

Shariah Penal Code Order, 2013 of Negara Brunei Darussalam: Its Implementation and Challenges

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1. INTRODUCTION

Shariah, or Islam law, is not foreign to Negara Brunei Darussalam. Its implementation started since the conversion of Awang Alak Betatar to the Islamic faith and assumed the royal name of Sultan Muhammad Shah (1363-1402 M).¹ Brunei, then, had officially accepted Islam as the religion of the ruler and the ruled; and thenceforth the birth of a new nation known as “Negeri Brunei”, a Malay Islamic Monarchy state (*Kerajaan Kesultanan Melayu Islam*).² The

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This paper is a concise translation of the original paper “*Perintah Kanun Hukuman Jenayah Syariah, 2013 Brunei Darussalam: Pelaksanaan dan Cabaran*” which was earlier submitted.

¹ See Abdul Mohaimin Ayus. “Memperkasakan Undang-undang Jenayah Syarak: Analisis Perundangan Perbandingan Antara Brunei dan Malaysia”. *Prosiding Seminar Isu-Isu Kontemporari Dalam Syariah dan Undang-Undang*, organized by the Faculty of Shariah and Law, Universiti Islam Sultan Sharif Ali (UNISSA), Negara Brunei Darussalam. 1432H/2011M, pp. 76-108. See also Prof. Dato’ Dr. Haji Mahmud Saedon bin Awang Othman. (1996). *Perlaksanaan dan Pentadbiran Undang-undang Islam di Negara Brunei Darussalam: Satu Tinjauan*. Bandar Seri Begawan: Dewan Bahasa dan Pustaka Brunei, p. vii.

²*Ibid.*, p. 19. Pengiran Dato Seri Setia Dr. Haji Muhammad bin Pengiran Haji Abd. Rahman. (2007). *Islam di Brunei Darussalam Zaman British (1774-1984)*. Bandar Seri Begawan: Dewan Bahasa dan Pustaka Brunei, hal. 68-93. Pengiran Dato Seri Setia Dr. Haji Muhammad, at p. 92: “Berdasarkan sumber China dan sumber tradisi, Awang Alak Bertatar dipercayai menganut Islam pada atau sebelum 1371. Oleh itu kunjungan baginda ke Melaka pada awal abad ke-15 itu adalah dalam sifat baginda seorang raja atau sultan yang sudah menganut Islam sejak lebih tiga puluh tahun sebelumnya.” (Based on

monarchy system was officially established since early 15th century with the conversion of Awang Alak Betatar and this Islamic Monarchy State has remained till today.

2. THE ENFORCEMENT OF SHARIAH IN BRUNEI

With the conversion of the Sultan and the people of Brunei at that time, the Shariah of Islam was simultaneously introduced and enforced. In the “*Silsilah Raja-raja Brunei*”³ (Genealogy of Rulers of Brunei) it was stated that the religion of Islam according to the Shariah of Prophet Muhammad *sallallahu alaihi wassalam* was brought to the Kingdom of Brunei by Sultan Muhammad's brother Sultan Ahmad. His son-in-law was Sultan Sharif Ali who came down from the state of Taif, descendant of Amirul Hasan ibn ‘Ali *radiallahu ‘anhu*, known as *Sultan Berkat*. The practice of Shariah continues till this day.⁴

Shariah implementation is substantiated by the existence of two copies of early Brunei Islamic law enactments:

(1) *Hukum Kanun Brunei* (Penal Code of Brunei), and

(2) Undang-undang dan Adat Brunei Lama (*Old Law and Customs of Brunei*).

Hukum Kanun Brunei contained 47 clauses covering criminal law, i.e. *hudud*, *qisas* and *ta'zir*. In addition, the elements of the Malay customary law and practices were found therein.⁵

Chinese and traditional sources, Awang Alak Bertatar was believed to have embraced Islam in or before 1371. His visit to Malacca in the early 15th century was in the capacity of a king or sultan who had embraced Islam for more than thirty years before.)

³PL Amin Sweeney. (1968). “Silsilah Raja-raja Brunei”. *Journal of the Malayan Branch of the Royal Asiatic Society* (JMBRAS). Vol. 41. Pt. 2, hal. 11, cited in Pengiran Dato Seri Setia Dr. Haji Muhammad bin Pengiran Haji Abd. Rahman. (2007). *Islam di Brunei Darussalam Zaman British (1774-1984)*, hal. 92.

⁴*Ibid.*, pp. 92-93.

⁵Prof. Dato 'Dr. Haji Mahmud Saedon bin Awang Othman. (1996). *Implementation and*

Shariah law has indeed been enforced in Brunei Darussalam. WH Treacher, Acting British General Consul, had stopped over in Brunei in 1871, before Brunei came under the auspices of the British protection. According to his records, he had met the Sultan of Brunei and reported to His Majesty that several people had stolen several items, including a gold watch and a gun (rifle), from the British warships moored on the Brunei River. As a result of the report, three people involved in the theft of the goods had been arrested and sentenced to *hadd* punishment of the amputation of the hand, and the stolen items were returned.⁶

According to the observations of Pengiran Dato Seri Setia Dr. Haji Muhammad bin Pengiran Haji Abd. Rahman⁷, the historical record above shows that all the mentioned Sultan of Brunei are the developers and supporters of Islamic law.⁸ The situation persisted from one Sultan to another till this day, although there were some adjustments when Brunei Darussalam under the British intervention.

3. BRITISH INTERVENTION

The British intervention in Brunei began with a friendly business agreement in 1847, when some foreign activities began to threaten Brunei's position and security at that time. In 1888, Sultan Hashim Jalilul Alam Aqamaddin signed the Protectorate Treaty with the British Government, in order to defend and uphold the existence of the state and sovereignty of Brunei.

Under the Treaty, the British, in fact, took over the entire administration of justice, except the administration of Islamic justice and, to a degree, the Malay customs. The British, on the basis of improving the laws of Brunei, have brought in the laws from the Federated Malay States of Malaya (now Malaysia). The bringing of statutes or written law into Brunei by the British was legally granted under the Courts Enactment 1908 and the Federated Malay States Laws Adoption Enactment 1939. Statutes of the Federated Malay States (FMS) in Malaya have

Administration of Islamic Laws in Brunei Darussalam: One Review, p. 22-24.

⁶*Ibid.*, p. 25.

⁷Former Minister of Religious Affairs of Brunei Darussalam.

⁸Pengiran Dato Seri Setia Dr. Haji Muhammad bin Pengiran Haji Abd. Rahman. (2007). *Islam di Brunei Darussalam Zaman British (1774-1984)*, p. 93.

been adopted by the courts in Brunei. *State of Brunei's Annual Report for the Year 1941* reported that the following FMS statutes had been applied in the country:

- Penal Code;
- Law of Evidence;
- Criminal Procedure Code;
- Civil Procedure Code;
- Law on Specific Relief, and
- Law of Contracts

In 1956, the Adopted Law (Publication in the Gazette) Enactment was passed. This Enactment empowered the Legal Adviser, with the consent of His Majesty the Sultan, to print and publish the adopted statutes in the Government Gazette as law, with amendments as it deemed necessary for its application in Brunei. Some of the subsequent statutes had from England, Malaya, Sarawak and Singapore through the same process. Islamic law, especially the criminal legislation, has since been marginalized.

