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THE APPLICABILITY OF ISLAMIC CRIMINAL LAW IN BRUNEI DARUSSALAM: PROBLEMS AND PROSPECTS

BY

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ABSTRACT

Islamic Criminal Law, being a part of Sharīʿah, contains efficacious measures to prevent and control crimes. In the scheme of Islamic law of governance, it is an incumbent duty on the executive authorities to implement them as part of their attempt to bring the whole social and individual aspects of human life in line with the requirements of the Sharīʿah. We have seen that several countries have embarked on the Islamization of their legal systems including the penal laws. In South East Asia, countries like Malaysia have gradually moved towards the same direction by introducing *taʿzīr* punishments for certain offences as defined by Islamic law; Brunei Darussalam has the same desire. To explore the possibility of such an implementation in Brunei, the study primarily aims at delineating its problems and prospects. To accomplish this, using qualitative methodology, the study addresses three main issues: first, it dispels the myths and misgivings which surround the concept of Islamic punishments, second, it identifies the existing legal hurdles for full application of such punishments in Brunei, and lastly, it explores legislative strategies which make such implementation feasible in the country. The study concludes that for the above dream to become a reality, three things are essential, namely, giving full force to the meaning of the relevant provisions of the constitution relating to Islam; amending several existing laws; and improving the existing legal institutions towards such an end.

ملخص البحث

القانون الإسلامي هو جزء من الشريعة، وهو يتضمن خطوات متقدمة لمنع الجرائم ومعالجتها، فيسمى بالقانون الجنائي الإسلامي. وفي نظام الحكم للشريعة الإسلامية، فهو من واجبات السلطات التنفيذية لتنفيذها في إطار تحقيق كل الجوانب من حيث الإجتماعية والفردية لحياة البشرية مع متطلبات الشريعة. لقد شهدنا من البلدان التي قد شرعت واسلمت نظمها القانونية، وكذلك القانون الجنائي. فمثلا ماليزيا من دول جنوب شرقي آسيا؛ الذي انتقل تدريجيا في نفس الاتجاه عن طريق استحداث العقوب التعزيرية بعد انتهاكات معينة على النحو الذي تحدده القانون الإسلامي. لبحث إمكانية تنفيذ التشريع الجنائي الإسلامي في بروناي، فمن الأولى يهدف إلى دراسة مشاكلها واقتراحاتها. ولتحقيق ذلك ، وباستخدام منهجية النوعية، تتناول الدراسة بثلاثة قضايا رئيسية: الأول، فإنه لإبطال الحواجز والأساطير التي تحيط مفهوم العقوبات الإسلامية، والثاني، يحدد العقبات القانونية القائمة من أجل التطبيق الكامل لمثل هذه العقوبات في بروناي ، وأخيرا ، ويستكشف الاستراتيجيات التشريعية التي تجعل هذا التنفيذ ممكنا في هذا البلد. وفي ضوء ما سبق، تخلص الدراسة إلى أن الحلم قد تصبح حقيقة واقعة، وذلك بثلاثة أمور أساسية، وهي إعطاء القوة الكاملة لأحكام الدستور المتعلقة بالإسلام، و تحسين عدة القوانين الموجودة، و أيضا تحسين المؤسسات القانونية القائمة حتى النهاية.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh & Uṣūl Fiqh).

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Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh & Uṣūl Fiqh).

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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THE APPLICABILITY OF ISLAMIC CRIMINAL LAW IN BRUNEI DARUSSALAM: PROBLEM & PROSPECTS

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This dissertation is dedicated to my parent, my brother, my husband and my son, "All of you are my strength"

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CHAPTER 1

INTRODUCTION

Islamic Law, being a part of Sharīʿah contains efficacious measures to prevent and control crimes, called Islamic criminal law. Islamic criminal law adopts two-prolonged approaches to combat crime and criminality, namely preventive and corrective. At the level of prevention, first and foremost, it incessantly and clearly reminds man and conditions him not to involve in criminality. But to deal with a committed crime, the Islamic criminal justice system does not neglect the punitive measures that are needed to effectively combat crimes. The penal law of Islam consists of three major types of penalties, namely *ḥudūd, qiṣāṣ/diyah* and *taʿzīr*. These penalties represent various categories of punishments that would be meted out against perpetrators of certain offences as defined by textual sources as well as those legislated by state authorities. Accordingly, in the scheme of Islamic law of governance, it is incumbent duty of the executive authorities to implement them as part of their attempt to bring the whole social and individual aspects of human life in line with the requirements of the Sharīʿah.

