

2005- IMPLEMENTATION OF THE SYARIAH LAW ACCORDING TO THE MAQASID AL-SYARIAH: BRUNEI DARUSSALAM'S APPROACH IN THE UNIVERSAL PERIODIC REVIEW

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ABSTRACT

The Syariah Penal Code Order, 2013 (SPCO) was implemented in 2013 and fully enforced in 2019, strengthening Brunei Darussalam's Syariah legal system. However, it has attracted international attention and sparked debates. This resulted in increased recommendations put forth to repeal, revise the SPCO, and align the SPCO with international human rights standards during the second review of the Universal Periodic Review ("UPR"). UPR is a platform for state parties to articulate their concerns, aimed at addressing their human rights situation. It is a mechanism within the United Nations Human Rights Council that assesses the human rights records of all United Nations member states. This article uses qualitative research and doctrinal analysis. It involves an in-depth examination of primary and secondary sources, including al-Qur'an and Hadith, and relevant documents related to the UPR. The qualitative approach allows for a comprehensive exploration of the underlying principles and concepts of Maqasid al-Syariah (objectives of Islamic Law) and the SPCO, while the doctrinal analysis enables a critical examination and interpretation within the implementation of the SPCO and the recommendations in the UPR. This study found out that the implementation of the SPCO is based on the Maqasid al-Syariah, particularly with regard to the safeguarding of basic human rights including religion, life, lineage, intellect and property.

Keywords: Universal Periodic Review, Maqasid al-Syariah, Brunei Darussalam

INTRODUCTION

On the 22nd of October 2013, a historic milestone was achieved in Brunei Darussalam's legislative journey with the promulgation of the Syariah Penal Code Order, 2013 (SPCO). This significant event marked the dignified establishment of laws pertaining to the offences, falling under the jurisdiction of the Syariah Court.¹ This momentous development was made possible through the *titah* of His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah Ibni Al-Marhum Sultan Haji Omar 'Ali Saifuddien Sa'adul Khairi Waddien, Sultan and Yang Di-Pertuan of Brunei Darussalam:

¹ Department of Information, Prime Minister's Office, Brunei Darussalam. (May 2014). Brunei Darussalam's Newsletter. Volume 29 Issue 5.
<https://www.information.gov.bn/Brunei%20Today%20PDF%20Library/2014/BD%20MEI.pdf>

“... by the Grace of Allah, this order, on this day, October 22, 2013, is now gazette, and it will come into force six months after the gazette and will be enforced in phases.”²

His Majesty expressed that the SPCO represents a restoration of Islamic principles that were formerly observed in the Sultanate many centuries ago. He further emphasised his personal responsibility to uphold and enforce divine laws. The primary objective is to direct our attention solely towards Allah the Almighty, striving for His acceptance exclusively, without diverting our gaze towards the opinions or validation of others. The negative perception of others has not been observed by us, as we acknowledge that their actions fall within their rights and up to their choices. His Majesty also stated:

“We have never viewed others in a negative light because what they do is within their rights and up to their individual choices. We also do not expect them to accept and agree with us, but it is sufficient if they respect us as we duly respect them.”

However, the new law was claimed to discriminate against vulnerable groups, including children, women, and religious and sexual minorities, and jeopardize fundamental human rights. The provisions violate Brunei’s obligations under international human rights conventions to which Brunei is a party.³ The frequent and inaccurate understanding of the concept of “the Sharia” with codified Syariah law, undermines the international media’s credibility in the eyes of many Bruneians.⁴ What they are saying is merely a misconception and in reality, the SPCO guarantees justice for everyone and safeguards their well-being.⁵

Therefore, this article is to analyse the implementation of SPCO in Brunei Darussalam’s approach to the UPR with a focus on its alignment with Maqasiq al-Syariah. This article clarifies the relationship between the Maqasid-al Syariah and the SPCO, emphasizing the role as the guiding framework for the application of the Syariah law in the country. It also examines Brunei Darussalam’s engagement with the Universal Periodic Review through the lens of its unique adherence to the Syariah law. This study found out the impact of Maqasid al-Syariah on the legal system in the country safeguarding basic human rights including religion, life, lineage, intellect and property.

It is hoped that this exploration will contribute to a deeper understanding of how the legal systems of Islamic societies can strive for greater harmony between the law and the values it seeks to uphold (UPR, 2014).⁶

² During the opening ceremony of the 2013 Knowledge Convention at the International Conference Center, Berakas, Brunei Darussalam on 22nd October 2013; See Pelita Brunei. (October 23, 2013). 58/130.

³ <https://www.hrw.org/news/2019/05/22/bruneis-pernicious-new-penal-code>.

⁴ Dominik Muller. (May 2, 2019). What International Criticism of Brunei’s Harsh New Penal Code Overlooks. *World Politic Review*. <https://www.worldpoliticsreview.com/trend-lines/27811/what-international-criticism-of-brunei-s-harsh-new-penal-code-overlook>.

⁵ The Honourable Pehin Orang Kaya Laila Wijaya Dato Seri Setia Dr. Haji Awang Abdul Aziz bin Begawan Pehin Udana Khatib Dato Seri Paduka Haji Awang Omar, State Mufti of Brunei Darussalam. <https://btarchive.org/news/national/2014/01/04/syariah-law-critics-do-not-understand-islam-mufti>

⁶ Recommendations by Iran, Pakistan and Saudi during the 2nd Cycle in the UPR.

