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## Revisiting Implementation of Treaties on Human Rights in The Islamic Court of Aceh, Indonesia: Compliance or Violation?

By Rina Shahriyani Shahrullah\*

Indonesia has ratified six international treaties in the field of human rights, namely CEDAW, CAT, CERD, CRC, ICESCR, and ICCPR. These international human rights treaties oblige a ratifying state to transform them into their national law; consequently Indonesia as a ratifying state must transform them to its applicable legislation, so that courts in Indonesia can apply them when making decisions. Different from the Religious Courts which are established in other provinces in Indonesia, the Aceh Islamic Court has jurisdiction to decide both private matters and criminal offenses. Since the competencies of this court cover the area of public law, this study aims to examine whether it has implemented the principles or norms of international treaties which have been ratified by Indonesia. To achieve this particular objective, the study adopts normative legal research<sup>9</sup> focusing on the examination of the Aceh Jinayat Qānūn and Islamic Court decisions. Data used in this study was based on secondary data obtained from official legal documents, books, research reports and journal articles and it was analysed by using the qualitative approach. It was found that the international treaties has never been implemented by the Islamic Court of Aceh because the Court adopts the caning punishments which are considered inhuman and cruel; consequently they violate human rights and the ratified international treaties. It was also found that the Central Indonesian<sup>27</sup> government is silent regarding this matter even though international community and the UN Human Rights Committee called on Indonesia to evaluate the Aceh Jinayat Qānūn to comply with the ratified international treaties. It was further found that although the Aceh Jinayat Qānūn which imposes the caning execution and considers being cruel and inhuman, people of Aceh remains to support the implementation of the Qānūn and have no objections to the Islamic Court decisions.

**Keywords:** International Treaties; Human Rights; Islamic Court; Aceh; Indonesia

### Introduction

Majority of population in Indonesia embrace Islam as their religion. Yet, it does not mean that Islamic Law is implemented in its entirety by all courts in 34 provinces in Indonesia. Aside from Aceh Province, courts in other provinces only implement Islamic Law which is relevant to the matters relating to marriage, inheritance, succession, gifts, and the endowment of money for religious purposes (*wakaf*), the giving of alms (*shadaqah*) and Islamic economic matters such as Islamic finance and banking.<sup>1</sup> Islamic law is integrated into the Indonesian legal

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<sup>1</sup>Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law covers marriage, inheritance and endowment (*Wakaf*). Religious Court settles all financial, banking and economic

system together with Customary Law (Adat Law),<sup>2</sup> the Civil Law System with a Dutch Colonial Law model<sup>3</sup> and to some extent the Common Law system due to a new development of law in Indonesia.<sup>4</sup> Hence, the Indonesia legal system in principle constitutes a pluralist legal system.

As a result of pluralistic legal system, the judiciary system in Indonesia consists of state courts (*Pengadilan Negeri*), military courts, administrative courts and religious courts as it is stated under Article 24 of the 1945 Constitution. Each of the courts has its own appeal court (*Pengadilan Tinggi*), and the Supreme Court (*Mahkamah Agung*) is the highest in the hierarchy. The organizations and competencies of Islamic Court are established under the 1989 Religious Judicature Law.<sup>5</sup> Article 4(1) of the Law stipulates that the first instance courts (*Peradilan Agama*) should exist in each regency (*kabupaten*) and municipality (*kotamadya*), while the Islamic appeal courts (*Peradilan Tinggi Agama*) are located in every capital of province.<sup>6</sup>

In 2006, the 1989 Religious Judicature Law was amended by the 2006 Religious Judicature Law. The later Law sets up a number of changes relating to the courts' powers, in particular the abolition of the "choice of law" rule relating to inheritance. Based on this Law, Indonesian Muslims are no longer permitted to submit their inheritance cases decided according to the customary law (*Adat*) in the civil courts. The 2006 Religious Judicature Law also added new competencies to the Islamic courts to include disputes relating to "Shariah Economics" (*Ekonomi Syariah*).<sup>7</sup> In 2009, the second amendment was made to the 1989 Religious Judicature Law. In order to improve the uniformity in the implementation of Islamic law within the jurisdiction of Islamic courts,<sup>8</sup> in 1991 the Indonesian President issued a Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (*Kompilasi Hukum Islam*). The Compilation of Islamic Law consists of Three Books, namely Book One on Marriage, Book Two on Inheritance, and Book Three on Charity. The Compilation is implemented by the Religious Courts in Indonesia except Aceh Province. Based on the contents of the Compilation and the 2006 Religious Judicature Law, it is obvious that the

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matters based on the Islamic Law (*Syariah*) based on Law No.3 of 2006 as amended by Law No.3 of 2009 concerning the Second Amendment to Law No.7 of 1989 concerning Religious Court Judicature.

<sup>2</sup>Law No. 5 of 1960 concerning Agrarian Law (Land Law) is based on Adat Law.

<sup>3</sup>The Civil Law System is inherited by the Dutch Colonial Law and it strongly influences the Indonesian style of legal thoughts, structure of legal institutions, legal classification and procedures. See Marzuki (2012) at 26.

<sup>4</sup>Law No. 20 of 2001 concerning the Amendment to Law No. 31/1999 on the Eradication of the Criminal Act of Corruption adopts the approaches of the Common Law.

<sup>5</sup>Law No.7 of 1989 concerning Religious Judicature.

<sup>6</sup>Article 4(2) of Law No.7 of 1989 concerning Religious Judicature.