In view of the above, the post-colonial era has witnessed a great Islamic resurgence for the restoration of Islamic norms and its laws. As part of this endeavour some countries, such as Pakistan and the Sudan, have embarked on the Islamization of their legal systems including the penal laws. In South East Asia, a country like Malaysia gradually has moved towards the same direction by introducing *taʿzīr* punishments for certain offences as defined by Islamic law.

Other Muslim countries, such as Brunei, nurture the same desire, the cogent proof of which is the statement made by His Majesty Paduka Seri Baginda Sultan and Yang Di Pertuan Negara Brunei Darussalam on the occasion of his 50th birthday celebration at Istana Nurul Iman on 15th July 1996 when he gave his consent to the formation of the Syariah Court[1]. Thereafter, he stated that the formation of Syariah Court is to be at the highest possible levels, to implement not only the administration of family law but also at a suitable time to handle Islamic Criminal Act entirely as required by Allah, the Almighty.[2]

Accordingly, for this political will as expressed by His Majesty to be materialized, currently there are attempts underway for devising the operational framework for such an implementation. To be part of this noble mission, therefore, I propose to address some academic dimensions of the issue including: First, by dispelling the myths and misgivings that surround the system of Islamic punishments - emanating from both the massive smear campaigns by the detractors of Islam and the pitfalls in some of its contemporary implementations. Secondly, I will identify the existing hurdles for the implementation of Islamic criminal law in Brunei Darussalam. Lastly, I would explore the prospects for its application within the existing legal framework in Brunei Darussalam.

1.1 STATEMENT OF THE PROBLEM

To implement Islamic criminal law in countries whose legal system has suffered the throes of colonization is not an easy task. For instance, when Brunei Darussalam

[1] In Brunei Darussalam, the "Sharīʿah Court" is spelled "Syariah Court". Therefore, the researcher will follow this mode of writing throughout the thesis and will not follow the standard Arabic Transliteration. The same goes to the law pertaining Sharīʿah in Brunei Darussalam.

[2] Kumpulan Titah Kebawah Duli Yang Maha Mulia Paduka Seri Baginda Sultan Dan Yang Di-Pertuan Negara Brunei Darussalam sepanjang tahun 1996, Jabatan Penerangan, Jabatan Perdana Menteri, Negara Brunei Darusslam,.

became a British Protectorate in the 19th century, the role of Islamic law similar to Malaysia was reduced to the application of Muslim Personal Law. All the other laws of the country were replaced with English common law and principles of equity. After the independence of Brunei Darussalam in 1984, however vehement efforts have been made in order to Islamize the law in Brunei Darussalam. In this process, the most pertinent question arises: What would be the possibility of Islamizing the penal system of the country especially when there has not been any perfect model of successful implementations in countries with similar colonial experience? To answer this and other incidental questions, therefore, this study proposes to embark upon.

1.2 RESEARCH QUESTIONS

This study attempts to address the following:

1. What was the position of Islamic criminal law before colonization in Brunei?
2. What is the current status of Islamic Law and Syariah Courts in Brunei Darussalam?
3. What is the extent of compatibility of the existing law with Islamic criminal law?
4. What are the hurdles which obstruct the full implementation of Islamic criminal law in Brunei Darussalam?
5. What should be done to embark upon the full Islamization of criminal law in Brunei Darussalam?