In 1908 the Kadi Court was established. Its jurisdiction is only confined to matters of Muslim marriage and divorce, and Islamic worship.⁹ In reorganizing the Islamic law in Brunei, the State Legislative Council in 1911 passed the Islamic Religious Law Enactment. This law was a mixture of Shariah rules and local customs. Obviously, the jurisdiction of the court granted by this Enactment was merely related to Islamic family law and worship.¹⁰

4. BRUNEI AFTER INDEPENDENCE

The independence of Brunei Darussalam from the British interference and intervention on 1st January 1984 did not directly bring Brunei back to the full Islamic legal system and customs that had been prevalent before the arrival of the British. The law applicable after independence is subject to the provisions of section 2 of the Application of Laws Act (Cap.2), which states as follows:

“Subject to the provisions of this Act and save in so far as other provision has been or may hereafter be made by any written law in force in Brunei Darussalam, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement

⁹Siti Zaliha bint Abu Salim. (2006). *Brunei Justice System: A Comparative Study with Islamic Judicial System*. Gadong: IPIISOAS, UBD, e.g. 62.

¹⁰*Ibid.*, P. 75-76.

of this Act, shall be in force in Brunei Darussalam:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Brunei Darussalam so far only as the circumstances of Brunei Darussalam and of its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary.”

Although the application of the law after the independence is similar between Brunei Darussalam and Malaysia, however, from the perspective of the implementation of Islamic law, Brunei Darussalam is not confined to the same situation as found in Malaysia.

On the making of Islamic law, the power contained in the Constitution of Brunei Darussalam is different from the power conferred by the Federal Constitution of Malaysia. The power to make Islamic law in Brunei Darussalam can be seen from the provisions of Article 3 of the Constitution of Brunei Darussalam as follows:

“(1) The official religion of Brunei Darussalam shall be the Islamic Religion:

Provided that all other religions may be practised in peace and harmony by the persons professing them.

(2) The Head of the official religion of Brunei Darussalam shall be His Majesty the Sultan and Yang Di-Pertuan.

(3) The Religious Council shall be the authority responsible for advising His Majesty the Sultan and Yang Di-Pertuan on all matters relating to the Islamic Religion.

(4) For the purpose of this Article, His Majesty the Sultan and Yang Di-Pertuan may, after consultation with the Religious Council, but not necessarily in accordance with the advice of that Council, make laws in respect of matters relating to the Islamic Religion.

The provisions of Article 3 of the Constitution of Brunei Darussalam above empowers absolute authority to His Royal Highness the Sultan and Yang Di-Pertuan, under Article 3(4) to “make laws in respect of matters relating to the Islamic Religion.” In Brunei Darussalam there is no question of the separation of 'religion' and 'law'. There are no restrictions or

constitutional barriers in passing and implementing the full Shariah law in Brunei. His Majesty the Sultan has already acknowledged in his *Titah* (royal command) to reinstate Shariah law, such as the “*Hukum Kanun Brunei*” (the Brunei Penal Code) which had been implemented and enforced ntry beginning 1598, to again be the basic law of this country.¹¹

5. THE SYARIAH PENAL CODE ORDER, 2013: GAZETTE AND ENFORCEMENT PHASE

On 15th May 2011 His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam has stated that Brunei could maintain two legal systems and two judiciaries, Islamic and civil systems. There is no problem if the two systems are maintained in parallel. Many civil laws (referring to the laws introduced by the British and the current written laws based on the common law) have been harmonised and adjusted in compliance with the will of *syarak* (Islamic religious rules). However, not all the civil laws are against *syarak*. Any law that does not contradict the *syarak* should be maintained, while the ones contrary to the religious rules to be brought within the will of the *syarak*. The goal is to find the best in context of the world and the hereafter.

During the Opening Ceremony of the 2013 Knowledge Convention (*Majlis Ilmu*) at the International Conference Center, Berakas, Brunei Darussalam on 22nd October 2013, the aspirations of His Majesty the Sultan have come true. In His Royal Address, His Majesty declared the implementation of the “Syariah Penal Code Order, 2013”:

“... By the Grace of Allah, ... This Order, on this day, October 22, 2013, is now gazetted, and it will come into force six months after the gazette and will be enforced in phases.”

The Syariah Penal Code Order, 2013 (SPCO) has formally become the law of Brunei Darussalam, and the first phase of the implementation commenced on 1 May 2014. The first phase of the enforcement of the Syariah Penal Code Order, 2013, has been in progress, six months after the publication of this Order in the Government Gazette. All offences classified as "General Offences", punishable with *ta'zir* punishment in Part IV, from section 192 to section 251, are enforced in this first phase

¹¹ See *Media Gems*, Volume: MP13 / 195 dated 16.3.2011, the cover.

of enforcement; except the offences imposing death penalty or whipping.¹²

Although the first phase of implementation of the Syariah Penal Code Order, 2013 has been running for the last five years, the draft Order of the Syariah Criminal Procedure Code, at this point of time, is awaiting the Royal assent and publication in the Gazette. The 2nd phase of the enforcement of the Syariah Penal Code Order, 2013, will begin 12 months from the date of the gazetting of the Syariah Criminal Procedure Order. All offenses imposing the *hadd*, *diyat*, *arsy* and *al-sulh* will be enforced¹³, except those offences carrying the death penalty such as *hirābah* (robbery) if a victim is killed, *zinā* and *zinā bi al-jabar*¹⁴ [18] (rape) and *liwāt*¹⁵ (if the offender is *Muḥṣan*¹⁶), offences relating *irtidad* (apostasy) and *qatl al-‘amd* (murder).¹⁷

The 3rd phase is the full implementation of the Syariah Penal Code Order, 2013, including the enforcement of offences leading to death penalty, will commence 24 months from the date of the gazetting of the Syariah Criminal Procedure Code. Currently, the enforcement authorities, the prosecution and the Syariah Courts are still using the same Criminal Procedure Code which is applicable in the civil courts

¹²However, for offences under sections 221, 222, 223 or 224 above, section 226 of this Order provides that the Court shall sentence and before execution, order the offender to repent. If the offender repented, and the Court is satisfied with it, section 227 allows the offender to be acquitted.

¹³‘*Hadd*’ means punishment or penalty as ordained by the al-Qur’an and Sunnah. ‘*Diyat*’ means specified amount payable to the heirs or beneficiaries of the victim of *qatl* (homicide). ‘*Arsy*’ means compensation of specified amount either determined or not determined by *Hukum Syara*’ (religious rules) payable to a victim of hurt. ‘*Al-Sulh*’ mean a mutual settlement or agreement to settle amicably.

¹⁴In the Syariah Penal Code Order, 2013, it is spelled “*zina bil-jabar*”.

¹⁵Sexual intercourse between a man and another man or between a man and a woman other than his wife, done against the order of nature that is through the anus. (Section 82(2) SPCO, 2013.)

¹⁶A legally married person and had sexual intercourse in the marriage. (Section 2(1) SPCO, 2013.)

¹⁷See the Pelita of Brunei < <http://www.pelitabrunei.gov.bn/nasional/item/8438-their-the-students-of-the-syariah-2013-dangerous> > (Accessed 9.10.2014).