<sup>7</sup>Elucidation of the 2006 Religious Judicature Law states that "Syariah Economics are commercial activities carried out according to the principles of the Shari'a." The elucidation also includes a non-exhaustive list of subjects encompassed by "ekonomi Syariah", including Shari'a-compliant banking, finance, microfinance institutions, insurance, fund management, time deposits, securities, pawn brokerage, pension funds, and other business transactions.

<sup>8</sup>Mawardi (2003) at 125,127.

jurisdiction of the Religious Courts in other provinces are limited to private and Islamic economics matters only.

Different from other provinces in Indonesia, since 1999 Aceh Province has formally implemented Islamic Law through Law No.44 of 1999 which recognized the “Special Status of the Province of Aceh Special Region in the fields of religion, education, and customary law (*Adat*)”.<sup>9</sup> Other legal sources which render full authority to Aceh Province to implement Islamic Law are Law No. 18 of 2001 on Special Autonomy for the Province of Aceh, and Law No. 11 of 2006 concerning the Government of Aceh. The Laws provides the authority to Aceh Province to formulate its regulations (Qānūn) at provincial level based on Islamic Law. Table 1 shows the Hierarchy of Rules in Aceh Province.

**Table 1. Legal Hierarchy in Aceh Province**

<sup>31</sup> Types and National Hierarchy of Rules <sup>8</sup>	Types and Hierarchy of Rules for Special Autonomy	Types and Hierarchy of Rules based on Islamic Law
The Constitution of the Republic of Indonesia of 2015	The Constitution of the Republic of Indonesia of 1945	The Constitution of the Republic of Indonesia of 1945
People's Consultative Council Decree	People's Consultative Council Decree	
<sup>14</sup> Law/Government Regulation In Lieu of Law	Law/Government Regulation In Lieu of Law	Law/Government Regulation In Lieu of Law/ Islamic Law (al-Qur’an/Sunnah/ Ijtihad/ Mazhab)
Government Regulation		
Presidential Regulation	Presidential Regulation	
Province Regulation/Regency/Municipality Regulation	Qānūn of Aceh/ Qānūn of Regency/Municipality/ Reusam Gampong	Qānūn of Aceh
		Qānūn of Regency/Municipality/ Reusam Gampong

Source: Al-Yasa' Abubakar.<sup>10</sup>

Law No.11 of 2006 also gives a special authority to Aceh Province to issue Qānūn which covers the field of family matters (*ahwal al-syakh siyah*), civil matters (*muamalah*) and criminal matters (*jinayat*). Consequently if a Qānūn is contrary to the Government Regulation, Presidential Regulation, and Province Regulation/Regency/Municipality Regulation, it is not automatically cancelled. This is because such regulations must be adjusted to Law No.11 of 2006 as an umbrella legislation for Qānūn.<sup>11</sup> Aceh Province has Qānūn No.11 of 2002 on the Implementation of Islamic Law on the Fields of Doctrine (*Akidah*), Ritual

<sup>9</sup>Cammack & Feener (2012) at 38.

<sup>10</sup>Abubakar (2007) at 18.

<sup>11</sup>Kasim (2011) at 13.

Practices (*Ibadah*), Markers of Identity (*Syar Islam*), Qānūn No. 7 of 2004 on Obligatory Charitable Giving (*zakat*), and Qānūn No.10 of 2007 on the Institution of Obligatory Charitable Giving (*Baitul Mal*).<sup>12</sup> Previously, it has Qānūn No. 12 of 2003 on the Consumption of Alcohol (*Khamr*), Qānūn No.13 of 2003 on Gambling (*Maysir*), and Qānūn No.14 of 2003 on Improper Covert Association (*Khalwat*). Yet, they were repealed when Qānūn No.6 of 2014 on *Jinayat* Law (Criminal Law) was issued. To strengthen the implementation of Islamic Law in Aceh Province, the Indonesian President issued a Presidential Decree No.11 of 2003 concerning Islamic Court (*Mahkamah Syar'iyah*) and it was followed by the Decision of the Chief of Indonesian Supreme Court No.KMA/070/SK/2004 which delegates the authority of general courts to the Islamic Court (*Mahkamah Syar'iyah*) in Aceh Province.<sup>13</sup> Different from the Religious Court in other provinces, the Islamic Court of Aceh Province decides both private matters and criminal offenses.

Since the Islamic Court has jurisdiction to decide both criminal and private cases under the Islamic Law, controversies arise regarding the punishments imposed by the Court. This is because the form of whipping for example is not only foreign to the higher level of legislation in Indonesia, but also to the international legal instruments which are ratified by this country. In this regard, it must ensure that its legislative products at the national and regional level, both the existing ones or and those that will be formulated later, must comply with the provisions of the ratified international treaties. Accordingly, Qānūn as „a statutory regulation similar to provincial regional regulation which governs the administering of government and life of Aceh community“<sup>14</sup> must also be in accordance with the treaties ratified by Indonesia. Up to the present, Indonesia has ratified six major international human rights treaties, namely:

- a. International Convention on the Elimination of All Forms of Discrimination against Women (CEI<sup>13</sup>W), ratified by Law 7 of 1984;
- b. Convention International Against Torture and Treatment or Punishment other Cruel, Inhuman and Degrading Man's Dignity (CAT), ratified by Law 5 of 1998;
- c. International Convention on Elimination of All Forms of Racial Discrimination (CERD), ratified with Law 29 of 1999;
- d. International Convention on the Rights of the Child (CRC), ratified through Presidential Decree No. 36 of 1990;
- e. International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Law 11 of 2005;
- f. The International Covenant on Civil and Political Rights (ICCPR), ratified by law 12 of 2005.<sup>15</sup>

<sup>12</sup>Cammack & Feener (2012) at 39.