1.3 OBJECTIVES

This study aim to:

1. Delineate the existing legal framework for a possible implementation of Islamic criminal law in Brunei.
2. Evaluate options that would most viably work for such application in Brunei.
3. Identify practical strategies for the implementation of Islamic Criminal Law.

1.4 SIGNIFICANCE OF THE RESEARCH

This study intends to contribute towards bringing enlightened understanding about the necessity of the Islamization of the penal system in Brunei Darussalam. In the meantime it is unique as it engages in legal analysis of options and strategies that would viably lead to the implementation of Islamic criminal law in Brunei Darussalam.

1.5 METHODOLOGY OF RESEARCH

The study uses qualitative methods of research to investigate the problems and prospects for the full implementation of Islamic criminal law in Brunei. This method involves two kinds of research activities: First, it requires critical content analysis of the available literary works pertinent to the topic. Second, it warrants fact finding mission about the problems and prospects of implementation of Islamic criminal law, which would be accomplished through conducting unstructured interviews with relevant legislative and judicial bodies in the country.

1.6 JUSTIFICATION / RATIONALE OF THE RESEARCH

To the best of the researcher's knowledge, to date this topic has not been adequately researched in a manner the researcher proposes to attempt. Accordingly, to thrush out issues surrounding the implementation of Islamic criminal law and identify the available launching pads in the existing legal framework of the country to achieve such an end *ipso facto* validate this study.

1.7 LITERATURE REVIEW

Indisputably, the juristic work on the substantive Islamic criminal law is voluminous. The literature on the application of Islamic criminal law in the contemporary setting is also vast. However, by and large, these studies focus on the application of Islamic criminal law in countries such as Pakistan, Sudan, Saudi Arabia and Nigeria. But to address the issue in the context of a South Asian country like Brunei Darussalam, has seen only some scanty attempts. However, some of the most relevant works which deal with this topic include:

Ahmad Ibrahim (1993) who wrote an article on the topic of "*Suitability of the Islamic Punishment in Malaysia".* He deliberated on the challenges that the application of Islamic criminal Law would entail but expressed full conviction that Islamic criminal law as compared to laws inherited from colonial powers best suits the interest of Muslims in Malaysia- as it bears close affinity to their culture and norms. However, he does not outline any framework to be useful for the study at hand. Even though Brunei has common issues with Malaysia, the author did not touch on Brunei at all in his article.

Hashim Mehat (1991), in his book "*Malaysian Law and Islamic Law on Sentencing*" describes the punishment of crimes in Islam and then compares them with

the Malaysian Penal Code. He also draws upon the experience of the Islamization of the Penal Code in Pakistan by highlighting some of its common features with the Malaysian legal scenario. Nevertheless, he does not discuss the issue in the context of Brunei Darussalam specifically.

Another book written by Matthew Lippman, Sean Mc Conville, and Mordechai Yerushalmi (1988), entitled "*Islamic Criminal Law and Procedure- An Introduction*" provides an introductory reference guide on Islamic comparative criminal procedure, comparative legal systems and comparative politics in general with the focus on some particular aspects of the subject. However, this research does not touch on issues that the writer wants to highlight which are the problems and prospects on its applications in Brunei.

A thesis written by Ahmad Termizi bin Abdullah (2005) on *"The Implementation of Islamic Criminal Law in Malaysia: Challenges and Prospects"*, points out the real problems and prospects of enforcing the Islamic Criminal Law in Malaysia. Although he discussed the same questions but he does not deal with issues in Brunei Darussalam.

Another MA dissertation by Akhtarzaite bt Haji Abdul Aziz (2001) entitled *"Taṭbīq al-niẓām al-jinā'ī al-Islāmī fi Mālīziyā : iṣhṭilāḥāt wa iqtirāhāt"*, spells out the hurdles that exist for the implementation of Islamic criminal law in Malaysia. It also proposes some methods to overcome these obstacles but it does not cover the situation in Brunei as both countries faced different problems and needed different solutions.

