

DEVELOPMENT OF THE IMPLEMENTATION OF HUDUD IN BRUNEI

By

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On 22 October 2013, the Government of Brunei Darussalam gazetted the Syariah Penal Code Order 2013.

On 01 May 2014, Phase 1 which includes the law of *ta'zir* except the death penalty and *qisas* (retaliation), was implemented.

On 03 April 2019, Phases 2 and 3 including the death penalty were fully implemented.

So far, no *hudud*ⁱⁱ case has been tried. There are only a few cases of *sariqah* (theft) offences in which the offenders have been sentenced to *ta'zir* (imprisonment) and one case of *qisas* of causing injury in which the offender was sentenced to B\$91,000.00 (1/3 *diyat*ⁱⁱⁱ) and imprisonment for five years.

It should be noted that, although the Syariah Penal Code Order, 2013 has been implemented, the Penal Code is still in force in Brunei and the cases under it are tried by Civil Courts. Therefore, there are many overlapping offences, that is, for an act, such as stealing, there is an offence under the Syariah Penal Code Order, 2013 and also under the Penal Code. How are such cases determined to be charged under the Penal Code and tried by the Civil Court or under the Syariah Penal Code Order, 2013 and tried by the Syariah Court?

In this respect, it is pertinent to refer to the explanation given by the Hon. Attorney General of Brunei in her special talk on 30 April 2014.

“B. For overlapping offences (Offences under the jurisdiction of both Syariah Courts and civil courts)

(i) Investigation

Investigation of cases involving offences within the jurisdiction of syariah courts and civil courts such as theft, robbery, murder, causing hurt and rape, as it is now, will be reported to and investigated by the Royal Brunei Police Force with the assistance of other law enforcement agencies, if relevant.

(ii) Evaluation of evidence

After conducting the investigation, the Investigation Paper will be submitted for evaluation by the Public Prosecutor with the assistance of the Chief Syar'ie Prosecutor if required. Assessment will be made whether there is sufficient evidence to prove the offences under the Syariah Penal Code Order, 2013 or if the suspect wishes to make a confession by iqrarin accordance with the Syariah Courts Evidence Order, 2001 and the criminal procedure code for syariah courts. In such case, the case will be transferred to the syariah courts for prosecution by Syar'ie Prosecutors with the assistance of Deputy Public Prosecutors, if required. Otherwise, the prosecution will continue under the Penal Code (Chapter 22) in civil courts.

Explanation

...The Syariah Penal Code Order, 2013 will apply if the conditions required by syarak are fulfilled, which, we are given to understand have a very high standard of proof which is beyond any doubt. Therefore, the initial process of investigation and prosecution for overlapping crimes available in both the Penal Code (Chapter 22) and the Syariah Penal Code Order, 2013 will continue as it is. Initial assessment will be made to determine the appropriate court so that a person will not be tried twice for the same offence (double jeopardy)."

According to the Attorney General, the evaluation of the evidence is done by the Public Prosecutor with the assistance of the Chief Syar'ie Prosecutor, if necessary.

In this regard, we should refer to Article 81 (3) of the Constitution of Brunei and section 25 (2) of the Emergency (Syariah Courts) Order 1998 (section 25 (2) Syariah Courts Act Chapter 184.)

Article 81 (3) of the Constitution of Brunei provides:

(3) The Attorney General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence other than —

(a) proceedings before a Syariah Court, subject to the provisions of any written law to the contrary;"

I am unable to find "*provisions of any written law to the contrary*", so, I take it that the power of the Public Prosecutor does not include a trial before a Syariah Court.

Section 25(2) of the Syariah Courts Act Chapter 184 provides:

"(2) The Chief Syar'ie Prosecutor shall have powers exercisable at his discretion to commence and carry out any proceedings for an offence before a Syariah Court."

(The Malay version in section 25 (2) of the Emergency (Syariah Courts) Order 1998 says the same thing.)

I believe that at the time the two laws were drafted, the drafters did not envisage that there would be overlapping offences as they do today. Looking at the provisions of the Constitution and section 25 (2) Syariah Courts Act Chapter 184 (as well as section 25 (2) of the Emergency (Syariah Courts) Order 1998), in my view, for overlapping offences, both the Public Prosecutor and the Chief Syar'ie Prosecutor should make a joint assessment of the evidence and determine (jointly) whether the charge is to be made under the Penal Code and the case tried in the Civil Court or under the Syariah Penal Code Order, 2013 and tried in the Syariah Court.