<sup>13</sup>Kasim (2011) at 12.

<sup>14</sup>Article 1(21) of Law No.11 of 2006.

<sup>15</sup>Kasim (2011) at 14.



### Literature Review on Punishments in Islamic Law

Based on Islamic Law, there are six major offenses which are referred to the offenses of *hudud* or *hadd* punishment.<sup>16</sup> They are drinking of alcohol, theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity, and apostasy.<sup>17</sup> Their penalties are prescribed in the *Qur'an*<sup>18</sup> or the *Sunnah*.<sup>19</sup> Islamic law also prescribes punishment for homicide and the infliction of injury which could be either as *Qisas* (retaliation) or the payment of *Diya* (blood-money).<sup>20</sup> Relatives of the deliberate murder may demand *diya* instead of *qisas*.<sup>21</sup> Table 2 shows the category of *hudud* and *qisas* offenses and their punishments.

**Table 2.** Criminal Offenses (*Jarīmah*) and Punishments (*Uqubat*)

Criminal Offenses (Jarīmah)	Category of Offenses	Punishment ('Uqūbat)	Sources
Theft ( <i>al-Sariqa</i> )	<i>Hudud</i>	Amputation of hand	Qur'an: al-Ma'idah: 38.
Armed Robbery ( <i>al-Hiraba</i> )	<i>Hudud</i>	5 Death penalty, crucifixion, cutting off the hands and feet on the opposite sites, banishment	Qur'an: al-Ma'idah: 33 – 34.
Illicit Sexual Relations ( <i>al-Zina</i> )	<i>Hudud</i>	100 lashes	Qur'an: al-Nur: 2; Qur'an: al-Anfal:38.
False Accusations of Unchastity ( <i>al-Qadhf</i> )	<i>Hudud</i>	80 lashes	Qur'an: al-Nur: 4.
Consumption of Alcohol ( <i>al-Khamr</i> )	<i>Hudud</i>	40 lashes	<i>Sunnah</i> (practices established by Prophet Muhammad Peace be Upon Him).
Apostasy ( <i>Murtadd</i> )	<i>Hudud</i>	Death penalty	<i>Sunnah</i> (practices established by Prophet Muhammad Peace be Upon Him).
Homicide	<i>Qisas</i> or <i>Diya</i>	Retaliation or blood-money	Qur'an: al-Baqarah: 178-179.

Source: Abū Zahrah.<sup>22</sup>

<sup>16</sup>El-Awa (1982) at 1.

<sup>17</sup>El-Awa (1982) at 1-2.

<sup>18</sup>The Qur'an is the literal word of God, which He revealed to His Prophet Muhammad peace be upon Him through the Angel Gabriel. See Ibrahim (1997) at 5.

<sup>19</sup>The Sunnah is comprised of *hadeeths*, which are reliably transmitted reports by the companions of Prophet Muhammad peace be upon Him of what he said, did, or approved of. See Ibrahim (1997) at 49.

<sup>20</sup>El-Awa (1982) at 71.

<sup>21</sup>El-Awa (1982) at 71.

<sup>22</sup>Zahrah at 76.

Apart from *hudud* and *qisas*, other offenses in Islamic Law are categorized as *Ta'zir* (discretionary punishment).<sup>23</sup> The ultimate objectives of *Ta'zir* are 'to punish wrong deeds which may do harm to the society or to the rights of an individual'.<sup>24</sup> In this regard, its objectives are to prevent further commission of crimes and to reform punishment the offender'.<sup>25</sup> *Ta'zir* constitutes a discretionary power of judges; consequently they are free to determine the types of offenses and their punishments.<sup>26</sup> The punishments of *Ta'zir* are admonition (*al-Wa'z*), reprimand (*al-Tawbikh*), threat (*al-Tahdid*), boycott (*al-Hajr*), public disclosure (*al-Tashhir*), fines and the seizure of property (*al-Gharamah wal-Musadarah*), imprisonment (*al-Habs*), flogging (*al-Jald*), death penalty (*al-Ta'zir bil Qatl*).

According to Suparyanto,<sup>27</sup> punishments in Islamic Law contain specific purposes, namely:

- a. Punishment is to prevent offenders to repeat the same crimes. In addition, it also prevents others from conducting such crimes since they understand the consequences or punishments that can be imposed on them.
- b. Punishment aims to educate offenders. In this regard, they abstain from conducting the crimes not only because of fearing the punishment, but because of their self-consciousness and willingness of obtaining forgiveness from God.

The execution of punishment under Islamic Law requires some conditions to be met in order to achieve the purposes of punishments stated above. The conditions are<sup>28</sup>:

- a. Punishment must be prescribed by Islamic Law (principle of legality). This means that the punishment is based from the Islamic Law sources, namely the Qur'an, As-Sunnah, Ijma, or the law set by the authorized institution (*Ulil Amri*). The latest must not be in contradiction with the provisions of Islamic law, otherwise it is void.
- b. Punishment should be personal (principle of accountability). This implies that it should be imposed only on a person who commits the crime.
- c. Punishment must be universal (principle of equality). This means that it is applicable to everyone without discrimination.

## Methodology

This study aims to analyse whether the Islamic Court in Aceh Province implements the international treaties on human rights ratified by Indonesia. To

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<sup>23</sup>El-Awa (1982) at 2.

<sup>24</sup>El-Awa (1982) at 116.

<sup>25</sup>El-Awa (1982) at 116.