6. THE PROVISIONS IN THE SYARIAH PENAL CODE ORDER, 2013

Syariah Penal Code Order 2013 contains 254 sections, which is divided into five parts as follows:

Part I	Provision
5 sections: sections 1-5	Preliminary: Contains preamble, including citation, interpretation and application of this Order.

Part II	Provision
31 sections: sections 6 to 36	General Exceptions: For example, an offence committed by a person of unsound mind; including Right of Private Defence.

Part III	Provision
15 sections: sections 37 to 51	Abetment: Includes common intention; punishment of abettor.

Part VI	Provision
200 sections, divisible into 4 Chapters: Chapter I : sections 52 to 251 section 53 to section 117	<p>Offences: Section 52, the definition of " <i>ḥadd</i> ": "(1) For the purpose of this Order, " <i>ḥadd</i> " means punishment or penalty as ordained by the al-Qur'ān or the <i>Sunnah Rasulallah Sallallahu 'Alaihi Wa Sallam</i> for the offence of <i>sariqah</i> , <i>ḥirābah</i> , <i>zinā</i> , <i>qazaf</i> , drinking intoxicating drinks and <i>irtidād</i>. (2) <i>Zinā bil-jabar</i> and <i>liwāṭ</i> are included in the meaning of <i>zinā</i> liable to <i>ḥadd</i> punishment."</p> <p>Sariqah -<i>sariqah</i> and <i>hirz</i> (s.53); value of <i>niṣāb</i> for <i>sariqah</i> (s.54); Punishment for <i>sariqah</i> (s.55); When <i>ḥadd</i> punishment for <i>sariqah</i> offences not imposed (s.56); Property in different <i>hirz</i> (s.57); Punishment for committing <i>qatl</i> or causing hurt to person during commission of <i>sariqah</i> (s.58); Attempt to commit <i>sariqah</i> (s.59); Abetting commission of <i>sariqah</i> (s.60); Return of <i>sariqah</i> property (s.61)</p> <p>Ḥirābah -<i>Ḥirābah</i> (s.62); Punishment for <i>ḥirābah</i> (s.63); When punishment of amputation of hand and foot in <i>ḥirābah</i> shall not be imposed (s.64); Attempts to commit <i>ḥirābah</i> (s.65); Abetting commission of <i>ḥirābah</i> (s.66); Return of <i>ḥirābah</i> property (s.67).</p> <p>Zinā -<i>Zinā</i> (s.68); Punishment for <i>zinā</i> (s.69); Punishment for <i>zinā</i> where the offender is not <i>mukallaf</i> or has not attained the age of <i>baligh</i> [puberty] (s.70); Attempt to commit <i>zinā</i> (s.71); Attempt to commit <i>zinā</i> where the offender is not <i>mukallaf</i> or has not attained age of <i>baligh</i> (s.72); Abetting commission of <i>zinā</i> (s.73); Abetment to commit <i>zinā</i> where the offender is not <i>mukallaf</i> or has not attained age of <i>baligh</i> (s.74).</p> <p>Zinā bil-jabar -<i>Zinā bil-jabar</i> (s.75); Punishment for <i>zinā bil-jabar</i> (s.76); Punishment for <i>zinā bil-jabar</i> where the offender is not <i>mukallaf</i> or has not attained age of <i>baligh</i> (s.77); Attempt to commit <i>zinā bil-jabar</i> (s.78); Attempt to commit <i>zinā bil-</i></p>

	<p><i>jabar</i> where the offender is not <i>mukallafor</i> has not attained age of <i>baligh</i> (s.79); Abetting commission of <i>zinā bil-jabar</i> (s.80); Abetment to commit <i>zinā bil-jabar</i> where the offender is not <i>mukallafor</i> or has not attained age of <i>baligh</i> (s.81);</p> <p>Liwāt -<i>Liwāt</i> (s.82); Proof of <i>liwāt</i> (s.83); Attempt to commit <i>liwāt</i>(s.84); Abetting commission of <i>liwāt</i> (s.85).</p> <p>Offenses relating to <i>zinā , zinā bil- jabar or liwāt</i> -Withdrawal of <i>ikrar</i> in cases of <i>zinā , zinā bil-jabar or liwāt</i> (s.86); Withdrawal of evidence in cases of <i>zinā, zinā bil-jabar or liwāt</i> (s.87); Accuser and witnesses not liable to <i>qazaf</i> (s.88); Accuser and witnesses liable to <i>qazaf</i>(s.89); <i>Ityan al-mayyitah</i> (s.90); <i>Ityanal-bahimah</i> (s.91); <i>Musahaqah</i> (s.92); Reluctance to perform <i>li'an</i>(s.93); Pregnant out of wedlock (s.94).</p> <p>Qazaf -<i>Qazaf</i> (s.95); Condition for person who commits <i>qazaf</i> and person who are liable to <i>qazaf</i> (s.96); Manner of committing <i>qazaf</i> (s.97); Punishment for <i>qadhif</i> (s.98); Cases in which <i>hadd</i> punishment is not imposed or enforced (s.99); Issuing documents deemed to contain the meanings of <i>qazaf</i> (s.100); Sale of document deemed to contain the meanings of <i>qazaf</i> (s.101); Attempt to commit <i>qazaf</i> (s.102); Abetting commission of <i>qazaf</i> (s.103).</p> <p>Intoxicating drink -Drinking etc. liquor or intoxicating drinks (s.104); Attempt to offence of drinking etc. liquor or intoxicating drinks (s.105); Abetting commission of offence of drinking etc. liquor or intoxicating drinks (s.106).</p> <p>Irtidād -<i>Irtidād</i> (s.107); Declaring oneself as god (s.108); Declaring oneself as <i>Rasul</i> or <i>Nabi</i> (s.109); Contempt of <i>Nabi</i> (s.110); Deriding etc. verses of the al-Qur'ān, <i>hadīth</i> or obligatory matters with <i>ijma'</i> (s.111); Declaring oneself as non-Muslim (s.112); Attempt to commit <i>irtidād</i> (s.113); Abetting commission of <i>irtidād</i> (s.114); Forfeiture and disposal (s.115); Order to repent (s.116); Acquit after repentance (s.117).</p>
<p>Chapter II : Section 118 to section 183</p>	<p>Qatl and Injury -<i>Qisas</i> (s.118); <i>Diyat</i> (s.119); Value of <i>Diyat</i> (s.120); <i>Arsy</i> (s.121); <i>Badal-al-sulh</i> (s.122); Application of <i>qisas, diyat</i> and <i>arsy</i> (s.123);</p> <p>Qatl -<i>Qatl</i> and its kinds (s.124); <i>Qatlul-'amd</i> (s.125); Punishment for <i>qatlul-'amd</i> (s.126); <i>Qatlul-'amd</i> due to <i>ikrah</i> (s.127); <i>Qatl</i> caused by being hired (s.128); <i>Qatlul-'amd</i> committed in self-defence (s.129); <i>Qatlul-'amd</i> committed by public servants (s.130); Right to <i>qisas of wali-ad-dam in qatlul-'amd</i> (s.131); Cases in which punishment of <i>qatlul-'amd</i> not enforced (s.132); Pardon in respect <i>qatlul-'amd</i> (s.133); Compound of <i>qisas</i> (s.134); Acquittal or punishment after pardon or compound of <i>qisas</i> (s.135); Commission of <i>qatlul-'amd</i> by <i>wali-ad-dam</i> after pardon or compound of <i>qisas</i> (s.136); Attempt to commit <i>qatlul-</i></p>