To avoid the possibility of the determination being challenged, especially if a non-Muslim suspect who is represented by a lawyer is charged under the Syariah Penal Code Order 2013 and tried in the Syariah Court, I think, it is advisable to amend the Constitution and section 25 (2) of Syariah Courts Act Chapter 184 and section 25(2) of the Emergency (Syariah Courts) Order 1998. The amendment is to state that, for overlapping offences, the determination shall be done jointly by both the Public Prosecutor and the Chief Syar'ie Prosecutor.

In making their assessment, they may use the test mentioned by the Attorney General in her special talk, that is, if:

- i. there is sufficient evidence to prove the offences under the Syariah Penal Code Order, 2013; or
- ii. the suspect wants to plead guilty by an *iqrar* (confession) in accordance with the Syariah Courts Evidence Order, 2001 and the Syariah Courts Criminal Procedure Code Order, 2018,

then, the charge will be made under the Syariah Penal Code Order 2013 and the case will be tried in the Syariah Court.

(To avoid confusion, it is hereby explained that after a person is arrested, he is referred to as "suspect"; after he is charged, he is referred to as the "accused"; after he is convicted, he is referred as an "offender" and when he is serving a prison sentence he is referred to as a "prisoner".)

The determination under which law the charge of an overlapping offence will be made and in which court the case will be tried, is done at the time when the suspect is in custody, that is, in the lockup. As in the case of **Mohd. Norazimi Fathullah**, the suspect was not represented by counsel. Most likely, he was asked by the investigating officer if he wanted to plead guilty. If the answer was "Yes", whether he wanted to do it by *iqrar* according to Islamic law or according to civil law. For an 18-year-old suspect as in that case who, most likely, was arrested for the first time, we do not know what was playing in his head.

First, perhaps he felt guilty, sinful, remorseful and wanted to repent and hope for forgiveness from Allah SWT. For that purpose, perhaps he thought that the Syariah Court was a more suitable place compared to the Civil Court.

Second, he might have heard that Civil Courts tried serious cases such as murder and robbery cases and the sentences include death and caning. The caning is terrifying. On the other hand, Syariah Court only dealt with minor cases such as *khalwat* and the punishment of caning is just like caning naughty boys.

Third, since the Syariah Penal Code Order 2013 had just been implemented, he did not know that, apart from imprisonment, he could also be sentenced to *arsy* which, if he is unable to pay, he will be imprisoned until the debt is paid which could mean until he dies in prison. On the other hand, if he is tried in a Civil Court, he could also be sentenced to caning. That is why the punishments that could be imposed by both courts need to be explained to him so that he can make a choice without misconception.

The case of Ketua Pendakwa Syar'ie Lawan Abdul Hafiz Bin Hj Muhammad Irwan

This judgment is dated 9 September 2019, therefore it is the first written judgment, as far as we know, for the overlapping cases handed down by the Syariah Court.

This case was brought to the Syariah High Court because the suspect wanted to plead guilty by *iqrar*. So, the question is whether it was sufficiently explained to him regarding the difference in the sentence that could be imposed on him by the Syariah High Court, namely the payment of compensation to the owner of the stolen goods?

According to the judgment of the Syariah High Court Judge, the accused was charged with three (3) *sariqah* (theft) offences under section 55 (3) (b) of the Syariah Penal Code Order, 2013. The judgment continued:

"When the charge was read, the accused admitted to hearing and understanding the charge and the consequences of the charge and then pleaded guilty to the three charges.

Syar'ie Prosecutor has read the brief facts of the offence for the three charges which contain the name of the accused, his identity and details relating to the charge including the place and time of occurrence and the existence of stolen goods (sariqah) in the accused's house and elements of the offence required.

Based on these facts, the following had happened:

1. *an act of moving (the goods - added) secretly;*
 - i. *movable property in the form of 1 double din tape, 3 car meters and 1 front bumper of the car belonging to the victim for the first charge,*
 - ii. *movable property in the form of 4 units of sport rims and 4 tyres for the second*

charge

iii. movable property in the form of 4 units of sport rims, 4 tires and 1 double din (radio tape) for the third charge.