BACKGROUND

The political system in Brunei is of absolute monarchy and has historically applied Islamic law in its legal system (Anton Minardi, Rini Afriantari, & Maesuroh, 2021).⁷ The introduction of Syariah rules in Brunei can be traced back to the reign of Sultan Sharif Ali (1425-1432), during which the Brunei Legal Code was established. It remained to be the main Bruneian legislature until the reign of Sultan Hashim (1885-1906). The implementation of the British Residential Administration in 1906 marked a challenging phase for Brunei Islamic laws. The Sultans of Brunei implemented Islamic law in stages until Islamic law became the basic law of Brunei Darussalam. However, the arrival of the British to Brunei and the adoption of the resident system in 1906 brought changes to the country's administration and law (Saadiyah Tamit, 2006).⁸ Consequently, the influence of Islamic laws was diminished, restricting its application primarily to matters pertaining to the family (Asbol Mail, 2022).⁹

His Majesty Sultan Haji Hassanal Bolkiah (1967 to present) undertook efforts to revive Islamic Criminal laws in stages through the implementation of the SPCO in 2013 (Asbol Mail, 2022). However, this prompted international criticism and condemnation and was highlighted during the second cycle of the Universal Periodic Review (UPR, 2014).

UPR was adopted by the United Nations General Assembly on March 15, 2006, and serves as a crucial component of the United Nations' dedication to promoting human dignity and fundamental freedoms.¹⁰ The General Assembly mandated the Human Rights Council to undertake a universal periodic review of every country every four and a half years that aims to improve human rights situations.¹¹

The Human Rights Council adopted the outcome of Brunei Darussalam's review on September 19, 2014. The government of Brunei received 189 recommendations provided by the member states during the 2nd cycle of the UPR. Brunei accepted 97 recommendations, partially accepted 14 recommendations, and rejected 78 recommendations.¹² Brunei demonstrates a commitment to upholding international legal norms while also maintaining harmonisation with its domestic legislation. Brunei is committed to fulfilling its duties and aligning with its domestic laws to ensure coherence. By adopting a balanced approach, Brunei is able to effectively manage its interactions with the international community and fulfill its obligations, all the while ensuring the protection of its sovereignty and upholding the integrity of its legal framework.

The existing literature highlights a gap in understanding Brunei's implementation of the SPCO in order to address misconceptions and speculative predictions (Muller, 2020). His Majesty rejected criticisms uncompromisingly, indicating that His Majesty prioritizes the

⁷ Anton Minardi, Rini Afriantari, & Maesuroh. (2021). The Implementation of Islamic Penal Law in Brunei Darussalam and International Society, *Socio Politica*. Vol. 11, No. 1 (2021), 1-9.

⁸ Saadiyah Tamit. (2006, Mac 8-9). Pentadbiran Undang-Undang Islam Di Negara Brunei. Seminar Sejarah Brunei III Sempena Sambutan Hari Kebangsaan Negara Brunei darussalam ke 22 Tahun 2006.

⁹ Asbol Mail. (2022). Islamic Law in Brunei Darussalam (1425-2014). A Historical Perspective and its Relationship with the Malay Islamic Monarchy Concept. *Routledge Handbook of Contemporary Brunei*. 1st Edition.

¹⁰ GA Res 60/251, 3 April 2006, A/RES/60/251, para 5(e).

¹¹ <https://www.ohchr.org/en/hr-bodies/upr/upr-home>.

¹² 2nd cycle UPR of Brunei Darussalam, 2014.

implementation of the SPCO (Tim Lindsey and Kerstin Steiner, 2017).¹³ Criticism focused mostly on its potential for disregarding international human rights standards (Tim Lindsey et al., 2017). As time passed, these announcements became less harsh than they were at first and were subsequently implemented gradually (Hashim Kamali, 2019).

RESEARCH METHODOLOGY

This paper uses qualitative approach and uses doctrinal legal analysis to analyze relevant provisions under the SPCO in relation to the principles of Maqasid al-Syariah. It involves in examining statutory provisions to determine a coherent interpretation of the law (Hutchinson & Duncan, 2012).¹⁴ It is a body of regulations associated with the traditional concept or principle with a long historical development (Kharel, 2018).¹⁵ It also uses an analysis approach to examine the legislative history and phased introduction, the implementation, and challenges of the SPCO in Brunei Darussalam. Furthermore, doctrinal or theoretical legal study can be defined as a form of research focused on a particular topic, involving the analysis of the legal doctrine and its evolution and application (Dobinson, I., & Johns, F., 2017).¹⁶

The Legal System in Brunei Darussalam

The legal system in the country exhibits an influence from the legal tradition of the United Kingdom, specifically the common law system¹⁷ and Syariah law that played an important in shaping the country's jurisprudence. The common law system which operates through the Civil Courts, is based on the English codified laws, while the Syariah laws operated through the Syariah Court are based on Islamic principles.¹⁸ Furthermore, the Constitution of Brunei Darussalam has declared Islam as the official religion in the country, and "Islam" refers to "*the Sunni Shafeite sect of that religion*".¹⁹

Syariah, or Islamic law, has been implemented in Negara Brunei Darussalam since the conversion of Awang Alak Betatar to Islam, leading to the establishment of a Malay Islamic Monarchy state in the early 15th century. This marked the acceptance of Islam as the religion of both the ruler and the ruled, giving birth to a new nation known as Negeri Brunei (Mohaimin

¹³ Tim Lindsey & Kerstin Steiner (2016) Islam, the monarchy and criminal law in Brunei: the Syariah Penal Code Order, 2013, Griffith Law Review, 25:4, 552-580, DOI: [10.1080/10383441.2016.1273294](https://doi.org/10.1080/10383441.2016.1273294).

¹⁴ Terry Hutchinson & Nigel James Duncan. (2012). Defining and Describing What We Do: Doctrinal Legal Research. Deakin Law Review. 83-119.

¹⁵ Amrit Kharel. (2018). Doctrinal Legal Research. SSRN Electronic Journal. 1-16.