	<p>'amd (s.137); Abetment of <i>qatlul-'amd</i> (s.138);</p> <p>Qatlul syibhil -'amd <i>-Qatlul syibhil -'amd</i> (s.139); Punishment of <i>Qatlul syibhil -'amd</i> (s.140); Proof of <i>qatlul syibhil-'amd</i>(s.141); Pardon of <i>diyat</i> in <i>qatlul syibhil -'amd</i> (s.142); Acquittal or punishment after pardon of <i>diyat</i> (s.143); Attempts to commit <i>qatlul syibhil -'amd</i> (s.144); Abetment of <i>qatlul syibhil -'amd</i> (s.145).</p> <p>Qatlul-khata' <i>-Qatlul-khata'</i> (s.146); Punishment of <i>qatlul-khata'</i> (s.147); Proof of <i>qatlul-khata'</i> (s.148); Pardon of <i>diyat</i> in <i>qatlul-khata'</i> (s.149); Acquittal or punishment after pardon of <i>diyat</i>(s.150).</p> <p>Qatl byblack magic -Black magic (s.151); <i>Qatl</i> by black magic (s. 152); Attempt to commit <i>qatl</i> with black magic (s.153); Abetment of <i>qatl</i> by black magic (s.154).</p> <p>Qatl by poison <i>-Qatl</i> by using poison or poisonous substance(s.155); Attempt of <i>qatl</i> by using poison or poisonous substance (s.156); Abetment of <i>qatl</i> by using poison or poisonous substance (s.157).</p> <p>Qatl by miscarriage of foetus <i>-Qatl</i> by miscarriage of foetus(s.158); Attempting<i>qatl</i>by miscarriage of foetus (s.159); Abetment of <i>qatl</i> by miscarriage of foetus (s.160); Miscarriage of pregnancy (s.161); Attempt to cause miscarriage of pregnancy (s.162); Abetment to cause miscarriage of pregnancy (s. 163); Exception for sections 158 and 161 (s.164).</p> <p>Suicide -Attempt to commit suicide (s.165); Abetment to commit suicide (s.166).</p> <p>Hurt -Causing hurt (s.167); Kinds of injuries (s.168); Punishment of causing hurt (s.169); Proof of hurtliable to <i>qisas</i> (s.170); Cases in which <i>qisas</i> punishment not enforced (s.171); Power of Court to determine hurt liable to <i>qisas</i> or otherwise (s.172); Pardon in respect of hurt (s.173); Compound of <i>qisas</i> (s.174); Acquittal or punishment after pardon or compound of <i>qisas</i> (s.175); Punishment of <i>arsy ghairu muqaddar</i> (s.176); Determination of value or <i>arsy ghairu muqaddar</i>(s.177); Recoveryof <i>arsymuqaddar</i> or <i>arsy ghairu muqaddar</i>(s.178); Punishment for hurtby rash or negligent act (s.179); Punishment for hurt by mistake (s.180); <i>Arsy muqaddar</i> or <i>arsy ghairu muqaddar</i> shall be paid to victim (s.181); Attempt to cause hurt (s.182); Abetting commission of causing hurt (s.183).</p>
<p>Chapter III : Section 184 to section 191</p>	<p>Withdrawalof Syahadah -Withdrawal of <i>syahadah</i> before pronouncement of punishment or sentencing, or making an order or judgment (s.184); Withdrawal of <i>syahadah</i> in <i>mal</i> case after order or judgment made (s.185); Withdrawal of <i>syahadah</i> after conviction, in cases of <i>qisas</i> and <i>hadd</i> other than <i>zinā.zinā bil-jabar</i> or <i>liwāt</i> (s.186); Withdrawal of <i>syahadah</i> in case of <i>zinā, zinābil-jabar</i> or <i>liwāt</i> (s.187); Withdrawal of <i>syahadah</i>hihsan by <i>syahid</i> (s.188); Withdrawalof <i>syahadah</i> in cases liable to punishment</p>

	other than <i>ḥadd</i> , <i>qisas</i> , <i>diyat</i> or <i>arsy</i> (s.189); Withdrawal of <i>syahadah</i> by <i>syahid furu</i> in <i>malcase</i> (s.190); False information by <i>muzakki</i> (s.191).
<p>Division VI : Section 192 to section 251</p>	<p>General Offences</p> <p>-Punishment of committing <i>ghasab</i> (s.192); Return of <i>ghasab</i> property (s.193); Failure to perform Friday prayers (s.194); Disrespecting month of Ramadan (s.195); <i>Khalwat</i> (s.196); Indecent behaviour (s.197); Man posing as woman or <i>vice versa</i> (s.198); Instigating married man or married woman to divorce or neglect duties (s.199); Preventing Muslim married couple from cohabiting (s.200); Enticing or causing Muslim married woman to leave matrimonial home (s.201); Enticing female Muslim to leave custody of her parents or guardian (s.202); Unmarried female Muslim who leaves custody of parents or guardian (s.203); Give away or surrender of Muslim (s.204); Acting as procurer (s.205); False claim (s.206); Doctrine or practices etc. contrary to <i>Hukum Syara'</i> (s.207); Practising etc. black magic (s.208); Propagation of religion other than religion of Islam (s.209); Persuading etc. Muslims to change religion (s.210); Persuading etc. people having no religion to become believers of etc. religion other than religion of Islam etc. (s.211); Exposing beliefs and practices of religion other than religion of Islam to Muslim child, or child whose parents have no religion, who is under 18 years (s.212); Publication contrary to <i>Hukum Syara'</i> (s.213); Delivering or sending publications relating to religion other than religion of Islam to Muslims or persons having no religion (s.214); Giving in public places publications relating to religion other than religion of Islam to Muslims or persons having no religion (s.215); Worship (s.216); Offences in relation to use of certain words in respect of religion of Islam (s.217); Misuse of titles for Muslims reserved for specific persons (s.218); Accusing etc. Muslim as <i>kafir</i> (s.219); Contempt or brings into contempt etc. religion of Islam (s.220); Contempt of <i>Nabi</i> by non-Muslim (s.221); Deriding etc. verses of Al-Qur'an or <i>hadith</i> by non-Muslim (s.222); Attempt to commit offence under section 221 or 222 (s.223); Abetting commission of offence under section 221 or 222 (s.224); Forfeiture and disposal (s.225); Order to repent (s.226); Acquit after repentance (s.227); <i>Fatwa</i> (s.228); Religious teaching without written approval (s.299); Contempt etc. of religious authority (s.230); Obstructing Religious Enforcement Officer (s.231); False report (s.232); Giving false <i>syahadah</i> (s.233); Giving false evidence or information (s.234); Incitement to neglect religious duty (s.235); Non-payment of <i>zakat</i> or <i>fitrah</i> (s.236); Collection of <i>zakat</i> or <i>fitrah</i> without authority (s.237); Payment of <i>zakat</i> or <i>fitrah</i> to unauthorized person (s.238); Fraudulent collection of <i>zakat</i> (s.239); Build etc. mosque without permission (s.240); Breach of secrecy (s.241); Intentionally insult or interruption to public servant who sitting in any stage of judicial proceeding (s.242); Omission to assist public servant when bound by law to give assistance (s.243); Public servant disobeying direction of law with intent to cause injury to any person (s.244); Omission to produce document to public servant by person legally bound to produce it (s.245); Refusing to make oath or declaration by public servant</p>

