unique case from the group of flogging punishment threat news group. On March 14, 2016, the consolidation team of Wilayatul Hisbah (WH)\textsuperscript{xii} Ulama, Indonesian National Army, and Police in District of Aceh Barat conducted raid to fight Lesbian-Gay-Bisexual-Transgender (LBGT)community by visiting several hair salons. In those salons the team met two transgenders. Both transgenders were considered violating the common gender expression (‘male who changed to become a female’). The consolidation team also conducted education, by advising them, and also threatening them if they were found showing the ‘wrong’ gender expression, they would be flogged 30 times.\textsuperscript{xiii}
In that news, it was mentioned that the Head of PP-WH (Community Police – Wilayatul Hisbah) Police Unit applied Qanun No. 6 of 2013 as the legal basis to do it. Whilst the qanun elucidated about The Amendment of Local Budget of Aceh for Fiscal Year 2013, not about criminal acts that are banned. Qanun Jinayat has never once enacted about the ban in relation with gender expression. The Islamic legal basis that can be applied for the transgender raid is Qanun Aceh No. 11 of 2002 which elucidated that each Muslim has the obligation to wear Islamic apparel and the failure to comply shall cause punishment under the ta’zir law after receiving the warning and education process by WH.

Legal practice which limit the transgender gender expression has long been applied as noted by Human Rights Watch in 2010. Even though the transgenders are covering their aurat according to the requirement to cover women’s aurat, they were still raided and threaten to be flogged. This raid is not only targeted to transgenders, but also to other LGBT groups. Different with the different gender expression that is not banned by Qanun Jinayat, people with the same sex orientation has a risk for flogging punishment because their act is considered as jarimah category, i.e. liwath (sexual activity between men) and musahaqah (sexual activity between women).

The application of flogging punishment to the LGBT group is a violation of right of freedom of expression, right of privacy, right of freedom of torture and other inhumane acts and punishments. Aside to that, criminalization and punishment to the LGBT group will create a climate where violence is allowed to the LGBT community, and cause double discriminatory practices to the them.

In relation with 332 flogging executions, there were also cancelled or postponed executions. There were several factors which caused them, i.e.:

1. The person was pregnant so the execution was postponed until the person give birth
2. The person was ill so the execution was cancelled
3. The person was physically unfit to experience the entire flogging so the execution was postponed to the next time.

The postponement and the discontinuation are in accordance with the jinayat procedural law, which elucidates that before the execution of flogging, the convict will be examined by the doctor and will be evaluated for his/her fitness
to experience the flogging. If not adequately fit, the execution will be postponed until the person is adequately fit. xx The flogging can also be temporarily stopped when during the execution the doctor instructed his/her medical consideration. xxi However, it is not described the medical restrictions that are allowed or not allowed to experience the flogging. There was also no explanation on the mental health of the person if he/she would experience the flogging, as flogging will have fatal impact to someone’s mental condition.

The involvement of doctor in flogging execution will be questionable for its justification under the medical ethics. Article 5 on the doctor’s obligation states that “Each doctor’s act or advise on flogging punishment execution should be questioned for its compliance to the doctors’ ethics. Article 5 on the doctor’s obligation states that “Every doctor’s act or advise that may weaken the psychological or physical endurance, shall require the approval of the patient/family and may only be given for the interest and benefit of the patient himself/herself.” xxi The doctor’s advise regarding the convict’s health shall determine whether the convict will be flogged or not. Therefore, the doctor has the role to provide possibly negative impact to his/her ‘patient’. The involvement of doctor in this act of torture can also be seen as an act of disciplinary violation of doctor’s professionalism. xiii

**Type of violation**

Aside to witnessing the act of execution, we also observe the types of criminal act that were conducted by the perpetrator. Several news that we found did not explain about the violation, therefore the data that has been utilized was reduced to 327 people. The following is the diagram which indicates the type of crime and the sex of the perpetrators:
Almost all of the criminal acts regulated under the qanun jinayathas the equivalent in Indonesian Criminal Code (KUHP) Indonesia, except khalwat and ikhtilath.

For khamar violation, Indonesian Criminal Code has banned the sales of khamar (alcohol drinks) for certain conditions, such as selling alcohol to children (article 538), selling alcohol to army (article 537) and et cetera, but not banning the consumption of liquor. In relation with khavar criminal act, there is a different between the criminal act conducted by man and woman. Majority of men were criminalized because of drinking liquor, while two women were criminalized and convicted guilty of transaction of selling alcohol.
At the meantime, for acts involving heterosexual couples, number of convicted men and women are considered similar. The example of of crime are ikhtilath, khalwat, and zina (adultery). The banning of khalwat and ikhtilat, we need to find out whether flogging is more harmful than the violations themselves. The community itself often does vigilante act by capturing and punishing the khalwat perpetrator using indigenous law that was unproportional to the act of the perpetrators.\textsuperscript{xxiv}

The execution of flogging also brings harm to one’s privacy; when the government should have done more essential activities, they regulate private matters such as the relationship between two people.