¹⁶ Dobinson, I., & Johns, F. (2017). Legal Research as Qualitative Research. In M. McConville & W. H. Chui (Eds.), *Research Methods for Law* (pp. 18-47). Edinburgh University Press.
<http://www.jstor.org/stable/10.3366/j.ctt1g0b16n.7>

¹⁷ Refer to Section 2 of the Application of Laws Act (Chapter 2). This statute stipulates that UK common law and the doctrines of equity, along with statutes of typical application, as administered or in force in England shall also be in force in the Sultanate. The key proviso to this is that the said common law, doctrines of equity and statutes of widespread application shall only be in force so far as circumstances permit. They are also subject to be qualified by local circumstances and customs.

¹⁸ Syariah Courts Act (Chapter 184).

¹⁹ Refer to Article 2 of the Constitution of Brunei Darussalam and Titah of His Majesty on the occasion of the Declaration of Independence on 1 January 1984, the Prime Minister, Haji Sultan Hassanal Bolkiah, declared that Brunei "shall forever be a Malay Islamic Monarchy" (Melayu Islam Beraja or "MIB"). The government considers "MIB" as the official "state ideology" and consistently emphasizes its categorical rejection of secularism, religious pluralism and liberalism since independence.

Yunus, 2013).²⁰ The System in Brunei should not be compared to the system in the West (Hussainmiya, 2007),²¹ due to the fact that the Islamic administrations in the country are shaped by Islamic principles.

The Syariah Penal Code has greatly expanded the jurisdiction of Syariah courts to now include offences for *sariqah* (theft),²² *hirabah* (robbery),²³ *zina* (adultery and fornication),²⁴ *zina bin jabar* (rape),²⁵ *liwat* (sodomy),²⁶ *qazaf* (false accusation of zina),²⁷ drinking intoxicating liquor,²⁸ *irtidad* (apostasy),²⁹ *qatl* (homicide)³⁰ and *jurh* (hurt)³¹. Brunei has a criminal justice system that allows both the existing Penal Code (Chapter 22) and the Syariah Penal Code Order 2013 to be in force concurrently.

The Universal Periodic Review Process: Brunei Darussalam

Brunei has undergone three 3 cycles of the UPR, in 2009, 2014 and 2019.³² The process involves a thorough examination of the status of human rights, encompassing its adherence to global human rights norms and obligations. However, the recommendations concerning repealing the SPCO were made during the second and third cycles, following the implementation of the law in 2013. During the process, member states provide constructive recommendations to the country under review with the intention of enhancing the human rights situation within that country. The UPR is seen as a significant improvement in human rights monitoring, but it requires continual improvement to enhance its intended outcomes (Christina Szurlej, 2013).³³

However, some of the recommendations received are believed not to be in accordance with the Constitution and Islamic principles.³⁴ The outcome report of the UPR provides a summary of the interactive dialogue and reflects recommendations and conclusions made by delegations. It

²⁰ Abdul Mohaimin Noordin Ayus. (2013). Syariah Penal Code Order, 2013 of Negara Brunei Darussalam: Its Implementation and Challenges. International Conference of Asean Perspective and Policy. 199-214.

²¹ B.A Hussainmiya. (2007). Some observations on the Pre-Colonial Legal Culture and System in Brunei. *Southeast Asia: A Multidisciplinary Journal*, 7(1), 27-37.

²² Sections 53-61 of the SPCO.

²³ Sections 62-67 of the SPCO.

²⁴ Sections 68-74 of the SPCO.

²⁵ Sections 75-81 of the SPCO.

²⁶ Sections 82-85 of the SPCO.

²⁷ Sections 95-103 of the SPCO.

²⁸ Sections 104-106 of the SPCO.

²⁹ Sections 107-117 of the SPCO.

³⁰ Sections 124-164 of the SPCO.

³¹ Sections 167-183 of the SPCO.

³² <https://www.ohchr.org/en/hr-bodies/upr/bn-index>.

³³ Christina Szurlej. (2013). Universal Periodic Review: A Step in the Right Direction? Retrieved from <https://www.researchgate.net/publication/312279817>.

³⁴ United Nations Human Rights Council. (2014, September 10). Working Group on the Universal Periodic Review: Twenty-seventh session, Agenda item 6, Universal Periodic Review Report of the Brunei Darussalam. A/HRC/27/11. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/075/30/PDF/G1407530.pdf?OpenElement>

also includes information prepared by relevant stakeholders and national human rights institutions (Christina Szurlej, 2013).³⁵

Table 1. Recommendations by State Parties regarding SPCO.

Number	Country	Recommendations
1.	Argentina	Review the provisions of the Penal Code of 2013 in order to ensure that they comply with international human rights law.
2.	Austria	Review the Penal Code in order to ensure its strict compliance with the human rights obligations and commitments of Brunei Darussalam.
3.	Australia	Implement the Syariah Penal Code Order in a manner consistent with international human rights standards.
4.	Bulgaria	Repeal the new punitive measures of the sharia Penal Code Order 2013 and ensure that the implementation of the law will not infringe on human rights and will be fully consistent with the international and regional human rights commitments and obligations undertaken by Brunei Darussalam.
5.	Canada	Suspend the Syariah Penal Code and make comprehensive amendments to reflect its obligations under international law.
6.	Canada	Decriminalize sexual activity between same-sex consenting adults, and ensure that the protection of human rights for lesbian, gay, bisexual, transgender and intersex persons is in conformity with its human rights obligations.
7.	Czechia	Repeal punishments, such as death penalty by stoning, hand-cutting and whipping, that violate international law by constituting torture or other cruel, inhuman or degrading treatment, and bring the Penal Code into line with international law standards.
8.	Ecuador	Eliminate all norms, including in the Penal Code, which provide for, inter alia, capital punishment, stoning, maiming and flogging as sanctions for certain offences or conduct.
9.	France	Repeal the provisions of the new Penal Code providing for corporal punishment and the death penalty for several crimes, including adultery, homosexuality, apostasy or blasphemy, contrary to the international commitments in human rights freely accepted by Brunei Darussalam.
10.	Iceland	Repeal the newly implemented sections of the Penal Code, and bring the Penal Code into line with international human rights laws and standards.
11.	Italy	Repeal the Penal Code Order in order for it to comply with international human rights law.
12.	Germany	Decriminalize consensual same-sex conduct and repeal provisions in the Syariah Penal Code Order that are not compliant with international human rights norms.
13.	Ireland	Repeal the new provisions of the revised Penal Code which, if implemented, will enshrine in legislation a range of extreme punishments that amount to torture or acts of cruel, inhuman or degrading treatment.
14.	Latvia	Repeal the new penalties of the Penal Code Order 2013, and ensure that the implementation of the Penal Code Order 2013 and the related Criminal Court Order 2018 is fully consistent with all international and regional human rights commitments and obligations undertaken by the Government.
15.	Malta	Consider alternatives to the current Penal Code, which enshrines in legislation cruel and inhuman forms of punishment, such as the application of the death penalty for offences such as rape, sodomy, extramarital sexual relations, among other offences.
16.	Netherlands	Ensure that the criminalization of offences in the Syariah Penal Code is compliant with international human rights standards by making immediate efforts to review, revise and repeal sections that are contrary to its legal obligations under the Universal Declaration of Human Rights and the human rights treaties that Brunei Darussalam has signed or ratified.

