

5th Asian Law Institute Conference

Thursday and Friday, 22 and 23 May 2008, Singapore

The Implementation of Shariah Offences in Malaysia: Issues, Challenges and The Way Forward

Dr. Siti Zubaidah Ismail

Shariah and Law Department, Academy of Islamic Studies, University of Malaya, Malaysia

szubaida@um.edu.my

Note:

Please note that ASLI will distribute the papers to conference participants only for the sole purpose of discussion. The papers might also be put on a CD-ROM to be distributed to conference participants. Neither the CD-ROM nor the printed copies of individual papers will constitute publication; papers will not thereafter be published by the conference organizers nor made available to individuals or libraries.

Presenters retain the copyright to their papers and are free to commit them for publication elsewhere. All papers should not be cited without prior permission from the authors.

Submissions may be made separately to the Asian Journal of Comparative Law. Please refer to their website at [h](#). The decision to publish will be made independently by the Journal's Board of Editors, not the conference organizers or ASLI.

For ASLI Secretariat Use Only

Date of Presentation *(delete where applicable)*:
Thursday, 22 May or Friday, 23 May 2007*

Panel Assigned: _____

THE IMPLEMENTATION OF SHARIAH OFFENCES IN MALAYSIA: ISSUES, CHALLENGES AND THE WAY FORWARD

Introduction

For the past thirty years or so, the Islamic criminal law in *its current form* has been implemented in Malaysia. Changes has taken place in forms and substance until it becomes what it is today: the Shariah criminal offences, provided under states' enactments. Shariah criminal offences, as the name connotes, refers to offences underpinned by religious values legally enacted by virtue of State List of Federal Constitution.¹ Therefore, the so-called 'religious offences' are constitutionally positioned under the administration of state's authority, they are to be administered and enforced by the State's religious authority and to be tried and heard in shariah courts. There are four categories of shariah offences under the enactments i.e those concerning belief (*akidah*), nobility, moral, miscellaneous while another one situated under family law enactment is what termed as matrimonial offences.

The Position of Islamic Criminal Law in Malaysia

Prior to discussion on the challenges of implementing shariah offences, it is necessary to understand the position of Islamic criminal law in Malaysia. In the context of this country, Islamic criminal law is not in its true sense of the word as . Meaning that, those offences falling under the categories of *hudud*, *qisas* and *taazir* as provided under the Quran and Sunnah do not. In the past, many people lashed a wild accusation that the law is unconstitutional for invading the freedom and the personal rights as bestowed by the Federal Constitution. The fact is that, Islamic criminal law is constitutionally situated under the state power. These laws are within the jurisdiction vested by the State List of the Federal Constitution², to be administered and enforced by the State's authority and to be tried and heard in shariah courts. Therefore, there should be no question as to its legality and constitutionality. Since the administration of Islamic law in Malaysia is state-based, it should be understood why each state has the individual state laws concerning Islam and the Muslims.³ Generally, there are nearly ten laws that was passed by state's legislative body, but only six of them have been standardized – to some extent - namely shariah criminal law, family law and administrative law, while three others are related to procedural aspects in shariah court i.e evidence, civil procedure and shariah criminal procedure.

¹ See Section 1, State List, Ninth Schedule of the Federal Constitution.

² See Section 1, State List, Ninth Schedule of the Federal Constitution.

³ Most of the laws have reached their uniformity, thanks to the Technical Committee of the Standardisation of Shariah and Civil Law.

The Shariah Criminal Offences act/enactment (hereinafter referred as the Enactment) is one of the six laws passed. Kelantan was the first state to pass the Enactment in 1985 as an individual enactment, followed by the other thirteen states. Each states has their own enactments with some varieties in terms of its names and wordings. However, since 1997, all states' are putting the effort to gradually standardize the Enactment (and the same applies to other enactments). The latest state which re-codified and passed the Enactment was Terengganu in 2001.⁴ With this standardization, administratively it would be able to facilitate the uniformity in terms of interpretation and the workability of the law. As far as shariah criminal offences are concerned, there are more or less forty two offences under four categories i.e regarding *aqidah* (belief)⁵, of nobility and Islamic institution, of moral and miscellaneous offences. Another one is categorically called matrimonial offences. These offences are however, separately provided under the Islamic family law enactment.⁶ To administer and enforce the law, the task is given to the Enforcement Section and Prosecution Unit under the states' Religious Department.

The problem stated: Much Ado About Nothing?