	when duly required (s.246); Refusal to answer public servant authorized to question (s.247); Refusal to sign statement (s.248); Voluntarily causing hurt to extort confession or to compel restoration of property (s.249); Attempt (s.250); Penalty not provided for (s. 251).
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Part V	Provision
3 sections: sections 252 to 254	<p>General :</p> <p>-Provisions under Chapter 22 do not apply (s.252): (Exclusion of person who has been tried under the Syariah Penal Code Order, 2013 from being tried under the provisions of the Penal Code (Chapter 22) on the same or similar offence.)</p> <p>-<i>Hukum Syara'</i> to apply if no other provision (s.253);</p> <p>Repeal (s.254): (concerning repeal of some provisions under the Religious Council and Kadi Courts Act (Cap.77).</p>

7. CHALLENGES AND IMPLEMENTATION

7.1. Constitution of Brunei Darussalam

The Constitution provides that "The official religion of Brunei Darussalam shall be the Islamic Religion: Provided that all other religions may be practised in peace and harmony by the persons professing them.¹⁸ ... The Head of the official religion of Brunei Darussalam shall be His Majesty the Sultan and Yang Di-Pertuan."¹⁹

"The Religious Council shall be the authority responsible for advising His Majesty the Sultan and Yang Di-Pertuan on all matters relating to the Islamic Religion...²⁰ "

Article 3(4) of the Constitution of Brunei Darussalam states:

For the purpose of this Article, His Majesty the Sultan and Yang Di-Pertuan may, after consultation with the Religious Council, but not necessarily in accordance with the advice of that Council, make laws in respect of matters relating to the Islamic Religion."

The power to make laws on matters pertaining to Islamic Religion, as provided under Article 3(4) of the Constitution, is within His Majesty the Sultan's prerogative and legislative power and, in essence, there is no constitutional or legislative barrier for Brunei Darussalam to introduce and enforce the Shariah Penal Code, 2013. In comparison, the Malaysian Federal Constitution also provides the religion of Islam as the official religion of the country. Article 3 (1) of the Federal Constitution states:

"Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

The power to make Islamic legislation, however, belongs to each State Government, except for the Federal Territory of Kuala Lumpur, Putra Jaya and Labuan where the power of making Islamic law is in the hands of Parliament.

In addition to the power of making Islamic law as provided under Article 3(4) of the

Constitution of Brunei Darussalam, His Majesty the Sultan has the power to make other laws in accordance with Article 39 of the Constitution:

"His Majesty the Sultan and Yang di-Pertuan shall have the power to make laws for the peace, order, security and good governance of Brunei Darussalam."

Currently, all laws in Brunei are made and styled as an "Order" under Article 83(3) of the Constitution of Brunei Darussalam, which provides for the following:

"When a Proclamation of Emergency has been made and so long as such Proclamation is in force, His Majesty the Sultan and Yang Di-Pertuan may make any Orders whatsoever which he considers desirable in the public interest; and may prescribe penalties which may be imposed for any offence against any such Order; and may provide for the trial by any court of persons charged with such offences."

According to practice, the law in the form of "Orders" made under the above provisions will go through the legal review process and will be reproduced as "Act" in later days.

7.2. Whether there is any legal and constitutional barrier

In Brunei Darussalam there is no constitutional or legal barrier that restricts the country from introducing or implementing any aspects of *Syariah* as national law. However, the judiciary in the country is still divided into two: the High Court (generally known as the civil court) and the Syariah High Court. Criminal offences under the Syariah Penal Code Order, 2013 are within the jurisdiction of the Syariah Court, while criminal offences under the Penal Code (Cap.22) lie within the jurisdiction of the civil courts.

The written law of Brunei Darussalam does not preclude the jurisdiction of the Syariah Court, as compared to the jurisdiction of the Syariah Court in Malaysia. The laws of Brunei Darussalam do not prescribe restrictive jurisdiction for Syariah Courts as provided under the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) in Malaysia.

The Syariah High Court in Brunei has open jurisdiction. The power to punish him is in accordance with the sentence prescribed by the

¹⁸Article 3(1) of the Constitution of Brunei Darussalam.

¹⁹*Ibid.*, Article 3(2).

²⁰*Ibid.*, Article 3(3).

provisions of the written law in which the offences of the Syariah offense are in effect. Section 15 of the Syariah Courts Act (Cap.184) states:

"The Syariah High Court shall -
 (a) in its criminal jurisdiction, try any offence punishable under –
 (i) the Syariah Penal Code Order, 2013;
 (ii) any written law which provides for syariah criminal offences;
 (iii) any written law relating to Islamic family law; or
 (iv) any other written law which confers on the Syariah High Court jurisdiction to try any offence, and may impose any punishment provided therefor.²¹; ... "

The Syariah Courts consists of Syariah Subordinate Courts, the Syariah High Court and the Syariah Appeal Court, with such jurisdiction, powers, duties and authority as are conferred and imposed by the Syariah Courts Act (Cap.184).

The jurisdiction of the Syariah High Court is not limited to the maximum penalty boundaries. Only the Syariah Subordinate Court is prescribed the maximum imprisonment limit which may be imposed. Section 16 of the same Act stipulates that the Syariah Subordinate Court has criminal jurisdiction and—

- (i) try any offence punishable under the Syariah Penal Code Order, 2013 where the maximum punishment provided for does not exceed \$28,000, imprisonment for a term not exceeding 7 years or both, and to whipping, and may impose any punishment provided therefor; or
- (ii) try any offence punishable under any written law which provides for syariah criminal offences, under any written law relating to Islamic family law or under any other written law which confers on the Syariah Subordinate Courts jurisdiction to try any offence, where the maximum punishment provided for does not exceed \$10,000, imprisonment for a term not exceeding 7 years or both, and may impose any punishment provided therefor.

Establishment of the Islamic Legal Unit at the Ministry of Religious Affairs, Brunei Darussalam in 1997 opened a new chapter in

²¹As amended by the Syariah Courts Act (Amendment) Order, 2014.

support of the aspirations of His Majesty the Sultan to establish the Shariah legislature and judiciary, to update the Shariah laws and the hierarchy and jurisdiction of the Shariah Judiciary and to establish a legal and judicial system based on the complete Shariah.

8. CHALLENGE ON THE BELIEF AND VALIDITY OF *HUḌŪD* LAW

8.1. *Disputing the rejam punishment for zinā offence*

When Brunei Darussalam declares the implementation of the Shariah Penal Code 2013, there were voices expressing concern and began to question the appropriateness of *ḥadd* punishment of stoning to death of adulterers or any *muḥṣan* offender who are convicted of *zinā* offence.