Serbini Bin Haji Matahir (1993) and (2003), also addresses the point in his two works, namely, "*Peruntukan Undang-undang Taʿzīr Dalam Akta Majlis Agama Dan Mahkamah-mahkamah Qadi Bab 77 Di Negara Brunei Darussalam*" and "*Sistem*

Pentadbiran Keadilan Jenayah Syariah Mahkamah Qadi Brunei Darussalam" respectively. These studies though delving with issues pertinent to our concern, such as the application of *taʿzīr* by Kadis Court in Brunei Darussalam but does not address the problems and prospects for full enforcement of Islamic criminal law in Brunei Darussalam.

CHAPTER 2

CONCEPTUAL FRAMEWORK OF ISLAMIC CRIMINAL LAW

2.1. DEFINITION OF CRIME IN ISLAM

According to Ibn Al Manṣūr (1990), the words *jurm* (جُرْمٌ), *jarīmah* (جَرِيمَةٌ) and *jināyah* (جِنَايَةٌ)are used for crime and offence in Islamic Criminal Law. The root word *jurm* (جُرْمٌ) literally means to cut off. It is said "جَرَمَهُ"(He cut it off), "جَرَمَ صُوفَ الشَّاةِ" (He shore, or sheared or cut off the wool of the sheep). The Holy Qur'ān (*al- Māidah: 8*) says,

وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا۟ ۚ

> And let not the hatred of others to you make you swerve to wrong and depart from justice.[3]

Thus, the word *jurm* ((جرمmeans a sin, a crime, a fault, an offence or an act of disobedience, transgressions, whether intentional or committed through inadvertence. It is for this reason that this word has been used for unfair earning and unfair action. For instance, the Holy Qur'ān uses it to all that is against justice and right path and the person who commits unjust and unfair action is called *mujrim* ((مجرم (Anwarullah, 1995). Hence, all the disorder and disobedience towards Allāh and His Prophet (s.a.w) are considered *jurm* and the word *jināyah* refers to any misdeed committed by a person. The word *jināyah* is used in legal sense as misdeed prohibited by law.

Although, the scholars of Islamic criminal law use the word *jināyah* and *jarīmah* to mean crime or offence, some of the jurists differentiate between the

[3] The translation of the Holy Qur'ān that will be used throughout this thesis is by Yūsof ʿAlī.

meaning of *jurm* and *jināyah.* Majority of them described *jināyah* (sdnik lla sa (جِنايَة of prohibited and injurious actions, whether they relate to human body or property or other violations. Some of the jurists applied the term *jināyah* in the sense of offences resulting in the loss of life such as murder and causing bodily injury. Others, refers *jināyah* to crimes or offences liable to *ḥudūd* and *qisās*. While the word *jarīmah* was often related with offences done for which punishment of *ḥadd* or *taʿzīr* has been prescribed. Technically, *jarīmah* or *jināyah* refers to commission or omission of punishable legal prohibition in Sharīʿah (Awdah, 2003: 57).

According to Al Mawardi (1983: 189), crimes are wrongful acts in Sharīʿah which are punishable by *ḥadd* (fixed punishsment) or *taʿzīr* (discretionary punishment).

Hashim Mehat (1993: 12) wrote in his book that, crime or *jināyah* in Islam means two things; committing what is forbidden (by Allāh) and omitting what is commanded by Allāh. In other words it denotes committing what is *ḥarām* (unlawful) and omitting what is obligatory.

The similarities and differences between Islamic Law and civil law with regard to the concept of crime have been dealt with by some authorities.

According to Anwarullah (1995: 7-8), the definition of crime in Islamic law is identical with its definition in the contemporary laws. In contemporary laws, crime means an act prohibited or omission not permitted by law. The author also inserted a definition of crime from a contemporary author, named Sardar Muhammad Iqbal Mokal to support his statement who wrote, “A crime is an act of commission or omission, contrary to municipal law, tending to the prejudice of the community for which punishment can be inflicted as the result of judicial proceeding taken in the

name of state." The author attached definite meaning to this word "an act or omission punishable by law."