<sup>26</sup>El-Awa (1982) at 110.

<sup>27</sup>Suparyanto (2015).

<sup>28</sup>Suparyanto (2015).



achieve this particular objective, it adopts a normative legal research<sup>29</sup>. Data used in this study was secondary data which consists of<sup>30</sup>:

- a. Primary legal materials, namely International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Law 7 of 1984; Convention International Against Torture and Treatment or Punishment other Cruel, Inhuman and Degrading Man's Dignity (CAT), ratified by Law 5 of 1998; International Convention on Elimination of All Forms of Racial Discrimination (CERD), ratified with Law 29 of 1999; International Convention on the Rights of the Child (CRC), ratified through Presidential Decree No. 36 of 1990; International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Law 11 of 2005; The International Covenant on Civil and Political Rights (ICCPR), ratified by law 12 of 2005 Law No. 11 of 2006 concerning the Government of Aceh, The *Jināyat Qānūn* of Aceh Province (Qānūn No.6 of 2014), Presidential Decree No.11 of 2003 concerning Islamic Court (Mahkamah Syar'iyah) and Aceh Islamic Court Decisions.
- b. Secondary legal materials, namely books, research reports and journal articles.

All data collected were analysed based on their content (content analysis) using the qualitative approach.<sup>31</sup> There are five main steps employed in the process of analysing the materials listed above. They are:

- Step 1: categorizing the secondary data which consists of laws, cases, experts' arguments obtained from books, research reports and journals
- Step 2: identifying the issues and categorizing the arguments (pros and cons arguments) based on the identified issues.
- Step 3: summarizing the relevant issues and arguments obtained from Step 2. The summaries that are originally written in Indonesia to be translated into English.
- Step 4: critically reviewing and analysing the summaries.
- Step 5: establishing analytical arguments in order to produce compelling conclusions pursuant to the summarized materials obtained from Step 4.

## Findings

The *Jināyat Qānūn* of Aceh Province (Qānūn No.6 of 2014) consists of ten chapters, namely General Provisions (Chapter I), Principles and Scope (Chapter II), Reason and Rejection Reason (Chapter III), *Jarīmah* and 'Uqūbat (Chapter IV), Bonding *Jarīmah* (Chapter V), *Jarīmah* and (Chapter VII), Other Requirements

<sup>29</sup>Soejono & Abdurahman (2003) at 56.

<sup>30</sup>Marzuki (2005).

<sup>31</sup>Qualitative research is a type of scientific research that aims to seek answers to the questions „what“, „how“ or „why“ of a phenomenon. See Coutin (2015).

(Chapter VIII), Transitional Provisions (Chapter IX) and Closing Provisions (Chapter X). Table 3 shows the category of offenses and their punishments under the *Jināyat Qānūn* of Aceh Province.

**Table 3.** *Offenses and Punishments under the Jināyat Qānūn*

<b>Criminal Offenses (Jarimah)</b>	<b>Description</b>	<b>Provisions and Punishment</b>
<i>Khamar</i>	An intoxicating drink and/or containing alcohols of 2% (two percent) or more.	<p>Article 15(1): Anyone who deliberately drinks <i>Khamar</i> is threatened with '<i>Uqubat Hudud</i>' by whipping 40 (forty) times.</p> <p>Article 15(2): Everyone who repeats such acts referred to in paragraph (1) shall be threatened with '<i>Uqubat Hudud</i>' by whipping 40 (forty) times plus '<i>Uqubat Ta'zir</i>' by whipping at most 40 (forty) times or a fine at most 400 (four hundred) grams of pure gold or imprisonment for a maximum of 40 (forty) months.</p> <p>Article 16 (1): Any person who knowingly produces, store/store, sell, or enter <i>khamar</i>, each is threatened with '<i>Uqubat Ta'zir</i>' by whipping at most 60 (sixty) times or fine at most 600 (six hundred) grams of pure gold or imprisonment for a maximum of 60 (sixty) months.</p> <p>Article 16(2): Every person who intentionally buys, carrying/transporting, or awarding <i>Khamar</i>, each is threatened with '<i>Uqubat Ta'zir</i>' by the most whips of 20 (twenty) times or a fine of at most 200 (two hundred) grams of pure gold or a maximum of 20 (twenty) months imprisonment.</p> <p>Article 17: Any person who deliberately commits an act as referred to in Articles 15 and 16 with involving children subject to '<i>Uqubat Ta'zir</i>' by whipping at most 80 (eighty) times or a maximum fine of 800 (eight hundred) grams of pure gold or the longest imprisonment of 80 (eighty) months.</p>