³⁵ Christina Szurlej. (2013). Universal Periodic Review: A Step in the Right Direction?

17.	Netherlands	Repeal or amend those sections of the Penal Code that criminalize consensual same-sex conduct and discriminate against people based on sexual orientation and gender identity, in line with Sustainable Development Goal 10
18.	Slovenia	Repeal the revised Penal Code Order, and ensure that any measures introduced are consistent with the State's international human rights obligations and international human rights law
19.	Spain	Amend the Penal Code to ensure that it meets minimum human rights standards
20.	Switzerland	Revise its amendments to the Penal Code of 3 April 2019 in order to bring it into line with international human rights standards.
21.	Sweden	Revoke immediately the new legislation dated 3 April 2019 that imposes the use of death penalty for homosexuality and adultery and introduces other cruel and inhuman punishment.
22.	Uruguay	Ensure that all amendments to the Penal Code announced in April, which reintroduced the death penalty for adultery and same-sex relations and other offences considered serious by the new legislation, remain without effect.
23.	United States of America	Repeal criminal penalties under the sharia Penal Code Order of 2013 that undermine the freedoms of religion and expression, and prohibitions on torture and other cruel, inhuman or degrading treatment or punishment, and would have a detrimental impact on a number of vulnerable groups, including women at risk of violence, religious and ethnic minorities, and lesbian, gay, bisexual, transgender and intersex persons.

Source: Universal Periodic Review: Brunei Darussalam's Matrix of Recommendations for 2019. ³⁶

The international community has reacted to the implementation of the SPCO particularly due to concerns about human rights (Anton et al., 2021).³⁷ It is evident that the countries that recommended Brunei to repeal and amend the SPCO are not Islamic countries. However, there are countries that recommended to strengthen the SPCO are as follows:

Table 2. Recommendations by State Parties (Islamic Countries) regarding SPCO.

Number	Country	Recommendations
1.	Islamic Republic of Iran	Enhance efforts to promote understanding of the Sharia Penal Code through awareness programmes and other relevant activities.
2.	Pakistan	Continue to promote just and fair implementation of the Sharia Penal Code through adequate training and capacity building.
3.	Saudi Arabia	Continue all efforts and measures aimed at promoting and strengthening capacity of national institutions for the implementation of Islamic sharia rules

The Office of the UN High Commissioner for Human Rights, including foreign observers, was worried and concerned that the SPCO may violate the international human rights law SPCO.³⁸ During the second cycle, Brunei has accepted 97 recommendations out of 189 recommendations and some of them have already been implemented.³⁹ The partial support to 14 recommendations, as they may be contrary to the Constitution of Brunei Darussalam,

³⁶ A/HRC/42/11/Add.1. Retrieved at <https://www.ohchr.org/en/hr-bodies/upr/bn-index>

³⁷ Anton Minardi, Rini Afriantari, & Maesuroh. (2021). The Implementation of Islamic Penal Law in Brunei Darussalam and International Society, Socio Politica. Vol. 11, No. 1 (2021), 1-9.

³⁸ Human Rights Resource Centre, University of Indonesia. (2015). Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN, Brunei Darussalam. Retrieved from <http://hrrca.org/wpcontent/uploads/2015/09/02.-FOR-Brunei.pdf>.

³⁹ UPR, 2nd Cycle of Brunei Darussalam.

Islamic principles, and its national legislation.⁴⁰ During the third cycle, the recommendations increased to 220 and accepted 108 recommendations (an increase of 11 percent with respect to the second cycle). The top recommendations related to sustainable development goals are as follows:

Table 1.3 Top Recommendations related to Sustainable Development Goals⁴¹

Sustainable Development Goals	Recommendations
Peace and Justice	36%
Decent work and economic growth	15%
Quality Education	11%
Gender Equality	11%
Reduced inequalities	9%

The Implementation of the Syariah Penal Code Order, 2013

The SPCO has been officially enacted as the legal framework of Brunei Darussalam. Its implementation began on 1st April 2014⁴², and fully enforced in 2019. It was implemented in phases to allow legal practitioners and relevant agencies sufficient time to enhance their preparations and capabilities in order to effectively enforce the Syariah Criminal Penal Code Order, 2013. This law was formulated with the aim of safeguarding the well-being and ensuring justice for both individuals and society. It is also hoped that this gradual implementation will make the authority ready for full implementation. Amendment to certain laws was made to ensure that the law is complementary to the enforcement of the SPCO.⁴³