On 13th March 2013, a local writer²² published an article in the *Borneo Bulletin* newspaper entitled "Should We Resort to Stoning or Flogging", and also in his blog dated 23rd March 2013 an article "*MORA*"²³ *Issues*". Among others, he stated:²⁴

1. Punishment for adulterers is not mentioned in any of the Chapters in the Qur'an.
2. The *ḥadith* is a human design.
3. There is contradiction between the Qur'an and the *Ḥadith* regarding punishment for adulterers.
4. Disputing the truth and legitimacy of some of the *Ḥadith* despite being reported by Imam Al-Bukhari and Muslim.
5. Doubting the authority of Imam Al-Bukhari and Muslims in *Ḥadith* narration.
6. Referring to the internet on views regarding the punishment.
7. Prefer logic in thinking about the position of some matters in religion.

The authorities immediately responded to the writer's article. On June 7, 2013, he officially expressed his regret in publishing his views and repented before a Syariah Subordinate Judge and two witnesses.

Similar issue was raised in Pakistan at the beginning of the enforcement *ḥudūd* law in the country. The matter was brought to the Federal Shariat Court in the case of the *Federation of Pakistan v Hazoor Bakhsh* PLD 1983 FSC 255.

²²Pengiran Hj Abdul Rahman.

²³Ministry of Religious Affairs (MORA).

²⁴See < http://www.religious-affairs.gov.bn/index.php?ch=bm_resc&pg=bm_re_sc_arkib&ac=3248 >, (Accessed 12.10.2014.)

The court has ruled that punishment of stoning to death imposed by the Shariah on *muḥṣan* adulterers is not unconstitutional. The Shariah ruling is legitimate as the strict rule is derived from the Sunnah of the Prophet *sallallahu alaihi wassalam*.

Among the issues raised before a panel of six judges was whether the stoning to death punishment was still meted out and in practice by the Prophet *sallallahu alaihi wassalam* even after the penalty of 100 lashes as provided in verse 2 *Surah Al-Nur* had been revealed.

Verse 2 *Surah Al-Nur* is translated as follows:

"The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment."

Zahoorul Haq J, has analyzed all *hadith* relating to the stoning of convicted adulterers, and found that the Prophet *sallallahu alaihi wassalam* continued punishing *muḥṣan* adulterers even after the revelation of verse 2 *Surah Al-Nur*. In his judgment, the learned judge based his findings on the event involving a Ghamidiah woman who had confessed to have committed *zinā*. She was sentenced to death by stoning. This incident occurred after the Treaty of Hudaibiyyah in the year of 6 Hijrah, whilst verse 2 of *Surah Al-Nur* was revealed between the year of 4 and 6 Hijrah.²⁵

The important fact in the Ghamidiah woman's case, according to the learned judge, was the involvement of Khalid ibn Walid in carrying out the punishment. He was one of those people who threw the stone on the Ghamidiah woman. Zahoorul Haq J said (at para. 82 of his judgment):

"The crucial fact of this incident is that according to Hadith of Hazrat Abdullah bin Buraida quoted on page 348 Vol. V of *Musnad Ahmad Ibn Humal*, Hazrat Khalid bin Walid was one of the persons who stoned her and when some drops of her blood reached him on account of his stoning, he abused her, upon which the Holy Prophet (S.A.) forbade him from doing so. Hazrat

Khalid had become a Muslim on 1st of Safar 8 A.H...."

Khalid ibn Walid was still a non-Muslim in 6 Hijrah where he led a horde of 200 riders of Mushrikin towards Hudaibiyyah at the time of the Treaty of Hudaibiyyah. Historians say Khalid ibn Walid had embraced Islam after the Hudaibiyyah Treaty. The outcome of the Ghamidiah woman's event, is that the Holy Prophet *sallallahu alaihi wassalam* still continued punishing *muḥṣan* adulterers with stoning to death even after the revelation of verse 2 *Surah Al-Nur*. In addition, 6 of the Prophet's companions who narrated that they had witnessed the stoning punishment, had embraced Islam after the occurrence of verse 2, *Surah al-Nur*. The year when the Companions embraced Islam are as follows: Abu Hurairah, 7H; Abdullah bin Harith, after the opening of Mecca 8H; Wail bin Hajr, 9H; Ibn Abbas came to Medina, 9H; Zain bin Khalid Juhani, after the Hudaibiyah Treaty, 6H; and Abu Bakrah during the Battle of Taif, 8H.

8.2. International Criticism

On 15 May 2014, a Workshop on the Response to Criticism on the Implementation of Shariah Penal Code Order, 2013 was held at Universiti Brunei Darussalam. The Guest of Honour at the Workshop was the Government *Mufti*, the Honorable Pehin Datu Seri Maharaja Dato Paduka Seri Setia (Dr.) Ustaz Haji Awang Abdul Aziz bin Juned. In his keynote address he stated the importance of addressing the criticism because if we do not respond, it could affect the effectiveness of the implementation of the Syariah Penal Code Order, 2013; and the 'silent' syndrome can also be interpreted though we agree with their criticisms and accept the criticism as correct.²⁶

There are numerous criticisms. Rupert Colville, the High Commissioner for Human Rights, stated amongst others that he was deeply concerned with the new criminal law in Brunei Darussalam which sets the death penalty for various types of crime including rape, adultery, sodomy, robbery and homicide. He also criticized the death penalty for anyone found guilty of insulting the Prophet, insulting any verses of the Qur'an and Hadith. He stressed that putting the

²⁶See *Pelita*

Brunei < <http://www.pelitabrunei.gov.bn/nasional/item/10865-kritik-kanun-kanun-perlu-dlarified> >, navigated 12.10.2014.

²⁵*Federation of Pakistan v Hazoor Bakhsh* PLD 1983 FSC 255, pg. 325-327.

death sentence on such types of offence is clearly against international law.²⁷

36 criticisms were selected for analysis in the Workshop. Among the articles were the criticisms of the *Human Rights Watch* published by the *Associated Press* (AP) on May 1st, 2014, stating Shariah law being implemented in Brunei was a step back for human rights in Brunei; Amnesty International's statement on 17 April 2014 urged that the newly enacted law be immediately abolished, and criticized that the death sentence could be only be imposed on offenders who are over 18 years of age after conviction of the criminal offence in question; Statement of Members of the International Legislative Commission (*International Commission of Jurists* (ICJ) on 2 May 2014 criticized that a person may be prosecuted for defamatory offences and denounce this as a means to curb freedom of speech. Furthermore, the ICJ criticized that the Syariah Penal Code Order was a reproach to human rights and contravened international standards. The Order was also criticized as inconsistent with the commitment of Brunei Darussalam as a member of ASEAN to participate in preserving human rights in the region.²⁸

Participants contributed their ideas. Among them, a research should be conducted to examine the nature of hudud punishments as reported by the social media and formal media. The writer has voiced the issue whether the execution of hudud punishments was carried by formal Shariah criminal justice institutions or by a legitimate government of an Islamic state, or was it implemented by non-institutionalized Muslim groups but guarantee of proper justice.. In the writer's view, what was displayed in the media was mostly the execution made by some by non-legally institutionalized Muslim groups or society, without formal Islamic justice institutions. The dissemination of true and clear information needs to be made to the general public so that the focus would not be on the types and forms of punishment but to show the *due process* of hudud implementation. The understanding of this *due process* should be highlighted primarily. In addition, it should highlight the humanitarian and philosophical aspects of hudud punishment compared to the punishment imposed under conventional law.