<p><i>Maysir</i></p>	<p>An act that contains the element of the bet and / or an element of chance made between 2 (two) parties or more, accompanied by an agreement that the parties who wins will get paid / certain profit from the losers either directly or indirectly.</p>	<p>Article 18: Everyone who deliberately performs <i>Jarimah Maysir</i> with a bet and/or a maximum of 2 points (two) grams of pure gold, is threatened with '<i>Uqubat Ta'zir</i>' by whipping at most 12 (twelve) times or a maximum fine of 120 (one hundred and twenty) grams of pure gold or the longest imprisonment of 12 (twelve) months.</p> <p>Article 19: Everyone who deliberately performs <i>Jarimah Maysir</i> with a bet value and / or gain of more than 2 (two) gram of pure gold, is threatened under '<i>Uqubat Ta'zir</i>' with the most whip many 30 (thirty) times or a fine of not more than 300 (three hundred) grams of pure gold or imprisonment not exceeding 30 (thirty) months.</p> <p>Article 20: Any person who deliberately organizes, provide facilities, or finance <i>Jarimah Maysir</i> as referred to in Articles 18 and 19 shall be threatened with '<i>Uqubat Ta'zir</i>' by whipping at a maximum of 45 (forty five) times and/or a fine of not more than 450 (four hundred and five) pure gold gram and/or a maximum of 45 months imprisonment.</p> <p>Article 21: Everyone who deliberately performs <i>Jarimah Maysir</i> as referred to in Articles 18 and 19, which involving children is threatened with „<i>Uqubat Ta'zir</i> involving children is threatened by whipping at a maximum of 45 (forty five) times or a fine of maximum 450 (four hundred fifty) grams of pure gold or imprisonment of a maximum of 45 (forty five) months.</p> <p>Article 22: Anyone who attempts to do the <i>Jarimah Maysir</i> as referred to in Articles 18 and 19 shall be liable '<i>Uqubat Ta'zir</i>' is at</p>
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		most 1/2 (half) of <i>Uqubat</i> which is threatened.
<i>Khalwat</i>	An act of being in a closed place or hidden between 2 (two) people of different types sex which is not <i>Mahram</i> <sup>32</sup> and without marital ties with the willingness of both parties that leads to fornication.	Article 23: (1) Everyone who deliberately does the <i>Jarimah khalwat</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by the most whipping of 10 (ten) times or the most fine of 100 (one hundred) grams of pure gold or the longest imprisonment of 10 (ten) months. (2) Every person who deliberately organizes, provide facilities or promote <i>Jarimah khalwat</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by the most whipping of 15 (fifteen) times and/or a maximum fine 150 (one hundred and fifty) grams of pure gold and/or imprisonment at a maximum of 15 (fifteen) months.
<i>Ikhtilath</i>	The act of touching, hugging and kissing between a man and a woman who is not a husband and wife with a willingness of both sides, either in a closed or open place.	Article 25: (1) Everyone who deliberately does the <i>Jarimah Ikhtilath</i> , is threatened with ' <i>Uqubat</i> ' by whipping 30 (thirty) times at the most or a fine of not more than 300 (three hundred) gram of pure gold or imprisonment not later than 30 (thirty) months. (2) Every person who deliberately organizes, provide facilities or promote <i>Jarimah Ikhtilath</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by whipping 45 (forty five) times at the most and/or the most fine of 450 (four hundred fifty) grams of pure gold And/or imprisonment of a maximum of 45 (forty five) months. Article 26: Any person who deliberately performs <i>Jarimah Ikhtilath</i> as referred to in Article 25 with a child whose age is over 10 (ten) years, is threatened with

<sup>32</sup>Mahram is very close relatives or family members that you are not allowed to marry. They are your children, grandchildren, mother, father, grandfather, grandmother, maternal grandfather, maternal grandmother, brothers, sisters whether real or children of the same father or of the same mother, uncle, niece, maternal uncle and niece, maternal aunt and nephew, paternal aunt and nephew, foster brother and sister. See Madani (2001) at 487-488.

		<p>'UqubatTa'zir' by whipping at a maximum of 45 (forty five) times or a fine of not more than 450 (four hundred and fifty) grams of gold pure or imprisonment of a maximum of 45 (forty five) months.</p> <p>Article 27: Any person who deliberately performs <i>Jarimah Ikhtilath</i> with people who have <i>Mahram</i> associated with him, in addition to be threatened with 'Uqubat' as referred to in Article 25 paragraph (1), it may be supplemented by 'Uqubat Ta'zir' at the maximum fine of 30 (thirty) grams of pure gold or 'Uqubat Ta'zir' of imprisonment for a maximum of 3 (three) months.</p>
<i>Zina</i>	Intercourse between a man or more with a woman or more without marriage bonds with the willingness of both parties.	<p>Article 33</p> <p>(1) Any Person who deliberately committed the <i>Zina Jarimah</i>, is threatened with 'Uqubat Hudud' by whipping 100 (one hundred) times.</p> <p>(2) Everyone who repeats such acts referred to in paragraph (1) shall be threatened with 'Uqubat Hudud' by whipping 100 (one hundred) times and can be supplemented with 'Uqubat Ta'zir' of a maximum fine of 120 (one hundred and twenty) gram of pure gold or 'Uqubat Ta'zir' of imprisonment not more than 12 (Twelve) months.</p> <p>(3) Any person and/or business entity intentionally provides facilities or promote <i>Jarimah Zina</i>, is threatened with 'Uqubat Ta'zir' by whipping at maximum of 100 (one hundred) times and/or a fine which is not more than 1000 (one thousand) grams of pure gold and/or a maximum of 100 (One hundred) months imprisonment.</p> <p>Article 34: Any adult who commits <i>Zina</i> with a child, is</p>