The implementation of shariah criminal offences in Malaysia is never without controversies. Even though the provisions for those offences are mostly spelt out under the relevant state enactment i.e the Shariah Criminal Offences Enactment/Act, its implementation is sometimes met with controversies and to some extent, questionable by certain quarters of the public, particularly in the manner of its enforcement. Approaches carried out by the state's religious enforcement unit, are the target of the criticism and sometimes the officers are labelled as "moral police" for enforcing what some quarters call moral offences especially relating to the offence of public indecency. They argue that these moral police enforce moral 'offences' that are not lawful or religious at all, but according to their personal judgement and standard. The fact is that, the offences are lawful and religious enforcement officers are doing their job.

Be it as it may, one cannot deny that in similar vein, the enforcement effort is also at fault. The fact that there is no standard operating procedure (SOP) contributes to this

⁴ Before that, all provisions regarding shariah offences and procedural law were under one roof with the Administration of Islamic Law Enactment 1986 of Terengganu. Other states' enactments are Shariah Criminal Offences Enactment of Perlis, No. 4/1993, Shariah Criminal Offences Enactment of Pulau Pinang, No.3/1996, Shariah Criminal Offences Enactment of Perak, No.3/1992, Shariah Criminal Offences Enactment of Selangor, No.9/1995, Shariah Criminal Offences Act of Federal Territory 1997, Shariah Criminal Offences Enactment of Negeri Sembilan, No.4/1992, Shariah Criminal Offences Enactment of Johor, No.4/1997, Shariah Criminal Offences Enactment of Kelantan, No.2/1985, Shariah Criminal Offences Enactment of Sabah, No.3/1995, Shariah Criminal Offences Enactment of Terengganu 2001 and Shariah Criminal Offences Ordinance of Sarawak, No.6/1991.

⁵ The offences under this category are wrongful worship, teaching false doctrine, propagating religious doctrine other than Islam to Muslims, making false claim (i.e as a prophet, *Imam Mahdi* or *wali*).

⁶ The offences are non-permitted polygamy, divorce out of court, inequal treatment of wives, wife abuse and disobedience. The maximum penalty imposed are one thousand ringgit fine and six month imprisonment (except for Sarawak which makes it three thousand as the maximum penalty).

finger-pointing – in one way or another. Without due standard of enforcement, no matter how clear and just the law are, justice would not be seen. Apart from the issues surrounding the aspect of enforcement, other issues are related to legislature and evidential aspects: ambiguous provisions, lenient punishment and so on. Is it true that shariah offences are invading into the private rights of Muslim in Malaysia or is it merely a misunderstanding by the public due to some uncalled approaches by the enforcement unit is yet to be seen. This paper will discuss these issues and challenges and analyse them from different perspectives.

The Issues So Far

Over the years, many issues have been surrounding the shariah criminal justice system. Not only the administrative and human resources but also the enforcement process(es) that have become the highlight of them all. For the purpose of this paper, several issues shall be addressed here and they can be divided into several categories as below:

1. Technical enforcement aspect: human resource and training (elaborate pasal training)

In reality, the religious enforcement unit comprise of lower rank officers mostly with non-legal background. There are almost 574 religious enforcement staff throughout the country. Majority of them rank at the grade of S17-S27 as Assistant Religious Enforcement Officer, compared with those with degree graded at S41.

Table 1:
Total of Religious Enforcement Officers According to States in Malaysia

States	Total
Selangor	122
Wilayah Persekutuan	33
Perak	44
Perlis	5
Pahang	16
Pulau Pinang	17
Kedah	9
Terengganu	44
Kelantan	86
Sabah	20
Malacca	23
Johore	75
Sarawak	41
Negeri Sembilan	39
Total	574

Source: States' Religious Department (as at March 2008)

The majority of S17- S27 are diploma and certificate holders while those with Islamic studies qualification are made head of the section. Some of them hold a Diploma in Administration of Islamic Judiciary (DAIJ). With this background, some of them can perform but since the majority - recruited as enforcement staff - are not equipped with legal understanding once they join the unit, the situation would be quite disturbing. It will be quite later on when they are due for (short) course. Meanwhile, the only training they have is what we call "on-the-job-training". The exposure they get would be more practical, but then how can we ensure their effectiveness and legality of action. This is because in many occasion like in the event where a search and seizure is to be conducted, where examination of witness is also necessary, the law requires that it shall be done by Religious Enforcement Officer and not his subordinate. The question is, how to ensure that the subordinate know and follow the procedure. This shortcoming has occasionally led to inefficiency and sometimes 'misbehaviour'. Threatening suspects to confess, unjustified length of interrogation, inappropriate remarks during raiding, accusation of spying, asking bribes are some of the complaints and accusation thrown at the religious department's enforcement unit.⁷