²⁷See the Workshop on the Workshop on the Workshop, Professor Datuk Dr Osman Bakar, Director, Sultan Omar 'Ali Saifuddin's Islamic Studies Center (SOASCIS), Universiti Brunei Darussalam, p. 1.

²⁸*Ibid.*, pp. 6-7.

Hudud-related research should not be focused on its implementation in the time of the Prophet *Muhammad Sallallahu 'Alaihi Wasallam* and during the early Caliphs in Islamic history. Investigations should also reveal practices in every Islamic era, including reign of the Ottoman Caliphate or during the Moghul Empire in India before the arrival of the British.

9. RELATED CHALLENGES

9.1. The Syariah Court

The Syariah Penal Code Order, 2013 is implemented in three phases. Prior to the implementation of this Order, the Judges and the support staff of the Syariah Court had experience only on matters relating to the Islamic Family Law. In addition the Syariah Courts have limited experience on criminal matters as they were dealing only with *ta'zir* offences and punishments.

Judges from time to time undergo various courses and trainings on the implementation of the Syariah Penal Code Order, 2013. For example, on 5 April 2014 the Syariah Courts, the National Judicial Department, and the Prime Minister's Department held a Judicial Officers Conference on the Syariah Penal Code Order, 2013. More than 150 people comprising of the Syariah Judges, Registrars, Syariah Court Officers, officers from government departments and agencies involved in the implementation of the Syariah Penal Code Order 2013, and as well as syarie lawyers, have attended the conference.²⁹

According to the Acting Chief Registrar of the Syariah Court of Appeal, Brunei Darussalam, the management of the Syariah Courts has already prepared plans for programs or projects to be conducted from 2013 to 2017. Among the matters which is taken into consideration by the management of the Syariah Courts in making such plans is in relation to the human resources, the skill of understanding the Order, enhancing knowledge and skill through sharing of experience with judicial officers and related agencies within the country and abroad.

In addition, planning is also being made to improve the court infrastructure and improve the procedures, customer service quality, resources and the application ICT. There were then 55 plans and projects to be carried out to ensure the

²⁹See < <http://www.pelitabrunei.gov.bn/nasional/item/9980-promement-the-secretary-of-the-security-syariah-2013-of-student-syariah-development-freedom> >(Accessed 12.10. 2014).

effectiveness and just implementation of the Order. These plans will be improved and added from time to time by looking at its requirements and suitability.³⁰

9.2. The preparation of Government Agencies in promoting Sharia law

At the inception of the Syariah Penal Code Order, 2013, preparatory steps have been made and jointly undertaken by the Prime Minister's Department and Brunei's Ministry of Religious Affairs towards the implementation of the Syariah Penal Code Order, 2013. Committees have been formed among various qualified personnel to meet various groups, societies, foreign missions, schools, villagers, public servants, businessmen, professionals etc. to disseminate the information and awareness relating to the Order, 2013. It is important to provide information and knowledge that all citizens and residents of Brunei are familiar with the Syariah Penal Code Order, 2013. The personnel involved were divided into seven groups from various related agencies, i.e. the Syariah Legal Unit, Syariah Prosecution Division and Islamic Da'wah Center, under the Ministry of Religious Affairs; Government Mufti Department; Attorney General's Chambers; The Sultan Sharif Ali Islamic University (UNISSA) and other agencies concerned. Roadshow at Institutions of Higher Learning was also carried out.³¹

9.3. Enforcement and Prosecution Division

The Syariah Prosecution Division and the Enforcement Division under the Ministry of Religious Affairs have also intensified efforts to prepare their officers towards the implementation of the Syariah Penal Code Order, 2013. The personnel have attended courses and trainings on Prosecution Policy; Electronic Evidence; and Advocacy Skills for Syariah Lawyers 2.0 (Proof and Admission of Documentary Evidence).³²

For that purpose, the representative of the Sultan Sharif Ali Islamic University (UNISSA) has been entrusted by the Islamic Religious Council of Brunei Darussalam to chair the Training Sub-Committee. Among the programs to

be launched by UNISSA, under the Faculty of Syariah and Laws (2015) are (1) National Higher Diploma in Syariah Criminal Justice System, and (2) Certificate in Syariah Criminal Justice System, for officers involved directly with the implementation and enforcement of the Syariah Penal Code Order 2013, including members of the Police Department and other enforcement agencies, and school leavers. A new diploma program would be introduced soon (National Diploma in Syariah Criminal Justice System).

9.4. Sharia Legal Education

The Faculty of Syariah and Law at UNISSA has to also reorganise the teaching and learning approach of Syariah Criminal Courses or Fiqh Jinayat. The Fiqh jinayat course continues to be taught according to the traditional approach, but a new course called the "Syariah Penal Code" (Kanun Jenayah Syariah) was introduced and taught across the board in all undergraduate programs and postgraduate diploma program. Current research shows that the teaching of Islamic law today lies in the approach and expectation of the course's aims and objectives, contents and delivery. The outcome is closely linked to the institutional department in which the Islamic law courses are offered, and this has resulted in an uneven pattern of understanding. Islamic law courses offered within the department of Religious Studies or a department of Theology will no doubt be informed by the philosophy, ethos and perspective of that discipline. The title of the course, 'Islamic Studies' for instance, will have as its content Islam as a religious tradition. Courses offered in Faculties of Social Sciences and Law will have them dealt with from legal perspectives, drawing upon primary and secondary sources as well as contemporary state practices. The method of teaching tends to present a combination of doctrine and application, highlighting the theory and practice within the Islamic legal tradition and the contemporary application of *Shari'ah*. Professor Shaheen Sardar Ali made a significant observation as follows:

"Students often confuse teaching of Islam with Islamic law; hence the critical question: Are we teaching Islam or Islamic law [?] What is the difference between teaching Islam and Islamic law? What is the impact of this difference on teaching and learning processes within the discipline? For example, if we seek to teach the subject as part of a curriculum in Religious Studies, both content and delivery is likely to be largely an information-giving undertaking of the origins, history and evolution of Islam

³⁰*Ibid.*

³¹See Pelita Brunei

< [http://www.pelitabrunei.gov.bn/haluan/item/8813-kheu-penggerak-velopment-KHEU regulation of the development of the religious](http://www.pelitabrunei.gov.bn/haluan/item/8813-kheu-penggerak-velopment-KHEU%20regulation%20of%20the%20development%20of%20the%20religious) >, visit 12.10.2013.