		<p>threatened with '<i>Uqubat Hudud</i> as referred to in Article 33 paragraph (1), it may be supplemented by '<i>Uqubat Ta'zir</i> by whipping at a maximum of 100 (one hundred) times or a maximum fine of 1,000 (one thousand) grams of pure gold or imprisonment of 100 (one hundred) months.</p> <p>Article 35: Any person who deliberately commits the <i>Zina Jarimah</i> with the people who have Mahram associated with him, is threatened with '<i>Uqubat</i> as referred to in Article 33 paragraph (1), it may be supplemented by '<i>Uqubat Ta'zir</i>' at a maximum fine of 100 (one hundred) grams of pure gold or „<i>Uqubat Ta'zir</i> of maximum 10 (ten) months imprisonment.</p>
Sexual Harassment	An act of immorality or deed obscene that someone is deliberately committed in public or against others as victims of both men and women without victim's willingness.	<p>Article 46: Everyone who deliberately does <i>Jarimah</i> sexual harassment, is threatened with '<i>Uqubat Ta'zir</i> by whipping At a maximum 45 (forty five) times or a maximum fine of 450 (four hundred fifty) grams of pure gold or a maximum of 45 (forty five) months imprisonment.</p> <p>Article 47: Everyone who deliberately does <i>Jarimah</i> Sexual Harassment as referred to in Article 46 against a child, is threatened with '<i>Uqubat Ta'zir</i> by a maximum whipping of 90 (ninety) times or a maximum fine of 900 (nine hundred) grams of pure gold or a maximum of 90 (ninety) months imprisonment.</p>
Rape	Sexual intercourse with victim's <i>faraj</i> or rectum with an offender's <i>faraj</i> or rectum or other objects used by the offender against victim's mouth, <i>vice versa</i> , by force or coercion or threat to the victim.	<p>Article 48: Everyone who deliberately does <i>Jarimah</i> Rape is threatened with '<i>Uqubat Ta'zir</i> by whipping minimum 125 (one hundred and twenty-five) times, maximum 175 (one hundred and seventy five) times or a fine of minimum 1,250 (one thousand two hundred fifty) grams of pure</p>



		<p>gold, maximum 1,750 (one thousand seven hundred and fifty) pure gold grams or minimum 125 (one hundred and twenty five) months imprisonment, maximum 175 (one hundred and seventy five) months imprisonment.</p> <p>Article 49: Everyone who deliberately does <i>Jarimah</i> Rape of people who have a <i>Mahram</i> relationship with him, is threatened with '<i>Uqubat Ta'zir</i>' by whipping minimum 150 (one hundred and fifty) times, maximum 200 (two hundred) times or a fine of minimum 1,500 (one thousand five hundred) gram of pure gold, maximum 2,000 (two thousand) grams of gold pure or imprisonment of minimum 150 (one hundred and fifty) month, maximum 200 (two hundred) months.</p> <p>Article 50: Everyone who deliberately does <i>Jarimah</i> Rape as referred to in Article 48 against child is threatened with '<i>Uqubat Ta'zir</i>' by whipping minimum 150 (one hundred and fifty) times, maximum 200 (two hundred) times or a fine of minimum 1,500 (one thousand five hundred) grams of pure gold, maximum 2,000 (two thousand) grams of pure gold or imprisonment of minimum 150 (one hundred and fifty) months, maximum 200 (two hundred) months.</p> <p>Article 51 (1): In the case of a victim's request, any person who is subject to '<i>Uqubat</i>' as referred to in Article 48 and Article 49 may be subject to a maximum '<i>Restricted Uqubat</i>' of 750 (seven hundred and fifty) grams of pure gold.</p>
<i>Qadzaf</i>	Accusing someone of <i>Zina</i> without presenting at least 4 (four) witnesses.	<p>Article 57: (1) Any person who deliberately performs <i>Qadzaf</i> is threatened</p>

		<p>with '<i>Uqubat Hudud</i>' by whipping 80 (eighty) times.                  (2) Everyone who repeats the deeds as it is referred to in paragraph (1) shall be threatened with '<i>Uqubat Hudud</i>' by whipping 80 (eighty) times and can be supplemented by '<i>Uqubat Ta'zir</i>' fines maximum 400 (four hundred) grams pure gold or '<i>Uqubat Ta'zir</i>' for a maximum of 40 (forty) months imprisonment.                  Article 58;                  (1) In the case of any defendant's request, any person who is subject to '<i>Uqubat</i>' as referred to in Article 55 may be subjected to '<i>Uqubat Restitution</i>' at maximum 400 (four hundred) grams of pure gold.</p>
<p><i>Liwath</i></p>	<p>The deed of a man by the way putting his penis into another male's rectum with the willingness of both parties.</p>	<p>Article 63:                  (1) Everyone who deliberately does the <i>Jarimah Liwath</i> is threatened with '<i>Uqubat Ta'zir</i>' by whipping at maximum 100 (one hundred) times or a fine of at maximum 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.                  (2) Everyone who repeats such acts referred to in paragraph (1) shall be threatened with '<i>Uqubat Ta'zir</i>' by whipping 100 (one hundred) times and can be added with a fine at maximum 120 (one hundred and twenty) grams of pure gold and / or imprisonment of no more than 12 (twelve) months.                  (3) Any Person who does <i>Liwath</i> with a child, in addition to be threatened with '<i>Uqubat Ta'zir</i>' as referred to in paragraph (1) may be added with a whip of at maximum 100 (one hundred) times or a fine of not more than 1,000 (one thousand) grams pure gold or a maximum of 100 (one hundred) months imprisonment.</p>

<i>Musahaqah</i>	The deed of two or more women by mutually rubbing limbs or <i>faraj</i> to obtain sexual stimulation (pleasure) with the willingness of both parties.	<p>Article 64:</p> <p>(1) Everyone who deliberately does the <i>Jarimah Musahaqah</i> is threatened with '<i>Uqubat Ta'zir</i>' by whipping at maximum of 100 (one hundred) times or a fine of at maximum of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.</p> <p>(2) Everyone who repeats such acts as referred to in paragraph (1) shall be threatened with '<i>Uqubat Ta'zir</i>' by whipping 100 (one hundred) times and can be added with a fine at maximum of 120 (one hundred and twenty) grams of pure gold and / or imprisonment of no more than 12 (twelve) months.</p> <p>(3) Anyone who does the <i>Jarimah Musahaqah</i> with children, in addition to being threatened with '<i>Uqubat Ta'zir</i>' as referred to in paragraph (1) may be supplemented by whipping at maximum of 100 (one hundred) times or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.</p>
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Source: Qānūn No.6 of 2014 concerning *Jināyat* Law (Criminal Law)

The punishment by whipping under Qānūn No.6 of 2014 is done by rattan which has a diameter between 0.75 cm to 1 (one) centimetre, 1 meter long without a double edge/split. It is conducted in public. Offenders must wear white clothes. Women must cover their heads. The executor must cover the face and head to cover the identity.