With various background – of Islamic studies qualification in general and high school diploma – one has to be legally oriented in order to be efficient in the job implementation. Currently this is lacking due to the fact that no systematic module for new staff has been developed. What is available are in the form of short courses conducted throughout the year by the government agencies (like Institut Ilmu-Ilmu Islam Malaysia (ILIM) and Institut Latihan Kehakiman dan Perundangan (ILKAP) – two legal and judicial training institutes) but it rarely aims specifically at the development of religious enforcement expertise. ILKAP is an agency under the Attorney General's Chamber, meant for *legal officers'* training and development. While ILIM is under the Islamic Development Department (JAKIM) cater for *all sorts* of training for religious department's staff.

2.the ambiguous provisions and lack of definition

Under the enactment, there are nearly 45 offences ranging from concerning Islamic belief, nobility of Islam or morality. Among them, at least twenty offences are loosely provided under the enactment, thus need to be clearly interpreted or illustrated. Without any of them, it would be quite difficult (if not impossible) to work on its elements of crime and what sorts of evidence necessary to be gathered in order to establish the said crime.

⁷ These are some of the findings by a research project led by the presenter entitled "Issues and Problems Facing the Religious Enforcement and Prosecution Unit in Malaysia and Brunei". This finding will be presented in a National Convention on the Enforcement of Shariah Law in Malaysia on the 17th - 18th of December 2007 in Kota Kinabalu, Sabah. The project wishes to thank the Sabah Religious Department for the interest in the research finding and subsequently contribute financial assistance to hold this convention.

Sometimes lack of definition will not prevent neither can they hinder the implementation of law. For example, the offence of public indecency as provided under section 29 Shariah Criminal Offences Act of Federal Territory 1997. It revolves around two central questions, namely whether one's behaviour in public should be regarded as 'offence' and be punished for it and secondly what is indecency? Since there is no working definition or explanation as to what constitutes indecent acts, one might wonder what is really going on in practice. On the face of it, this might seem absurd, surely one cannot let personal interpretation and judgement in applying the proviso. If this is allowed, miscarriage of justice will then take place. To avoid 'wild' accusation of imposing personal judgement, perhaps it would be better to take into account the time-and-place factor where indecency occurs. This factor is significant to relate any indecent act/dressing with immoral or vice element that should be underpinning the offence. For example an act in question takes place at 1 a.m at a pub, a public park or swimming pool. Based on my brief observation and interview conducted, the writer was informed by many states' religious enforcement officers that public indecency is very much related to behaviour and the dressing tendency.

Another provision is with regards to an offence of contempt of religion as provided under section 7 of the 1997 Act. In Federal Territory and most of states, the very action of contempt was not spelt out and therefore subjected to various interpretation. No attempt was ever made in any state to charge or prosecute any person with this offence. In Sarawak however, any Muslim confessed to be non-Muslim or apply to shariah court to be declared as a non-Muslim – for whatever reason – could be charged with this offence.

The test

In terms of indecency, it can also be questioned as to what are the test(s) to be applied by shariah court. This test must surely be objective, enabling the judges to determine whether a certain behaviour or dressing would be likely to cause offence to a reasonable person, on the basis of evidence led by religious enforcement agency witnessing the behaviour/dressing. So far, there has not been any case where such test was put forward or explained in details. The absence of case law is largely due to the fact that almost all cases regarding indecency end up with guilty plea and therefore, no room for questioning and testing. The accused party are always 'advised' to plead guilty to expedite the trial and normally the case will end up with fine.

3. lenient sentences?

It is a very well-known fact that the criminal jurisdiction granted for shariah court is very limited. The jurisdiction is spelt out under section 2 Shariah Court Act (Criminal Jurisdiction) (Amendment) 1984 which "provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding

six stroke or with any combination thereof.” With this so-called 3-5-6 formula of sentencing, the shariah judge will have to determine the appropriate and reasonable sentence for an offence. It is a general wisdom that no shariah case ever get punished with a high sentence. A review of some cases reported in *Jurnal Hukum* and based on the study conducted previously, it shows that in practice, the offender would be punished between RM1000 – RM2000 or be sentenced to imprisonment not more than a year.