The existence of regional autonomy in Aceh causes dualism of criminal law enforcement, between Qanun Jinayat and Indonesian Criminal Code (KUHP). These two legal instruments have different objectives of punishment. Meanwhile, Qanun Jinayat emphasizes on deterrent and revenge, the punishment discourse that was built by the correctional system are rehabilitation and reintegration of the “transgressors”

**DEFINITION**

**Khalwat**
An act between two opposite sex in a closed or disguised area who are not Mahram and without marriage bound with the consent between two parties which leads to Adultery.

**Ikhtilat**
Promiscuous act such as making out, touching, embracing and kissing between man and woman who are not spouses with the consent between two parties, both in a closed or an open area.

**Maisir**
An act of betting, and/or an act which has element of luck that is conducted between 2 (two) parties or more, along with the agreement that is stating that the winning party will acquire certain payment/profit from the losing party directly or indirectly.

**Zina**
Intercourse between man/men and woman/women without marriage bound with both parties’ consents.

**Khamar**
Intoxicating drink, whereas consumed may disturb one’s health, consciousness and mental ability.
so that they will be well functioning in the society.\textsuperscript{xxv} The different objectives of punishment will also have different outcomes.

**Average of the Flogging that they had received**

In relation with average numbers of lashes executed to the \textit{jarimah} convicts, the data that we have acquired is the data of 182 people. This is due to the remaining data that are not mentioning clearly the number of lashes applied to the convicts. In this calculation, we are also not including the criminal act where in the data there was only a person who was convicted for the crimes, such as fornication and child sexual abuse. This is because the data is not quite representative of the number of lashes acquired by the convicts. The following is the diagram:

\begin{center}
\textbf{AVERAGE NUMBER OF LASHES RECEIVED FOR EACH VIOLATION}
\end{center}

- **IKTHILAT**
  - \(\text{\textbf{(15 Times)}}\)

- **KHALWAT**
  - \(\text{\textbf{(7 Times for women}}} \text{\& 8 Times for men)}}\)

- **KHAMAR**
  - \(\text{\textbf{(35 times)}}\)

- **MAISIR**
  - \(\text{\textbf{(7 Times for women}}} \text{\& 8 times for men)}}\)

- **ADULTERY**
  - \(\text{\textbf{(93 times)}}\)

- **RAPE**
  - \(\text{\textbf{(113 times)}}\)

- **CHILD RAPE**
  - \(\text{\textbf{(118 times)}}\)

\begin{center}
\textit{N = 182 People}
\end{center}
Based on the abovementioned data, it is known that the most executed flogging punishment is for child rapist, 118 lashes, followed by adult rapist, 113 lashes. The flogging penalty for adultery is also high, i.e. 93 lashes. Furthermore, *khamar* violation shall receive on average 35 lashes.

In several criminal acts, there are different average numbers of lashes between men and women. In khalwat criminal act, men acquire three times more lashes than women. Meanwhile for *maisir* or gambling, men usually acquire an extra lash than women.

From the abovementioned data there are *khalwat* and adultery perpetrators often receive maximum penalty. The maximum penalty for khalwat is 10 lashes, the same with average number of lashes received by the male perpetrators. The maximum punishment of adultery is 100 lashes, and the adultery perpetrators on average receive 93 lashes.

When the criminal act victim is a child, there is incriminatory flogging penalty. Child adultery is threatened under maximum of 100 lashes, but there was a case where a person committing adultery experienced 143 lashes. The number of lashes which exceed the maximum regulation was also received by a sex molester to a minor whereas he received 100 lashes while the maximum limit of punishment was 90 lashes. This is fundamentally a violation of Qanun law itself.

The number of flogging penalty given really impacts the the convict’s health. When the punishment given are hundreds of lashes, usually the convict will faint and the penalty will be continued with the next event. Not only the convict was not strong enough, the executioners should also alternate if there are many lashes. Taken to consideration how extreme the number of lashes executed, it is very apparent how this punishment is part of torture and inhumane punishment as well as degrades the human dignity.xxvi

**Place and Time**

Furthermore, we also conducted data collection on the number of people facing flogging execution in Aceh, which are distributed to several Districts/Municipalities where the flogging executions were implemented. The below diagram indicates the District/Municipality area in Aceh where the flogging execution is applied to the Qanun Jinayat convicts.
Data for varies of online news that we had received of course do not rule out the possibility of the flogging execution in the other districts/municipalities, such as Municipality of Lhokseumawe, Municipality of Sabang, and District of Aceh Singkil. However, because we do not acquire the clear/accurate sources, we cannot include it to our report.