Data from the Acehese Child and Woman Protection Agency stated that there were 428 cases in 2013, 515 cases in 2014 and 548 cases in 2015. At least 108 people are executed by caning law. The Institute for Criminal Justice Reform found at least 180 prisoners have been executed by whipping sentences throughout Aceh Province. Data from the Institute for Criminal Justice Reform (ICJR) recorded that the Aceh Shariah Court made at least 221 decisions on *jinayat* cases from January to September 2016. Five major areas where the *jinayat* case decided are:

1. Banda Aceh: 40 cases;
2. Kualasimpang: 29 cases;
3. Kutacane: 24 cases;
4. Blangkejeren and Jantho: 21 cases;
5. Langsa: 17 cases.<sup>33</sup>

Based on the annual report of the Supreme Court of Indonesia, 274 cases were decided in 2017 for various categories, namely:

1. *Maysir*: 113 cases.
2. *Ikhtilath*: 64 cases.
3. *Zina*: 24 cases.
4. Sexual Harassment: 24 cases.
5. *Khamar*: 19 cases.
6. *Khalwat*: 21 cases.
7. Rape: 7 cases.
8. *Liwath*: 2 cases.<sup>34</sup>

## Discussion

Article 128 of Law No. 11 of 2006 concerning the Government of Aceh stipulates that the implementation of *Shariah* law in the life of Acehnese people is within the national legal system in the Unitary State of Republic of Indonesia (NKRI). This provision implies that international treaties ratified by Indonesia have to be reflected in the Aceh Qānūn. Hikmahanto Juwana asserts that international agreements on human rights have the substance of formation norm (law making), consequently a ratifying state has an obligation to transforming them into their national law. Accordingly, the international human rights legal instruments require Indonesia as a ratifying state to transforming the existing principles and norms of the treaties into its applicable and existing legislation.<sup>35</sup> Article 2 paragraph (2) of the ICCPR and Article 2 paragraph (1) of the ICESCR requires the state to take legislative measures to include provisions in both covenants at the national level. Article 2 of CEDAW obliges also the state to take all appropriate steps to establish a policy of elimination of all form of racial discrimination. It also emphasizes the importance of reform the state laws to ensure the promotion of women's human rights. Similarly, Article 4 paragraph (1) of the CERD and Article 4 of the CRC requires that a state to take appropriate legislative, administrative and other measures to implement the norms of the Convention. Accordingly, all Indonesian legislation including the Aceh Qānūn the must reflect the international norms and principles of the ratified Conventions.

However, the Aceh *Jinayat Qānūn* which imposes the carrying out of the punishment on offenders by using rattan canning raises controversies among most

<sup>33</sup>Institute for Criminal Justice Reform (ICJR) (2016).

<sup>34</sup>*Laporan Tahunan Mahkamah Agung 2017* (2017)

<sup>35</sup>Juwana (2010).

Indonesian jurists because the punishment system in Indonesia strictly prohibits the use of caning. Many of international jurists also consider that it violates human rights and international treaties ratified by Indonesia in the field of human rights. Table 4 shows the punishment in Aceh Province which are regarding as the violations of international treaties ratified by Indonesia.

<b>Criminal Offenses (Jarīmah)</b>	<b>Case Descriptions</b>	<b>Punishment ('Uqūbat)</b>
Khamar	The case of Miftahul Alias MIP bin Jusran. The case number 10/ JN.S/2015/MS.KC. He was convicted legally guilty to drink alcohol.	40 lashes in public
	The case Rita Sinaga (Non Muslim) was convicted legally guilty of selling alcohol.	28 lashes in public at the Takismon Arts House (GOS) of Takengon, Central Aceh
Maysīr	The case Gunawan Wahyudin Als.Gogon Bin Zakaria. The case Number JN.S / 2016 / MS.KC. He was convicted legally guilty to gambling.	7 lashes in public minus the prison days that was undertaken by the offender during the investigation process.
	Alem Suhadi and Amel Akim (Non Muslim).They were found guilty of cockfighting.	9 lashes (Alem Suhadi) and 7 lashes (Amel Akim) in public. Their sentences were mitigated because they had spent over a month in detention
Khalwat	The case of Ramli Tampubolon Als. Ramli (Christian) and Luciana Als. Uci Binti Mahyudin (Muslim). The case Number 03 / JN.S/2016/MS.KC. They were convicted legally guilty to conduct Khalwat.	8 lashes in public less the number of prison days that were undertaken by the offender during the investigation process.
Ikhtilāṭ	The case of Sa who was convicted legally guilty to conduct Ikhtilāṭ.	20 lashes in public at Al Furqan Mosque, Gampong Beurawe, Kuta Alam Sub-district, Banda Aceh.
Zina	Two people of Kampung Burlah residents. They were convicted legally guilty of Zina.	100 lashes respectively in public at Tugu Blangkejeren, Gayo Lues district.
Rape	The case of Ali Imran Bin Abdul Samad. The case Number 0004 / JN / 2016 / MSY-TTN. He was convicted legally guilty of rape.	125 lashes in public at Istiqamah Tapaktuan Grand Mosque.
Liwāṭ	MT and MH were found guilty of conducting Liwath or similar relationships.	82 lashes in public.

