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AIMS AND SCOPE

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CONTRIBUTIONS AND EDITORIAL CORRESPONDENCE

Comments, suggestions and requests to: journals@iais.org.my
Online journal: icrjournal.org

Published by IAIS Malaysia, P.O Box 12303, Pejabat Pos Besar, 50774, Kuala Lumpur
Office Address: Jalan Ilmu, Off Jalan Universiti, 59100 Kuala Lumpur
Printed by Vinlin Press Sdn Bhd, Jalan Meranti Permai 1, Meranti Permai Industrial Park, 47100 Puchong, Selangor
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**Significant Speeches, Events and Developments**

*Apnizan Abdullah*

Webinar: Pandemic and the Movement Control Order in the Islamic History (16 April 2020)
*Mohammad Mahbubi Ali*

Webinar: Contagious Disease: Islamic and Malaysian Perspectives (23 April 2020)
*Muhammad Fakhrurrazi Ahmad*

Webinar: The Impact of COVID-19 Pandemic on Islamic Banking (30 April 2020)
*Mohammad Mahbubi Ali*

Webinar: Kesan PKP Terhadap Kontrak Pekerjaan dan Perbankan di Malaysia (Impact of the MCO on Work and Banking Contracts in Malaysia) (14 May 2020)
*Apnizan Abdullah*

*Mohammad Mahbubi Ali*

Webinar: The US Racial Unrest: Muslims, Social Justice, and Beyond (9 June 2020)
*Wan Naim Wan Mansor*

*Ahlis Fatoni*
Webinar: COVID-19 from the Perspective of Islamic Theology and Spirituality  
(9 July 2020)  
*Muhammad Fakhrurrazi Ahmad*

Forum: Rukun Negara: Revisiting Its Role, Pillars of National Unity  
(TIAIS Malaysia, 28 July 2020)  
*Wan Naim Wan Mansor*

Online Research Camp for Academic and Policy Research  
(11 August 2020)  
*Mohammad Mahbubi Ali*

(TIAIS Malaysia, 27 August 2020)  
*Ahmad Badri Abdullah*

Webinar: Managing Shariah Non-Compliant Risk in Financial Institutions  
(3 September 2020)  
*Mohammad Mahbubi Ali*

Forum: The ‘Social Contract’ and the Future of Nation-Building in Malaysia  
(TIAIS Malaysia, 17 September 2020)  
*Wan Naim Wan Mansor*

Webinar: COVID-19: An Issue in Religion and Science  
(22 October 2020)  
*Ahmad Badri Abdullah*

Online Islamic Finance Talk Series: Sense and Sustainability: Islamic Finance for a More Humanistic Economy  
(26 October 2020)  
*Ahmad Badri Abdullah*
Online Roundtable Discussion: The Role of Civil Societies and Faith-based Organisations in Global Nuclear Disarmament (12 November 2020)
Wan Naim Wan Mansor

Book Review

Syed Farid Alatas and Abdolreza Alami, *The Civilisational and Cultural Heritage of Iran and the Malay World: A Cultural Discourse*
Alexander Wain

On 1 May 2014, Phase 1, which includes the law of *ta’zir*, but not the death penalty or *qisas* (retaliation), was implemented.

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

So far, no *hudud* case has been tried in Brunei. There have only been 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*) and imprisonment for five years.

It should be noted that, although the Syariah Penal Code Order 2013 has been implemented, the secular Penal Code is still in force in Brunei, with the cases under it being 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, we might ask, is it to be determined whether a case is charged under the Penal Code and tried by a 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 iqrar in 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 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 “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 language version, contained in section 25(2) of the Emergency (Syariah Courts) Order 1998, says the same thing.

I believe that, at the time these two laws were drafted, the drafters did not envisage the possibility of overlapping offences, as found today. Looking at the provisions of the Constitution and section 25(2) of the 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 so that the case is tried in a civil court, or under the Syariah Penal Code Order 2013 so that it is tried in the Syariah Court.