At the beginning of the implementation, preparatory steps were made and jointly undertaken by the Prime Minister's Office and the Ministry of Religious Affairs. Committees have been formed among various qualified personnel to meet various groups, societies, foreign missions, schools, businessmen, and professionals to disseminate information and awareness relating to the law. It is important to provide information and knowledge that all citizens and residents of Brunei are familiar with the law. 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 (AGC). The (SOPs) have already been prepared by all relevant parties which include coordination between the Religious Enforcement Division with the Royal Brunei Police Force that relates to investigation and enforcement; and collaborative coordination between the prosecutions from the Syar'ie Prosecution Division and AGC's.⁴⁴ The high burden of proof and procedural requirements, such as a voluntary confession or two

⁴⁰United Nations Human Rights Council. (2014, September 10). Working Group on the Universal Periodic Review: Twenty-seventh session, Agenda item 6, Universal Periodic Review Report of the Brunei Darussalam. A /HRC/27/11. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/075/30/PDF/G1407530.pdf?OpenElement>

⁴¹Source:https://www.ohchr.org/sites/default/files/libdocs/HRBodies/UPR/Documents/Session33/BN/Infographics3rdCycle_BruneiDarussalam.pdf

⁴² The enforcement of General Offences that are subject to fine and imprisonment, as outlined in Part IV covering from section 192- 251, excluding death penalty and whipping.

⁴³ Lecture on the enforcement of the Syariah Criminal Code Order, 2013 for the first phase' by the Attorney General in conjunction with the Proclamation Ceremony of the Enforcement of the Criminal Code Order, 2013 on Wednesday 30th, Jamadilakhir, 1435 / 30th April, 2014.

⁴⁴ Yang Berhormat Datin Seri Paduka Hajah Hayati binti Pehin Orang Kaya Shahbandar Dato Seri Paduka Hj Mohd Salleh. (2018, March 24). Opening Remarks at UNISSA Annual Law Dinner 2018.

witnesses of "just character," (*adil*) may limit the actual application of the penalties (Muller,2020).

As of today, since full enforcement in 2019, there have been no recorded cases of theft or other punishments. This is due to the high burden of proof and other requirements, such as a willing confession or at least two witnesses with *adil*⁴⁵ character, it is possible that the harshest punishments in the SPCO will not be used or will only be used in very few cases.⁴⁶ Every punishment to be carried out for *Hadd* offences must be fulfilled the conditions that have been set. (Fatimah & Zakiyah, 2021).⁴⁷

Furthermore, the primary objective of the implementation of the SPCO is to safeguard and uphold the principles of religion, life, intellect, lineage, and property.⁴⁸ The application of this principle is uniformly regardless of gender and aligns with the religious and cultural values that are important in society.⁴⁹

IMPLEMENTATION OF THE SPCO FROM MAQASID AL- SYARIAH'S PERSPECTIVE

The ultimate objective of the Syariah is to secure the well-being of mankind and establish a righteous society. It is designed to protect the rights of all citizens to a secure and peaceful life (Aziz Juned, 2013). The adherence to the principles of Maqasid al- Syariah constitutes an important dedication with the objective of protecting the welfare and overall prosperity of society. This undertaking involves a comprehensive approach that incorporates a range of methods and strategies. The main aspect is the administration of justice and the efficient enforcement of laws. The task of upholding Islamic principles and ensuring justice is shared by both the Civil Court and the Syariah Court. Each court plays a significant role in upholding these laws, which are essential to ensure fairness, equality, safety, and well-being of society.

(i) Preservation of Religion:

⁴⁵ Adil means Muslims who performs the prescribed religious duties abstains from committing sins and is not perpetually committing minor sins. Refer to Section 3 of the Syariah Evidence Order, 2001.

⁴⁶ Human Rights Resource Centre, University of Indonesia. (2015). Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN, Brunei Darussalam. Retrieved from <http://hrrca.org/wpcontent/uploads/2015/09/02.-FOR-Brunei.pdf>.

⁴⁷ Dayangku Fatimah Pengiran Haji Sulaiman & Nurzakiah binti Haji Ramlee. (2021). Perintah Kanun Hukum Jenayah Syariah, 2013: Perbezaan Rukun dan Syarat bagi Mensabitkan Kesalahan-Kesalahan yang dikategorikan sebagai Jenayah Hudud dan Hukumannya menurut PKHJS, 2013. *Jurnal Sultan Alauddin Sulaiman Shah*. Vol 8 Bil 1. 90-101.

⁴⁸ The Honourable Pehin Datu Seri Maharaja Dato Paduka Seri Setia Dr Ustaz Haji Awang Abdul Aziz bin Juned, State Mufti of Brunei Darussalam. (2013). The Shari'ah Penal Code: An Introduction. State Mufti's Office. Borneo Printers & Trading Sdn Bhd. Brunei Darussalam.

⁴⁹ Human Rights Council. (2019, September 3). Report of the Working Group on the UPR- Brunei: Conclusion/Recommendations, Adv. Version, Agenda Item 6. A/HRC/42/11/Add.1.

The SPCO include provisions that criminalize acts of *irtidad* (renunciation of Islam),⁵⁰ proclaiming oneself as God,⁵¹ Messenger or Prophet,⁵² Contempt of Nabi⁵³ or denying quranic verse, hadith or matters that are wajib by *ijma'* (consensus),⁵⁴ declaring oneself as non-Muslim⁵⁵, attempt to commit *irtidad*⁵⁶ and abetting commission of *irtidad*⁵⁷. This can be seen as being in accordance with the purpose of preserving religion as outlined in Maqasid al-Syariah.

It is evident that the objective of safeguarding the religion of Islam is provided under the law and prevents actions that could jeopardise religious harmony. Aside from that, the law allows the opportunity for repentance, thereby the Court has the discretion to acquit the offender.⁵⁸

(ii) Preservation of Life:

In Islam, the most heinous crime is murder with the intent to cause death of another person. In the Al-Qur'an, Surah al-an'am 151:

”وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ”

“And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right.”