Source: Compiled by the author.

The implementation of caning penalty in Aceh Province is frequently criticized by international community on the grounds that it can be categorized as torture, inhuman and degrading punishment; consequently it violates the ICCPR which has been ratified by Indonesia.<sup>36</sup> Article 7 of the ICCPR states that „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment“. In addition, the execution does not only cause physical pain, but also mental torture because it is conducted in public.<sup>37</sup> The public display also results in a culture of violence in Aceh society.<sup>38</sup> In 2013, the UN Human Rights Committee whose functions to monitor the state compliance with their obligations under the ICCPR, calls on Indonesia to repeal the Aceh Qānūn because it does not comply with the ICCPR. From international law perspectives, Indonesia fails to undertake its obligations under the ICCPR. However, Head of Public Relation Bureau of Aceh Government, Frans Delian claimed that the *Jinayat Qānūn* is effective since none of offenders repeat their offenses. In addition, Aceh society has supported the implementation of the *Jinayat Qānūn* as it can be proved that Non Muslims preferred to choose to be punished under the Islamic Law even though they have option to be punished under the Indonesian Criminal Code.<sup>39</sup> Similarly, Alem (Non Muslim) who was caned due to gambling offense asserted that „we live in Aceh, so we have to obey the regulations in our region“. <sup>40</sup> This reveals that the offender accepted the consequences of the offense without objecting to it.

It is also advanced that the caning punishment is also a violation of CAT. Hence, in 2008 the UN Anti-Torture Committee requested Indonesia to evaluate and eliminate its national and local law products which impose harsh punishment that can be categorized as acts of torture.<sup>41</sup> This is a manifestation of Article 2(1) of CAT which states that „each State Party shall take effective legislative, administrative, judiciary or other measures to prevent acts of torture in any territory under its jurisdiction“. Head of Public Relation Bureau of Aceh Government, Frans Delian asserted that up to now the Central Government has not called on the Aceh Government to review the implementation of *Jinayat Qānūn*. He objected if its implementation is considered as a violation of human rights since the caning punishment is not as cruel as people imagine. He said that „no one who has been caned is taken to the Intensive Care Unit“. <sup>42</sup>

Ayu Ezra Tiara of the Indonesian Legal Aid Foundation claimed that the execution of caning penalty in public violates the protection of children since they are allowed to watch it. This apparently violates Article 6(2) of the CRC which requires „states parties shall ensure to the maximum extent possible the survival and development of the child“. The display of caning execution may impact on the psychology development of children.<sup>43</sup> The Coordinator of Women Solidarity

<sup>36</sup>Madani (2001) at 487-488.

<sup>37</sup>Abidin (2011) at 39.

<sup>38</sup>Madani (2001) at 487-488.

<sup>39</sup>Artharini (2016).

<sup>40</sup>The Straits Times (2017).

<sup>41</sup>Madani (2001) at 487-488.

<sup>42</sup>Wardah (2014).

<sup>43</sup>Wardah (2014). The Aceh Governor issued a Governor Regulation No. 5 of 2018 concerning the Implementation of *Jinayat* Procedural Law which regulates that the place of the caning punishment



Program, Nisa Yura pointed out that the *Jinayat Qānūn* is discriminative against women. She said that „if a woman reported that she was raped but she was unable to prove, the accused man could sue back on the ground of defamation“. It is obvious that a violation of CEDAW occurs since Article 2 of CEDAW requires a state party to „establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination“. In addition, Nisa Yura argues that a caning punishment to a woman causes not only physical but also psychological impacts because it is conducted in public without a face cover. It may lead to exclusion or discrimination to the female offender after the punishment because women are always considered as a moral guard.<sup>44</sup> Apart from the controversies regarding the implementation of the *Jinayat Qānūn* and the compliance of the Aceh Islamic Court to international treaties ratified by Indonesia, people of Aceh remain to support the Islamic Law to govern their life as it is reflected from the Aceh proverbs „*hukom nanggro keupakaian, hukom Tuhan keu kulahkama*‘ which means „state law is for dress, God’s law is for crown“.

### Conclusion

Indonesia as a member of international community has ratified six international treaties in the fields of human rights. Criticisms regarding the implementation of international treaties in the Islamic Court of Aceh has arisen controversies due to the implementation of caning punishment which are considered inhuman and cruel. International community and the UN Human Rights Committee request Indonesia to repeal the Aceh Qānūn to comply with the ratified international treaties. Up to now, there is no action taken by the Central government of Indonesia since it considers that Aceh society obeys the implementation of *Jinayat Qānūn*. It can be concluded that in addition to the Government, people of Aceh support the *Qānūn* which is based on Islamic Law to govern their life as it is reflected from the Aceh proverbs ‘*hukom nanggro keupakaian, hukom Tuhan keu kulahkama*‘ which means „state law is for dress, God’s law is for crown“.

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should be carried out in the correctional institution. The purpose of the Regulation is that the carrying out of the punishment will not be watched by children nor be recorded by TV reporters by using cellphones or cameras. Today, the controversies against the Regulation still occur in Aceh society. See Serambinews (2018).

<sup>44</sup>Wardah (2014).

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