To avoid the possibility of the determination being challenged, especially if a non-Muslim suspect 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 the Syariah Courts Act Chapter 184 and section 25(2) of the Emergency (Syariah Courts) Order 1998. The amendments should 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 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 tried in the Syariah Court.

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

The determination of which law an overlapping offence will be tried under is made when the suspect is in custody—that is, in the lockup. As in the case of Mohd. Norazimi Fathullah (discussed below), the suspect was not represented by counsel. Most likely, he was asked by the investigating officer if he wanted to plead guilty and, if “Yes”, whether he wanted to do so by iqrar or according to civil law. For an 18-year-old suspect, as in that case, who most likely was being 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 in the hope of forgiveness from Allah. For that purpose, perhaps, he thought that the Syariah Court was a more suitable place compared to the civil courts.

Second, he might have heard that civil courts only try serious cases such as murder and robbery, where the sentences include death and caning. The caning is terrifying. On the other hand, Syariah Courts only deal with minor cases, such as khalwat, where the punishment of caning is just like caning naughty boys.

Third, since the Syariah Penal Code Order 2013 had just been implemented, he perhaps did not know that, apart from imprisonment, he could also be fined arsy; if unable to pay, he would be imprisoned until the debt was cleared, which could mean until death. On the other hand, if he was tried in a civil court, he could also be sentenced to caning. That is why the punishments that could be imposed by both courts should have been explained to him so that he could have made a choice without misconception.

The Case of Ketua Pendakwa Syar’ie Lawan v. Abdul Hafiz Bin Hj Muhammad Irwan

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

This case was brought to the Syariah High Court because the suspect wanted to plead guilty by iqrar. So, the question is whether the difference between the sentences that could be imposed on him by the Syariah High Court and the civil courts was sufficiently explained to him—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 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] 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 tyres 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] 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 stated in detail the procedure followed by him and explained 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 were not reproduced in this judgment, with which a more complete picture would be possible. This is important because the judgment will be a precedent, and so potentially applied to later cases.

We also do not know whether, before he was asked if he wanted to plead guilty by *iqrar*, the difference in sentencing between the respective courts was explained to the accused—namely, that the Shariah Court could order him to pay damages to the victim, while the civil court could not.

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

Regarding the sentence, I will only refer to the order of the judge: “If the Offender is unable to pay it [damages], then it becomes a debt on him.” I understand this to be a debt that could be claimed through civil process, and so is 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 under the Syariah Penal Code Order 2013 for which we have the written judgment of both the Syariah High Court and the Syariah Court of Appeal.
The facts of the case as we have them are nothing more than what is mentioned in the charge—that is, that the accused, Mohd. Norazimi Fathullah b. Mohd. Safihi, on the date, time and place stated, caused an injury to Asahrin bin Idris by breaking his skull. Thus, he committed an offence under section 169(2)(a) of the Syariah Penal Code Order 2013, 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. Payment to the victim of arsy equivalent to 1/3 of the amount of full diyat (amounting to B$91,516.66), to be paid within three years, in installments.
3. If the arsy went unpaid, the offender should be imprisoned until the said amount was forthcoming.

So far, the cases heard by the Syariah High Court are ones in which the accused pleaded guilty. So, the judgments are only about sentencing. We are therefore unable to see how the procedure for trial is followed, how the law of evidence is applied (especially if the witness is a non-Muslim), 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 when 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 an identification of the offender as the person who made *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 that not everything that needed to be explained to the accused was before the conviction was 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 were 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 have been given to him before his conviction was recorded.

Thus, we do not know whether, before his *iqrar*, the accused was given an explanation of the consequences—among other things, that he could be sentenced to pay *arsy* which, if unpaid, could result in indefinite imprisonment. It should be understood that the single qualification for *iqrar* is that the accused know the consequences of choosing to be tried in a Syariah Court as opposed to a civil court.