The SPCO criminalizes offences such as intentionally causing death (*qatlul-'amd*), death caused without intention (*qatlu syibhil-'amd*)⁵⁹, death by mistake (*qatlul-khata'*)⁶⁰ and offences against the human body or causing hurt⁶¹. These are aligned with the Maqasid al-Syariah's objective of preserving life. These provisions aim to protect individuals from harm and ensure safety by safeguarding the fundamental value of every individual's right to life. They aim to deter and punish those who commit murder while also ensuring due process and considering circumstances of each case, where necessary, in order to arrive at a just decision. However, even though the death penalty is still in place, the country has been implementing a moratorium for more than 2 decades. This moratorium can be extended to cases that fall under the SPCO, which offers a broader scope for granting pardons.⁶²

(iii) Preservation of Intellect

⁵⁰ Sect. 107 of the SPCO.

⁵¹ Sect. 108 of the SPCO.

⁵² Sect. 109 of the SPCO.

⁵³ Sect. 110 of the SPCO.

⁵⁴ Sect. 111 of the SPCO.

⁵⁵ Sect. 110 of the SPCO.

⁵⁶ Sect. 113 of the SPCO.

⁵⁷ Sect. 114 of the SPCO.

⁵⁸ Sect. 116 & 117 of the SPCO.

⁵⁹ *Qatlu syibhil-'amd'* means an act which is done voluntarily and with intent to cause harm to the body or mind of a person, which causes death of that person or any other person, whether or not the act is done by means of a weapon and the act which in the ordinary course of nature is not likely to cause death. Refer to Sections 139-145 of the SPCO.

⁶⁰ '*Qatlul-khata'*' means an act done without an intention of causing death or injury which causes the death of a person, either by doing an act which is not anticipated may cause the death of such person or any other person, or by doing a wrongful act which later becomes the cause for the death of such person. Refer to Sections 146-150 of the SPCO.

⁶¹ Refer to Sections 167-183 of the SPCO.

⁶² Titah of His Majesty in conjunction with the month of Ramadhan (5th Mei 2019).

Alcohol consumption (drinking intoxicating drinks)⁶³ for Muslims is criminalised under the SPCO to preserve intellect and ensure the overall welfare of individuals in the country. For non-Muslims, it will only be an offence if it is done in public. This aligns with one of the Maqasid al-Syariah's objectives: preservation of intellect. Apart from that, it is prohibited (haram)⁶⁴ and *hadd* penalty is obligatory upon the drinker.⁶⁵ Preservation of intellect in the context of not allowing drinking alcohol refers to Surah al-Nisa (4:43):

“Do not draw near to the Prayer while you are intoxicated until you know what you are saying nor while you are defiled – save when you are travelling – until you have washed yourselves.”

(iv) **Preservation of Lineage:**

The SPCO may criminalize offences such as *zina* (adultery or fornication)⁶⁶, which can be viewed as aligning with the Maqasid al-Syariah's objective of preserving lineage and upholding the integrity of marital relationships and the institution of the family. It also emphasised the concept of lineage preservations that are commonly referred to as *nasab*. It is defined in Section 2 of the Islamic Family Law Act:

“Nasab means descent based on lawful blood relationship.”

Participating in *zina* can potentially result in pregnancy out of wedlock⁶⁷ and the subsequent birth of children considered illegitimate. Furthermore, it also relates to the preservation of the rights of the children and their interest in their entitlement to inheritance, maintenance, and guardianship.

(v) **Preservation of Property:**

The SPCO includes provisions that criminalize theft, aligning with the Maqasid al-Syariah's objective of preserving property. These provisions aim to ensure economic stability, protect individuals' rights to their belongings, and prevent acts of injustice within society. It was claimed that Brunei has fulfilled all the Maqasid with certainty at the *darūriyyat* level, and some even up to the *hājiyyat* and *tahsiniyyat* level. The Maqāsid for the preservation and promotion of faith, life, intellect, wealth, and progeny especially was made complete with the introduction of the SPCO (Rozan, 2017).⁶⁸

The Honourable State Mufti of Brunei Darussalam⁶⁹ also offered assurance that foreign travelers and tourists should not be concerned about the Syariah law or avoid Brunei after the law was implemented:

⁶³ Section 104-106 of the SPCO.

⁶⁴ Surah al – Baqarah (2:129): "In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit."

⁶⁵ Hadith of the Prophet *Sallallahu 'Alaihi Wasallam* "All that intoxicates is khamr (wine, alcohol) and all that intoxicants is (ruled) haram.

⁶⁶ Sect. 68-73 of the SPCO.

⁶⁷ Sect. 94 of the SPCO.

⁶⁸ Rozan Yunos. (2017). The Evolution of Islamic Governance: With Special Reference to Brunei Darussalam. *The Journal of Islamic Governance*. Vol.3, No. 1.1-19.

⁶⁹ The Honourable Pehin Orang Kaya Laila Wijaya Dato Seri Setia Dr. Haji Awang Abdul Aziz bin Begawan Pehin Udana Khatib Dato Seri Paduka Haji Awang Omar, State Mufti of Brunei Darussalam.

“Please listen to our answer: do all potential tourists to Brunei plan to steal? If they do not, then what do they need to fear. ... Believe me when I say that with our Shariah criminal law, everyone, including tourists, will receive proper protection.”⁷⁰

As such, the law can be used as a template for the global harmonisation of Syariah law with modern civil law. It can provide a guidepost for Muslim legislatures who are still in a dilemma in relation to the enactment of Syariah laws.⁷¹ In Surah Al-Ma'idah in verse 38:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ ﴿٣٨﴾

"As for the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from [Allah]. And Allah is Exalted in Might and Wise."

The main objective of the punishment as stated in the Quran, serves as deterrence. It is to discourage theft and protect the property rights of individuals in society.