The question is, how can that amount of punishment- be it the jail period or the amount of fine - deter the doer or others from committing shariah crime? The tendency of court sentencing is to punish with one sentence (imprisonment) and fine as an alternative. It is very rare to see an offender be sentenced with imprisonment together with fine.

4.difficulty in gaining evidence

This is particularly true in cases concerning deviant teaching, propagation of unIslamic teaching and the like. The evidence needed is not just any evidence, but something that could be related with the suspect. In a celebrated “case” of Ayah Pin, even though his “Sky Kingdom” was no longer existed – ruined after the local government established that it was built without permission. But the Sky Kingdom founder was still free at large and yet nothing can be done (so it seems) unless and until there is enough evidence to arrest him. In similar vein, the case of teaching false doctrine, failure to perform Friday prayer three times, incest and so on. All these will affect or prolong the investigation process, and if the evidence brought forward in the investigation paper is deemed to be inadequate, that would definitely call for re-investigation.

5.prosecution problem

Two aspects of problem that can be detected, one is: the culture of working and the service itself.

The Future of Islamic criminal law: The way forward

With all challenges facing the whole system, it is obvious that the survival of Islamic criminal law is at the hand of its maker and executioner. Certainly there are numbers of actions deem necessary to be taken into consideration for the betterment of the whole system.

In terms of enforcement, even if the law is perfect and properly spelt out in the enactment, but if the manpower is not equipped with proper knowledge and standard operating procedure, the whole thing will be seen as inefficient and ‘ugly’. Like Eldefonso says, sound organizational structure is vital and essential if there is to be an efficient network and a cooperative attitude and relationship between all officers and agencies concerned with the problems. If a law enforcement agency is weak and poorly structured, then, regardless of the individual efforts made by any or all dedicated officers

it will fail in its purpose.⁸ However, the wind of change is understood to be on its way where the standard operating procedure known as Arahan Tetap JAWI 2007 was approved by the central body (JAKIM) and currently it was in the hand of state authority to endorse prior to its implementation.

As far as substantive law is concerned, the law review must be done particularly when so many provisions seem to be unenforceable. After more than 20 years the substantive law in its current form, it is timely that such review being done. In my observation, there are at least 20 provisions that need to be re-looked because of problems ranging from ambiguous provisions to lack of definition and so on.⁹

In terms of manpower at the Syarie Prosecution Division, due to the fact that this division is legally oriented as compared with other departments under state's religious department, it would be much better if it is separated and stand on its own as a department like shariah court, or be put under Attorney Generals' Council. The implication by being (or staying) under the religious department is that, they can be transferred to any division (like Dakwah, Mosque, Education , etc.) under the religious department. This would be a wastage of expertist and manpower due to the fact that the kind of training and experience is very much into prosecution. This is happening especially for those under the S grade (social scheme) not L scheme.

In terms of punishment, stiffer punishment should be imposed, within the existing limit. In future, Shariah Court (Criminal Jurisdiction) Act 1984 should be amended. Another thing is that the whipping sentence seems to be a sleeping sentence. This is because it has not been imposed on any offender except for in Kelantan only. Other states are quite reluctant to impose this sort of punishment due to various reasons not known of. It would be better if a memorandum of understanding can be drawn with the Prison Department as carried out by the Kelantan State' government when whipping sentence is to be carried out.

As far as the substantive law is concerned, the offences between one estate to another must be standardised in terms of its wording, elements, workability and so on. For each and every provision, there must be a paragraph of explanation where examples or definition or exception can be included.

Conclusion

There is an urgent need to change the religious enforcement and the prosecution services so as to upgrade the Islamic criminal justice system. A long way for Islamic criminal law in Malaysia to be seen as a good law because no matter how good the law is, if the implementation is bad, then the beauty of a law is overshadowed.

⁸ Edward Eldefonso, Alan Coffey, Richard C. Grace (1968), *Principles of Law Enforcement* (2nd edition), Now York: John Wiley and Sons, pp.336

⁹ More details are in the paper "Kajian Semula Terhadap Undang-Undang Jenayah Syariah" (A Review of Islamic Criminal Law), presented at Seminar on Review of Islamic Law Corpus in Malaysia, organized by Institute of Islamic Understanding of Malaysia on 1st & 2nd April 2008 in Kuala Lumpur, Malaysia.