We also conduct some data grouping of the flogging execution per month during 2016. Considering that the news publication policy really depend on the editorial policy, not necessarily the fluctuation of the flogging will be in accordance with the situation on the field. An editorial board may not highlighting the flogging topic in that month. But at least, this diagram can be the initial description of how flogging execution can be very fluctuative.
The interesting point from both data is, from the aspect of number of execution, there is no evidence that the effectiveness of flogging punishment provides deterrent effect for the society. Even though the flogging punishment has been placed in locations where people can watch and humiliate the convict, the effectiveness of the flogging execution in providing deterrent effect will always be questionable.
CLOSING REMARK

Data outcome in the previous part possibly may only reflect a small sliver of the flogging law reality in Aceh. The flogging law is not something oriental or mystical, but already become a part of Acehnese daily routine. According to this data, there are several takeaway that can be obtained:

- The implementation of flogging law in Aceh is conducted massively to at least 332 people as the victims.
- There are cases where the LGBT community is being searched and threatened to receive the flogging punishment. This threat is not in accordance with the respective Qanun Jinayat, which does not regulate the gender expression.
- The most punished offenses were Maisir or gambling, continued with Khalwat (two opposite sexes without marriage binding were located in a closed area with the consent of both parties to conduct adultery) who shall receive on average 93 lashes out of 100 lashes as the maximum punishment.
- The high number of people who received flogging punishment indicates the effectiveness of flogging punishment for deterrent effect is questionable since it does not show its outcome.

In principle, the flogging punishment is a violation of human rights. It is an inhumane punishment and such punishment should be abandoned. The Convention of Civil and Political rights that has been ratified by Indonesia stated that not a single person may be sanctioned with torture or other ruthless and inhumane legal treatment to human, and degrading to the human dignity.\textsuperscript{xxvii} The respective punishment in this article is including corporal punishment that is applied as punishment to a crime.\textsuperscript{xxviii} The state should prevent the ruthless, inhumane, and degrading to the human dignity so that the public official will not implement it in his/her jurisdiction.\textsuperscript{xxix}

Entering its third year of implementation, human rights violation in flogging punishment has been notioned as the sacrifice for maintaining security and order. But, considering the data finding where flogging is also threatening gender identity and different sexual orientation, executed by violation someone’s rights of privacy, conducted exceeding the maximum limit (children adultery and child harassment), with unclear effectiveness, we should ask how
long will this sacrifice be executed. If later it is found that flogging punishment bring no benefit, we will recognize that corporal punishment cannot be justified for any situation.

END NOTES

i Indonesia, Constitution of Republic of Indonesia of 1945, Article 18 paragraph (2).

ii Indonesia, Law Number 23 of 2014 on Local Government, Article 1 point 6.

Ibid., Article. 12 point 1.

iv Indonesia, Law Number 11 of 2006 on Aceh Government, Law No. 11 of 2006, Article 12

Jarimah that is regulated under the Qanun Jinayat are: a) Khamar (intoxicating drink); b) Maisir (gambling); c) Khalwat (indecent behavior); d) Ikhtilath (fornication between non-spouse); e) Zina (sexual intercourse without being legally married); f) Sexual harrassment; g) Rape; h) Qadzaf (accusing someone of being adulterous); i) Liwath (homosexual sexual intercourse, between male and male); and j) Musahaqah (homosexual intercourse, between female and female.


x Ibid., pg. 9.

xi Online news here means the journalistic report upon an event published by online news site.

xii According to Qanun No. 7 of 2013 on Jinayat Procedural Law, Wilayatul Hisbah is part of the community policewhich has the function to conduct dissemination, monitoring, law enforcement, and education of Islamic Sharia implementation.


xiv Indonesia, Qanun Aceh No. 11 of 2002 on the Implementation of Islamic Sharia on Aqidah, Religious Practice and Islamic Proslytization, Article 3 point 1.

xv Ta’zir is the lawverdicted by the judge which characteristic is optional and the maximum and minimum extent.
xvi Indonesia, *Qanun Aceh No. 11 of 2002 on Islamic Syariah on Aqidah* (Islamic Law), *Ibadah* (religious practice) and *Syi’ar* (proselytization) of Islam, Article 23.


xx Indonesia, *Qanun Aceh Number 7 of 2013 on Jinayat Procedural Law*, article 259, paragraph (2).

xxi *Ibid.*, article 266.


xxiii Indonesian Doctors Council, *Regulation of Indonesian Doctors Council No. 4 of 2011 on Doctors and Dentists Professional Discipline*, Article 3 paragraph (2)


xxv Iqrak Sulhin, “Filsafat Pemasyarakatan dan Paradoks Pemenjaraan di Indonesia”, presented in the 3rd International Conference of Indonesia (Nusantara) Philosophy, Faculty of Philosophy, Universitas Gadjah Mada, 10-11 November 2015.


xxviii Human Rights Committee, OHCHR, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (10 March 1992), available in http://www.refworld.org/docid/453883fb0.html, paragraph 5.

xxix General Assembly resolution 39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (10 December 1984), available in http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf, article 16