Islamic Criminal law act as deterrence and not punitive

Although penalties such as amputation of the hand are stipulated in the Al-Qur'an, there are strict conditions that must be fulfilled before these Quranic penalties can be applied (Aziz Juned, 2013). The principle of proportionality in punishment under Islamic law aids in guaranteeing that such severe penalties are exclusively imposed only in the most extreme instances. Furthermore, the promotion of forgiveness, mercy, repentance, and restitution is advocated as viable alternatives to punitive measures (Mansurah, Mohamed, 2020).⁷² There is a need to consider the objectives of Syariah when legislating laws and emphasizes the importance of appropriate punishment for the offender (Azam et al., 2016).⁷³

Islamic Criminal law is not meant to be punitive. Their intention is to keep law and order in a Muslim society through deterrence. Many jurists are of the opinion that Quranic punishments such as the hudud cannot be applied to one who repents after the crime and before the execution of the punishment.⁷⁴ Importantly, Islam enjoins Muslims to be merciful even when applying the hudud as the Prophet has mentioned: “Strive to be merciful one to another in the application of Quranic punishments”. Hence, when society avoids the application of hudud by mercy and tolerance, it acts in accordance with the spirit of Islam and adherence to the teachings of the Prophet. As a peace-loving religion, the essence of Syariah is also characterized by mercy and

⁷⁰ Awang Abdul Aziz bin Juned. (2013). The Shari'ah Penal Code: An Introduction. State Mufti's Office. Borneo Printers & Trading Sdn Bhd. Brunei Darussalam.

⁷¹ Mohd Altaf Hussain Ahangar. (2016). Defences under Brunei Syariah Penal Code Order 2013: A Model for Harmonization of Laws, *International Journal of Business, Economics and Law*, Vol. 9, Issue 5. 105-111.

⁷² Mansurah Izzul Mohamed. (2020). Understanding the Situation on the Ground Symposium on Brunei's New Islamic Criminal Law Code. *Journal of Islamic Law*. Vol.1. No. 1.

⁷³ Mohamed Azam, Mohamed Adil & Ahmad Badri Abdullah. (2016). The application of Shariah principles of Ta'zir in Malaysia Common Law: A Maqasid Based Proposal. *ICR Journal* 7 (1), 47-64. <https://doi.org/10.52282/icr.v7i1.283>.

⁷⁴ In the case of irtidad, section 116: The Court shall, after sentencing an offender for any offence of irtidad and before execution of the punishment, order him to repent. Section 117, the Court shall after being satisfied that the offender has repented, make an order of acquittal from sentence on the offender.

compassion. The ultimate objective of the Shariah and hudud is to secure the well-being of mankind and establish a righteous society.

Element of mercy (Rahmah)

In the context of Syariah law, it is important to note that all forms of punishment are accompanied by an element of mercy (Aziz Juned, 2013). The punishment can only be carried out under various conditions that are extremely stringent. For example, in the case of theft, the amputation of the hand is not applied arbitrarily and shall not be imposed in certain conditions such as follows: that have been specified in the law.⁷⁵

- (a) when the stolen property is less than the value of nisab;*
- (b) when the offender is not mukallaf ((has attained 15 years and of sound mind);*
- (c) when the owner of the stolen property has not taken sufficient precaution to guard such property against theft, having regard to the nature of the property and place where the property is kept or left not in the hirz;*
- (d) when the offender has not obtained full possession of the stolen property, although its owner has already been deprived of its custody or possession;*
- (f) when the stolen property is of no value according to Hukum Syara' such as intoxicating drink or instruments for amusement;*
- (g) when committed by a creditor against the property of his debtor who refuses to pay the debt: Provided, however, that the value of the stolen property does not exceed the amount of the debt, or the value of the stolen property exceeds the amount of the debt but does not exceed the nisab;*
- (h) when the offence is committed at the time of national emergency (war, famine, disease, or natural disaster);*
- (i) when the offence is committed within a family;*
- (j) when the offence is committed by more than one person, the share of each offender after dividing the stolen property is less than the nisab;*
- (k) when the offender returns the stolen property or the value of the stolen property before the execution of hadd punishment;*
- (l) when the owner of the stolen property denies that his property has been stolen, notwithstanding the offender made an ikrar that he stole it;*
- (m) when the offender makes an objection acceptable by Hukum Syara' against the syahid;*
- (n) when the stolen property is, or the circumstances in which the offence is committed are, such that there is no hadd punishment liable according to Hukum Syara';*
- (o) when the stolen property is a common property; (p) when the offender's right or left hand is not functional, maimed or cut."*

⁷⁵ Execution for theft punishable with *hadd* punishment cannot be imposed in these situations: Refer to Sect. 56 of the SPCO.

In the case of murder, where the offences are liable to *hadd* punishment⁷⁶, a pardon⁷⁷ may be granted by the heir of the victim with or without payment of *diyat* or a compound of *qisas* by the heir with any mutually agreed compensation (*badal al-sulh*).⁷⁸ If the heir of the victim chooses to pardon or compound *qisas* on the offender, the latter shall not be punished with *qisas*.

In addition, based on the facts of the case, it is up to the discretion of the court to either sentence the criminal to imprisonment or acquit. When a judge decides that a convicted criminal constitutes a significant threat to the public, imprisonment is the best precautionary measure to safeguard public safety. This also applies to cases of causing hurt where the victim or his *wali* may pardon or compound *qisas* on the offender.