Regarding the sentence passed, I will only touch on the effects of the order in paragraphs 2 and 3 on the previous page.

Regarding paragraph 2, *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 and, if they are, whether they work, and so on.

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

Regarding paragraph 3, if the *arsy* goes unpaid, 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 shariah.

We should think, however, of the consequences. As I have argued, it is very unlikely that the offender will be able to pay the *arsy*. As such, they will almost certainly serve a life sentence, from the age of 18! Is that the intention of shariah and 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, that officer will find that the _arsy_ has not been paid and that the court sentence demands he be imprisoned until it is. He will therefore 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_. We should also consider whether, when that period expires, the debt is considered settled or not. I recommend that the law be amended accordingly.

So far, we have noticed the differences between the legal and judicial systems of shariah 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, however, come across such a case. Usually a criminal has no money and cannot afford to pay damages, while to take legal action requires the service of a lawyer, which often the victims cannot afford. 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 proceedings, 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 pre-modern times, when strong tribal ties persisted, the whole tribe could contribute to the payment of a fine. The Malay community is not based on tribes. 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 _diyat_ if any relative is killed by a person who can afford to pay it. That is why I am waiting to see how the _diyat_ system will work in the Malay community when we have such cases.

So far it is too early to say whether a system of _arsy_ will succeed in a Malay community. We have seen the possibility that the 18-year-old offender will grow old and die in prison unless a charitable body pays on his behalf or he receives a pardon from His Royal Highness, the Sultan—or unless the law is amended to abolish or limit imprisonment for non-payment of _arsy_.

But, 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 (insurance)? 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. Should a takaful company bear such liability? I do not think so. Even conventional insurance companies do not do that because it means they are supporting criminal acts.

Motor vehicle insurance 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 the liability. The basis, however, 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 it does not fall under any asnaf. Furthermore, it again 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 and 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 in Brunei. There have only been a few cases of sariqah (theft), for which the offenders were sentenced to ta‘zir (imprisonment), and one case of causing qisas injuries, for 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 Syar’ie Prosecutor should jointly assess and determine whether the charge is to be made under the Penal Code, and so tried in the civil courts, or under the Syariah Penal Code Order 2013, and so tried in the Syariah Court. To avoid challenge, the law should be amended accordingly.

The provision that the accused be sentenced to imprisonment for not paying arsy until such time as the arsy is fully paid should be reviewed. I recommend that it be replaced with imprisonment not exceeding a period determined by the judge within the limit set by law. 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. Such provision already exists.
Before a suspect in police custody decides to plead guilty, either in the civil court or through iqrar in the Syariah Court, an explanation should be given to him concerning the differences in punishment between the respective courts.

Although the judgments of the Syariah High Court are good (no mention need be made of the judgment of the Syariah Court of Appeal), to be more complete, it would be good if the facts of the case were reproduced and every step of the proceedings 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 whenever a law, including the law revealed by Allah, is implemented by man, the possibility of unintentional injustice exists. Therefore, efforts should always be made to improve its implementation.

Notes

* Tun Abdul Hamid Mohamad, Former Chief Justice of Malaysia. I may be contacted at tunabdulhamid@gmail.com. Please also see http://www.tunabdulhamid.my and https://tunabdulhamid.me.

I thank Tuan Hj Suhaimi Hj Gemok for obtaining the court judgments, relevant laws, and the speech of the Hon. Attorney General for me, enabling me to write this article. However, the views expressed are my own, based on the facts as I have them, according to my understanding and arguments. If the facts or my understanding are wrong, please correct me. If there are better arguments, I too will follow them. Wallahu a’lam.

1. Malay, takzir, a punishment for a crime that either does not measure up to the strict requirements of a hadd punishment, although being of the same nature, or for which a specific punishment has not been fixed in the Qur’an.
2. Plural of hadd, referring to punishments mandated and fixed by God.
3. Financial compensation paid to the victim or their heirs in the cases of murder, bodily harm, or property damage.