2. without the consent of the owner; and

3. with the intention of forfeiting the property from the owner.

The accused agreed with the facts presented by the Syar'ie Prosecutor. After hearing the accused's plea on the charge as well as (my – editor) examination of the facts and also the accused's admission of the facts, the Court convicted the accused for the three offences charged and then gave him the opportunity to plead to the Court... "

The Judge convicted the accused and passed the following sentences:

"1. Abdul Hafiz bin Haji Muhammad Irwan:

i. Imprisonment for 12 months for the first offence.

ii. Imprisonment for 12 months for the second offence.

iii. Imprisonment for 12 months for the third offence.

2. The prison sentences run consecutively totaling 36 months.

3. The punishment begins from the offender being detained in police custody on 26 August 2019.

4. The sariqah property identified by the victim shall be returned to the victim.

5. The Offender is ordered to pay compensation to the owner of the sariqah item, namely the car bumper that has been sold with a value purchased by the owner of \$150.00. If the Offender is unable to pay it, then it becomes a debt on him."

We note that the Judge in this case has stated in detail the procedure followed by him to explain to the accused about the charge, before convicting him. That is commendable and should be followed by other Judges. Unfortunately, the brief facts given by the Syar'ie Prosecutor was not reproduced in his judgment. Otherwise, we will get a more complete picture. This is important because the judgment will be a precedent that will be analysed whether it can be followed in later cases.

We also do not know whether, before he was asked if he wanted to plead guilty by *iqrar*, the difference in sentence that could be imposed by the respective court, was explained to him. The difference is that the Shariah Court could order him to pay damages to the victim while the Civil Court do not.

Reading the judgment, apart from the damages imposed, we feel as if we are reading the judgment of a Civil Court. That is a commendable development in judgment writing. The only difference is that, in Civil Court such cases are only tried by a Magistrate, not High Court Judge.

Regarding the sentence, I will only refer to the order of the Judge that reads: "*If the Offender is unable to pay it (damages - added), then it becomes a debt on him.*" I understand it as a debt that could be claimed through civil process, different from the *arsy* that will be discussed later.

The case of Pendakwa Syarie v. Mohd. Norazimi Fathullah Bin Mohd. Safihi

This case is the first case under the Syariah Penal Code Order, 2013 tried by the Syariah Court that we have the written judgment of the Syariah High Court as well as the Syariah Court of Appeal.

The facts of the case that we have is nothing more than what is mentioned in the charge, that is, the accused, on the date, time and place stated has caused an injury to Asahrin bin Idris by breaking his skull, thus he has committed an offence under section 169 (2) (a) of the Syariah Penal Code Order, 2013 which is punishable under section 169 (2) (ii) of the same code.

The accused pleaded guilty by way of *iqrar*. The learned Judge sentenced him to:

1. Imprisonment for 5 years from the date the Offender was arrested;
2. The Offender is ordered to pay *arsy* to the victim equivalent to 1/3 of the amount full *diyat* i.e. money amounting to \$ 91,516.66 to the victim.
3. The *arsy* must be paid within three years in installments.
4. If the *arsy* fails to be paid, the Offender shall be imprisoned until the amount ordered is paid.

So far, the cases heard by the Syariah High Court are cases in which the accused pleaded guilty. So, the judgments are only about sentence. We are unable to see how the procedure for trial is followed, how the law of evidence, especially if the witness is a non-Muslim is applied and how the Judge analyses the testimony of witnesses to make his finding of facts. What we can see in this judgment is a legal discussion of jurisdiction, *iqrar* and punishment.

From the judgment of this case, we do not know how the incident took place: whether the Offender suddenly hit the victim (with what?); whether there was a quarrel and a fight between them before the injury was caused; who started the quarrel and the fight, if any;

whether the Offender was also injured etc. All of that should be taken into account in determining the sentence.

In his judgment, the learned Judge said:

1. *"The Offender is the person whose pledge is accepted before the Court today.*
2. *I am satisfied with all the evidence that has been submitted by the Syar'ie Prosecutor in this case.*
3. *I am satisfied that I have given the Offender the opportunity to speak or make any application before the sentence is passed. However, the offender did not take the opportunity even though his rights have been explained and given as much space as possible. From the Offender's conversation I saw that the Offender did not seem to have any direct feelings about the wrong he had done and did not show his repentance."*

Paragraph 1 is more of an identification of the Offender as the person who made the *iqrar*, a matter that cannot be disputed because it was done before the Judge concerned. I also do not dispute the qualification of the Offender to make *iqrar* nor the decision of the Judge to accept it. What I am saying is about is what need be explained to the accused before the conviction is recorded.