³²*Ibid.*

and Muslims with little emphasis on the law-making process in the Islamic legal tradition. On the other hand, when located in Law and Social Sciences, there arises the necessity of evolving a sensitive yet rigorous methodology of using divine, and divinely inspired sources, ie, the *Qur'ān* and *Hadīth* as sources of a legal tradition and hence open to critical engagement and analysis. We will always be confronted with the question: Ought we to adopt a different approach to teaching of Islamic law on the basis that some of its sources are believed by Muslims to be the word of God from which no deviation is permitted. How far can the teaching and learning process in Islamic law critique these sources without breaking the boundaries of respect for religious text considered sacred and beyond debate. It is in this domain that the boundaries between teaching and learning of Islam and Islamic law are often blurred. This blurring of disciplines impacts heavily on the content and delivery of Islamic law courses, placing limitations on pedagogical approaches, questions framed for class discussion as well as assessment methods. These constraints, in turn impede development of analytical and critical abilities of pupils.³³

The teaching methods for most Syariah courses are traditional. As in many other places, although the program structure outlines 2 lectures and 1 tutorial a week, there is no uniformity in the way the lectures and tutorials are conducted by each lecturer with another lecturer. In delivering lectures, there are lecturers who open lectures without adhering to the course framework, some who follow their own scripts, some who give *dictation* for students copying. For tutorials, there are lecturers or lecturers who repeat the lectures that have been delivered before, some who hold independent question-and-answer sessions between students and lecturers on a random basis, there are lecturers who ask questions by expecting answers from students, discussing and interacting, and the variety of ways that are made, and sometimes without understanding the purpose of the tutorial itself.

Professor Shaheen Sardar Ali,³⁴ with the help of some researchers, has produced a method of teaching and learning Shariah compatible to the changes of the 21st century world. In their observations, there are different approaches in the concepts, methodology, and pedagogy applicable in institutions of higher learning in Islamic-administered countries and institutions of higher learning in non-Muslim countries, including United Kingdom, Norway, Denmark and the United States.³⁵

In addition to traditionally learned Shariah courses, a course on the Islamic Criminal Justice System is important to be introduced for various reasons. Firstly, crime is a transgression involving people as a whole. Therefore, the administration of criminal justice should be under the administration of public justice. The Islamic Criminal Law should necessarily be in the midst of the Islamic legal system itself. Secondly, more and more Muslim countries have striven for Shariah to be statutory in their respective countries. Brunei Darussalam has implemented the Syariah Penal Code Order, 2013; while Saudi Arabia, Iran, Sudan, Pakistan and Nigeria applied Syariah law to some extent. In the neighboring state of Terengganu in Malaysia, and Aceh in Indonesia, they also make laws on *Hudud* and *Qisas*. Thirdly, the application of Syariah criminal law has widespread implications. For example, in today's globalised world, it is important to examine the extent of its harmony with international human rights treaties in which Islamic countries are party to it. That is why the Islamic Criminal Justice System is important in the implementation of Islamic law in the modern era.³⁶

Traditionally Islamic law teaching focuses on lectures that convey knowledge according to what has been adopted from generation to generation. A lecturer has been instrumental in teaching descriptive approaches, simply describing the contents of the course alone, according to textbooks and existing scientific studies. Sometimes criticisms, debates, and discussions are not desirable and can invite problems, so they can be labeled with various negative names. There are also books written by renowned scholars that contain critical analysis of some aspects of Islamic law. Many academics have

³⁴*Ibid.*

³⁵*Ibid.*

³⁶ Mamman Lawan, *et al.* (2008). *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual*. UK Center for Legal Education.

³³Shaheen Sardar Ali. Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives. *Journal of Legal Education*, Vol. 61, No. 2 (November 2011), pp. 7-8.

only taken steps safely by teaching what is already available and in agreement with the *madhhab*, without asking questions and seeking answers, and avoiding critical analysis. From the three analytical questions, 'what', 'why', and 'how', lecturers have stopped as far as the 'what' questions, just at the level of understanding the concept by describing or describing the content in the topics taught.

This method does not look further to question how certain legal principles have been obtained. The approach of teaching Shariah mostly continues the legacy of teaching and learning by memorizing without the real understanding that can be developed by promoting questions to be raised, and issues to be discussed and debated.³⁷ If a person expresses a critical opinion on the issue of religion or in particular, any matter relating to Syariah law, he will be exposed to the risk of negative labeling, and in some countries he may face a life-threatening risk.

Among the obvious reasons there is lack of trust amongst those who are involved with Islamic law. This makes it difficult for the Islamic criminal justice system to thrive because of the disagreement and the attitude of the groups themselves. Behind the scenes there is a conflict between the interpretation of the clerics on a legal issue, on the one hand, and the legal practitioners of Shariah legislation as well as academics, on the other hand. The interpretation of an issue given by the second group is seldom unacceptable because of the two assumptions – (1) they cannot speak Arabic and (2) do not understand the principles of Islamic law (*uṣūl al-fiqh*). So the authority to decide on an issue should be on the shoulders of those who have these two things. In other words, from the perceptions of the general public, the second group, especially academics in the law faculty of Islamic countries, are less likely to have their views adopted as they are not *faqih* and they are not also *mufti*.

³⁷Lectures are the main means of teaching in most institutions of higher learning. While in Pakistan there are thousands of Syariah criminal case judgments which have been deliberated and decided by the Federal Shariat Court, but most of the published books and lectures presented on Shariah legislation do not debate important issues that contained in the judgments that have been reported. The experience from the administration of contemporary criminal justice system is not regarded as relevant by many.

In the opinion of the writer, both groups should work together for Islam, for the sake of truth and justice. Both groups should respect each other's opinions to build a more healthy and developed Islamic criminal justice system than to argue on non-fundamental matters.

9.5. Policies and Methods of Cooperation between Enforcement and Prosecution Agencies

Implementation and enforcement of the Syariah Penal Code Order, 2013 has revamped the landscape of Brunei Darussalam legal system which brought about a unique challenge as the Penal Code (Cap.22) is still enforced side by side and will continue to be operational. The Honourable Datin Seri Paduka Hajah Hayati binti Pehin Orang Kaya Shahbandar Dato Seri Paduka Haji Mohd Salleh, Attorney-General of Brunei Darussalam, stated that the Syariah Penal Code Order, 2013 will be applied if sufficient conditions as required by *Syara'* are met.

The process of investigation and prosecution for criminal offences may overlap, as some are provided under both Codes. Such cases will be processed or decided appropriately to determine to which court (civil or Syariah court) the offender should appear; and so to avoid any offender from being tried twice for the same offence or offenses (to avoid *double jeopardy*).

According to the Attorney-General, close cooperation between investigating officers from the civil and Syariah law enforcement agencies has already existed and will continue. Similarly, cooperation between prosecutors at the Attorney General's Chambers and Syariah Prosecution Department has also been coordinated. The Attorney General's Office has already provided training to Syariah prosecutors in terms of prosecution procedures and skill in recent years. This cooperation will be further enhanced to strengthen the integrity of the parties involved in the implementation of the Syariah Penal Code Order, 2013.³⁸

10. CONCLUSION

The implementation of the Syariah Penal Code Order, 2013, continues to move forward.

³⁸See Pelita

Brunei. < <http://www.pelitabrunei.gov.bn/nasional/item/10529-new-business-development-computer> >, (Accessed 12.10.2014.)

Despite the challenges, Brunei Darussalam remains on a solid and positive ground in promoting and enforcing of this law. From 1 May 2014 the Syariah Penal Code Order, 2013 has been enforced, the Syariah Court has handled

cases listed under the category “General Offences”punishable under *ta'zir* punishment. The first phase of its implementation goes smoothly. The Second and Third Phases will follow in time to be determined by the government.