The researcher does not totally agree with Anwarullah's view on the attached definite meaning of crime. In the researcher's opinion, there are differences between the definition of crime in Islamic law and contemporary law. In modern law, a crime consists of an act that has harmful effects on the public. In Islamic law, there are a numbers of rights that may be affected by a criminal act for instance, the right of Allāh in *ḥudūd*. The researcher agrees with the opinion stated by Ahmad Termizi (2005: 13) in his research on Islamic criminal law that "one of the most important aspects to differentiate between crime and civil wrong in man made law is to differentiate whether the acts are against the individual right or the right of the society. Any act will be considered a crime when it is connected to the right of the society. However, in Islam, both are considered as crime."

While Hashim Mehat (1993: 13) stated that, both laws have similarity in terms of commissions or omissions, but different in terms of sources of law for each of both laws. What is forbidden in Islamic law is not necessarily forbidden in modern or contemporary law.

ʿ Awdah (2003: 58) said that "in both Islamic laws and contemporary law the commission and omission of an act is not considered crime until punishment has been prescribed for it."

The researcher agrees that identification of crimes and prescription of punishment in Islamic Law has similarity to the modern law as both are designed to safeguard the interests of the community and social system. The main difference between both laws is the sources of the law itself. All the jurists of Islam all agreed

that there are four sources of Islamic criminal law; the Holy Qur'ān, the Sunnah, consensus and analogy.

The jurists are unanimous on the first three sources while they differ on the fourth. Some recognize it as source of Sharīʿah while others do not recognize it as a source of establishing crime and punishments (ʿAwdah: 2003, 143)

2.2 CLASSIFICATION OF CRIME

According to jurist, Crime can be classified into three different type based on different aspects: Firstly, classifications of crime according to punishments, secondly, classification of crime according to intentions and classification of crime according to the violation of rights.

2.2.1 Classification of Crimes According to Punishment

Based on this aspect, crime in Islamic criminal law can be divided to three kinds of punishment; *ḥudūd* (crimes of fixed punishments), *qisās* and *diyah* (crimes of retaliations and blood money); and taʿzīr (crimes of discretionary punishment).

2.2.2 Classification of Crimes in accordance with intention

From this angle, crimes fall under two categories; either intentional crimes or unintentional crimes.

2.2.3 Classification according to violations of rights

For this perspective, crime can be divided into two main categories which are crimes against the public or society, and crimes against individuals.

ʿAwdah (2003) in his book add another classification which is the classification of crimes in accordance with the time of revelation thereof. Crime in this classification falls under two categories in accordance with the time of their revelation; undoubtful crimes and doubtful crimes.

In this research, the researcher will only elaborate the classification which deal with the punishment issue.

2.3 ISLAMIC PUNISHMENT

Punishment in Islamic law refers to penalty prescribed by Allāh the All Mighty to deter a person from committing crime. ʿAwdah (2005, vol 3: 1) mentions his view on punishment that:

> the object of prescribing punishment for violation of the Law Givers' edict is to reform the society, deliver the individual from evil, save them from ignorance, lead them out of a life of aberration, prevent them from committing sins, and persuade them to obey Allāh and His messenger

Islamic law has devised three systems of punishments for all criminal offences to be implemented by an Islamic ruler where each system is specifically for certain misdeeds. These systems of punishments are known as *ḥudūd*, *qīṣāṣ* and *taʿzīr*. According Siddiqui (2003), in Islamic Law, criminal offences mostly concern; person, property, honour, state, religion, public peace and tranquility, decency or morals.

2.3.1 *Ḥudūd* (The fixed punishments)

Ḥudūd is the plural of Arabic term *ḥadd*. This word *ḥadd* has many different meanings. The literal meaning of *ḥadd* refers to limitations which have been defined by Allāh in the Holy Quran and the Sunnah. Shabbir refers *ḥadd* as prevention,

hindrance, restraint, prohibition and hence, it is a restrictive ordinance or statute of Allāh (s.w.t), which makes division between lawful and unlawful things.