Paragraph 2 seems to refer to the brief facts of the case given by the Prosecutor. The judgment would be more complete if the facts are reproduced.

Paragraph 3 refers to the opportunity given to the Offender to plead for a lenient sentence. My comment is about the explanation that should be given to him before his conviction was recorded.

We also do not know whether before accepting his *iqrar*, the accused was given an explanation of the consequences, among other things, he could be sentenced to pay *arsy*, which if he does not pay, he could be sentenced to imprisonment until he pays it which could mean until he dies. It should be understood that the qualification to make *iqrar* is one thing. Whether the accused knows the consequences of choosing to be tried in a Civil Court or a Syariah Court is another matter.

Regarding the sentence passed, I will only touch on the effects of the order in paragraphs 3 and 4.

Regarding paragraph 3, *arsy* shall be paid within three years, in installments. We recall that the Offender was 18 years old at the time of the offence. He was imprisoned for five years from the date he was detained. There is no evidence of his academic qualifications; whether he worked before he committed the offence; whether his parents are still alive; if they are, what are they working as and so on.

In any case, since the incident, the Offender was detained and will continue to serve his five-year prison sentence, which means that when serving the sentence of imprisonment, he could not work, even if he had worked before. Question: How is he going to pay the *arsy* in three years? We do not know the financial position of his parents. I dare say that they cannot afford to pay the installment of B\$1,516.60 (RM4,624.28) a month!

Regarding paragraph 4, if the *arsy* fails to be paid, the Offender shall be imprisoned until the amount ordered is paid. The Judge refers to section 193 (d) of the Syariah Courts Criminal Procedure Code Order, 2018 to make the order. There is no doubt that the section in question empowers the Judge to do so, meaning that the sentence is valid. I believe that is also the position in syariah.

We should think of the consequences. As I have argued, it is very likely that the Offender in this case will not be able to pay the *arsy* and will serve a life sentence, from the age of 18! Is that the intention of syariah and the intention of the court? I am worried that after the Offender is put in jail, he will be forgotten. Every time the prison officer examines his case, he finds that the *arsy* has not been paid and the court sentence is that he will be imprisoned until the *arsy* is paid, so he will continue to be imprisoned.

We do not have to wait for human rights NGOs to raise the issue 30 years later. Even now we should start thinking about it. I think, irrespective of the opinion of the jurists of the past, we should be brave enough to re-ijtihad, if necessary, and set a limit on the period of imprisonment for failing to pay *arsy* similar to failure to pay a fine; and also when the period expires, the debt (*arsy*) is also considered settled. I recommend that the law be amended accordingly.

So far, we have noticed the difference between the legal and judicial system of the syariah and common law. According to the English common law system, a criminal case is the action of the King (ruler) against an individual who violates the laws of the country made to maintain order. He will be prosecuted and punished. That is all.

If the criminal act has caused injury to an individual, it is up to the individual concerned to take legal action against the offender in a civil proceeding, to obtain damages. The government does not interfere because the matter is between the two of them.

I have not come across such a case. The reason is, usually a criminal has no money and cannot afford to pay damages. To take legal action requires the service of a lawyer and the victim too cannot afford it. So, the victim has to be satisfied with the Offender serving a prison sentence.

Shariah, perhaps more accurately *fiqh*, looks at the criminal act from both angles: government and individual (victim). It uses the same court, the same judge and the same trial to achieve both goals at the same time. At the end of the proceeding, both goals are achieved at no additional cost. It is a good system. But, whether the system is successful depends on the offender's ability to pay *arsy*.

In an Arab society, especially in ancient times, which was based on strong tribal ties, the whole tribe would contribute to pay for it. The Malay community is not based on tribe. No siblings even of the same parents would come forward to help, if it involves payment of money. But, I am sure they will fight for their rights to *diyāt* if any relative is killed by a person who can afford to pay *diyāt*. That is why, I am waiting to see how the *diyāt* system will work in the Malay community when we have such cases.

So far it is too early to say whether system of *arsy* will succeed in a Malay community. On the other hand, we have seen the possibility that the 18-year-old offender will grow old and die in prison unless a charitable body will pay on his behalf or he receives a pardon from His Royal Highness the Sultan or the law is amended to abolish imprisonment for not being able to pay *arsy* or limiting the period of imprisonment.

Should charitable bodies or the Baitul Mal pay for it? I do not think so. It means we are supporting, if not encouraging, crime.

What about *takaful*? What does it mean if a person takes *takaful* to pay for his *arsy*? It means that he is taking *takaful* because he intends to commit a criminal offence of injuring someone. Should a *takaful* company bear such a liability? I do not think so. Even conventional insurance companies do not do that because it means that they are supporting criminal acts.

Motor vehicle insurance or *takaful* is different. It is taken on the basis that if the car is involved in an accident that causes damage and injury and the driver of the car is negligent, then the insurance or *takaful* company will bear its liability. The basis is an accident not a deliberate criminal act.

Should it be paid with *zakat* money? I am not a jurist, but I think *zakat* money cannot be used for that purpose because I do not think it falls under any *asnaf*^v, furthermore, it means supporting criminal acts.

What if the government uses tax money to pay for it? I also disagree because taxpayers should not bear the consequences of someone's criminal act and indirectly encourage crime.

On the other hand, if as a result of the injury, the victim is unable to earn his livelihood, the government, through its social welfare department, deems it fit to support him, that is a different issue.

Conclusion

So far, no *hudud* cases have been tried. There are only a few cases of *sariqah* (theft) offences in which the offenders have been sentenced to *ta'zir* (imprisonment) and one case of causing *qisas* injuries in which the offender was sentenced to imprisonment and *arsy*. The cases were brought to the Syariah High Court because the suspects wanted to plead guilty by *iqrar*.

For overlapping offences, both the Public Prosecutor and the Chief Syarie Prosecutor should jointly assess and determine whether the charge is to be made under the Penal Code and tried in the Civil Court or under the Syariah Penal Code Order, 2013 and tried in the Syariah Court. To avoid challenge, the law should be amended accordingly.

The provision that an accused may be sentenced to imprisonment for not paying *arsy* until *arsy* is fully paid should be reviewed. I recommend that it is replaced with imprisonment not exceeding a period determined by the Judge within the limit set by law and when the period imposed by the Judge is completed, the Offender's debt (*arsy*) is deemed to have been paid, just like a fine.

This provision is only for cases where the offender is unable to pay the *arsy* and has no property. If he has property, his property may be seized and sold to pay his debt (*arsy*). Such provision already exists.

Before a suspect who, at that time, is under Police custody decides whether he wants to plead guilty or not and, if "yes", either in the Civil Court or through *iqrar* in the Syariah Court, an explanation should be given to him on the difference in the punishment which may be imposed on him by the respective court.

Although the judgments of the Syariah High Court are good (no mention need be made of the the judgment of the Syariah Court of Appeal), but to be more complete, it would be good if the facts of the case are reproduced in the judgment and every step of the proceeding, is stated in detail.

We are waiting to see new cases, including *hudud* cases, where the accused asks to be tried and is represented by counsel. Only then can we see how competent the investigators, prosecutors and judges are in carrying out their respective duties.

We must accept the fact that whatever law, including a law revealed by Allah SWT, as long as it is implemented by man, the possibility of unintentional injustice, always exists. Therefore, efforts should always be made to improve its implementation.

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NOTE:

I thank Tuan Hj Suhaimi Hj Gemok for getting me the court judgments, the relevant laws and the speech of the Hon. Attorney General to enable me to write this article. However, the views expressed in this article are mine based on the facts I have, my understanding

and my arguments. If the facts or my understanding are wrong, please correct me. If there are better arguments, I too will follow it. Wallahu a'lam.

ⁱ Malay, *takzir*, i.e. Punishment for crime not measuring up to the strict requirements of *hadd* punishments although they are of the same nature, or those for which specific punishments have not been fixed by the *Quran*.

ⁱⁱ Plural of *hadd*, it refers to punishments that under Islamic law (shariah) are mandated and fixed by God.

ⁱⁱⁱ Financial compensation paid to the victim or heirs of a victim in the cases of murder, bodily harm or property damage.

^{iv} group eligible for zakat.