Ḥudd also means boundary, limit, barrier and obstacle. It stands for an unalterable or unchangeable punishment fixed by Qur'ān and Sunnah. It cannot be increased, decreased, altered or remitted by anyone, even the head of the Islamic state. (Anwarullah, 1995: 125)

The *ḥudūd* punishments are called *ḥudūd* because they forbid repetitions. *Ḥudūd* are considered as *"ḥuqūq Allāh taʿālā"* (rights belonging to Allah) because they are promulgated for the protection of society against crimes, which affect the overall well-being. They are determined as *"ḥuqūq Allāh taʿālā"* to ensure enforcement. No human intervention is permitted to forgive or minimize them in any manner. This punishment is made to ensure the welfare of the society, its stability and the attainment of a rule of law, which is essential for a stable, orderly and civilized life. (ʿAta Al Sid, 1995: 29-30)

The following are the crimes of *ḥudūd* in Islamic Criminal Law;

1. *Zinā* (Adultery or fornication):

Zinā means illicit sexual intercourse between a man and a woman not married to each other and who are not suspected to be, validly married to each other. The term *zinā* includes both adultery and fornication but there is a difference in the punishment for these two offences.

The Qur'ān (*al-Isrā': 32*) describes zinā as an evil thing to do and the Muslims are prohibited to approach it,

وَلَا تَقْرَبُوا۟ ٱلزِّنَىٰٓ ۖ إِنَّهُۥ كَانَ فَٰحِشَةً وَسَآءَ سَبِيلًا ﴿٣٢﴾

nor come near to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)

وَٱلَّذِينَ لَا يَدۡعُونَ مَعَ ٱللَّهِ إِلَٰهًا ءَاخَرَ وَلَا يَقۡتُلُونَ ٱلنَّفۡسَ ٱلَّتِي حَرَّمَ ٱللَّهُ إِلَّا بِٱلۡحَقِّ وَلَا يَزۡنُونَۚ وَمَن يَفۡعَلۡ ذَٰلِكَ يَلۡقَ أَثَامٗا ٦٨

those who invoke not, with Allah, any other god, nor slay such life as Allah has made sacred except for just cause, nor commit fornication; - and any that does This (Not only) meets punishment. (al-furqan: 68)

There are two types of punishment laid down in Islam for adultery, whipping and banishment and stoning to death. Whipping and banishment are punishments to be given to an unmarried adulterer (.(غير المحصن)Unmarried is defined as somebody who unmarried at the time of the crime and was never married before. While stoning to death is the punishment for a married adulterer (المحصن). Married adulterer is defined as a person who was married at the time of the crime or once married before. If one is married and the other is unmarried, the former will be stoned to death while the latter shall be whipped and banished at the same time.

Thus, the Sharīʿah has prescribed the punishment of a hundred stripes for the unmarried adulterer or fornicator; this is the opinion of Imām Abū Hanīfah. According to Imām Shāfiʿī and Imām Aḥmad and Imām Mālik, the punishment of *zinā* for an unmarried person is whipping hundred stripes and also banishment for one year. Imām Mālik differed by saying that women are exempted from banishment. The Holy Qur'ān (*al-Nūr*: 2) lays down about the flogging;

ٱلزَّانِيَةُ وَٱلزَّانِي فَٱجۡلِدُواْ كُلَّ وَٰحِدٖ مِّنۡهُمَا مِاْئَةَ جَلۡدَةٖۖ وَلَا تَأۡخُذۡكُم بِهِمَا رَأۡفَةٞ فِي دِينِ ٱللَّهِ إِن كُنتُمۡ تُؤۡمِنُونَ بِٱللَّهِ وَٱلۡيَوۡمِ ٱلۡأٓخِرِۖ وَلۡيَشۡهَدۡ عَذَابَهُمَا طَآئِفَةٞ مِّنَ ٱلۡمُؤۡمِنِينَ ٢