The sentences need to be confirmed by Syariah High Judges,⁷⁹ Syariah CPC provides that for matters punishable with death, the accused must be tried by 3 judges⁸⁰ comprising 2 Syariah High Court judges and 1 Muslim Judge of the Supreme Court, and conviction requires a unanimous decision. This process serves as an extra safeguard mechanism to ensure that all possible suspicions can be examined and addressed before sentences may be carried out. Furthermore, a medical examination conducted prior to the imposition of the penalty functions as an act of mercy towards the punishment. The presence of a medical officer is necessary before and during the implementation of punishment in order to ascertain the physical and mental fitness. The medical officer also gives necessary medical treatment to the injured part of the body to avoid other harm.⁸¹

FINDINGS

Brunei made efforts to various parties to ensure that the relationship between Brunei and the cooperating countries will remain sound and that the image of Brunei Darussalam in the international community is not getting worse with Western media coverage (Anton et al., 2021).⁸² The fact that Brunei is a signatory to international treaties shows the country's commitment.⁸³ It was found that the SPCO provides protection for all people in Brunei in accordance with the comprehensive Maqasid al-Syariah. It is one of the essentials that may be taken into consideration in ratifying every international treaty (Afandi Salleh, Majid Mohamed, Lotpi Yusob & Fazidatul Yazid, 2016). The analysis shows that the concepts of Maqasid al-

⁷⁶ When it is proved either by *ikrar* of the accused or *syahadah* of at least two *syahid* according to *Hukum Syara'* after the Court is satisfied having regard to the requirements of *tazkiyah al syuhud*, is guilty of an offence and shall be liable on conviction to death as *qisas*. Refer to Sect. 126 of the SPCO.

⁷⁷ Pardon must be made in and confirmed by the Court and may not be withdrawn thereafter.

⁷⁸ *Badal al-Sulh* means the mutually agreed compensation according to *Hukum Syara'* to be paid or given by the offender to a *wali-addam* in cash or in kind or in the form of movable or immovable property. Refer to Sect. 122 of the SPCO.

⁷⁹ All *hadd*, *qisas*, *diyat* sentences including death penalties passed by a Syariah Court must be forwarded to the higher Syariah Court for confirmation, and the sentence must not be executed before the confirmation is obtained. Refer to Sect. 122 of the Syariah Courts Criminal Procedure Code (Chapter 224).

⁸⁰ Appeal will be heard by a Panel consisting of 5 judges.

⁸¹ Refer to Sect. 183 of the Syariah CPC.

⁸² *Titah* of His Majesty on 30th April 2014.

⁸³ Brunei is a state party to the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Rights of Person with Disabilities. Brunei has already signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Syariah are effectively incorporated in the SPCO highlighting their relevance and implementation within the legal system.

The consideration of Maqasid al-Syariah in Islamic countries at national and international levels will serve as a milestone for strengthening the international relations of Islamic countries (Usman Duguri, Afandi Salleh, Isayu Hasan & Nazri Azmi, 2021).⁸⁴ In addition, the need for continuous enforcement of existing legal provisions so that the guarantee of protection of all people continues is maintained in accordance with Maqasid al-Syariah. Despite these important steps for improving human rights, Brunei has continued with the implementation of the three phases of the Syariah Penal Code since 2014. The punishments of *hadd* and *qisas* in the SPCO are not man made laws but are ordained by Allah in the Al-Qur'an and in the Hadiths of the Prophet Muhammad (Peace be upon him), and not to be misunderstood as any kind of radicalization.⁸⁵ The application of the international human rights standards is grounded by the Islamic principles, constitution, and national laws. Brunei is not obligated to cease the implementation of the SPCO, as it is within its sovereign prerogative to uphold its domestic legislation (Anton et al., 2021).⁸⁶

The Brunei Government through their second Minister of Foreign Affairs provided a response to the Office of the High Commissioner for Human Rights:

“The Syariah Penal Code Order does not criminalise nor has any intention to victimise a person’s status based on sexual orientation or belief, including same-sex relations. The criminalisation of adultery and sodomy is to safeguard the sanctity of family lineage and marriage of individual Muslims particularly women. The offences, therefore will not apply to non-Muslims unless the act of adultery or sodomy is committed with a Muslim.

The Syariah Penal Code Order also protects women from slanderous accusations of adultery as such accusations are considered a serious criminal offence. It must be noted that women in Brunei Darussalam made significant achievements not only in education and business but also professions.

We would like to reiterate our commitment to international obligations in promoting and protecting human rights as enshrined in the Charter of the United Nations and the Universal Declaration of Human Right and will continue to uphold our obligations to international covenants on human rights including the CEDAW, Brunei Darussalam rejects all forms of torture, inhuman or degrading treatment or punishment. Finally, in our efforts to demonstrate further our commitment Brunei Darussalam is currently working towards advancing the necessary steps for early ratification of UNCAT.”

Upholding the principles of Maqasid al-Syariah is a paramount commitment aimed at preserving the overall welfare of society. It includes the meticulous administration of justice

⁸⁴ Usman Safiyanu Duguri, Mohd Afandi Salleh, Isyaku Hassan, Mohd Nazri Latiff Azmi. (2021). The Application of Maqasid Al-Shari'ah in the Foreign Policy of Islamic States. International Journal of Academic Research in Business and Social Sciences. 1-9.

⁸⁵ Yang Berhormat Datin Seri Paduka Hajah Hayati binti Pehin Orang Kaya Shahbandar Dato Seri Paduka Hj Mohd Salleh. (2015, September 3). Speech at the AGC Open Day and the Launching of AGC Report 2013-2015.

⁸⁶ Anton Minardi, Rini Afriantari, & Maesuroh. (2021). The Implementation of Islamic Penal Law in Brunei Darussalam and International Society, Socio Politica. Vol. 11, No. 1, 1-9.

and the effective implementation of laws, which are integral components of both the Civil Court and the Syariah Court. Legal institutions play an important role in those principles that contribute to fairness and justice as the primary objective of the SPCO is to safeguard basic human rights for all citizens in the country irrespective of their racial, religious and cultural background. This protection is important to preserve harmonious living in the community.

CONCLUSION

The implementation of the SPCO in Brunei aimed at upholding the overall welfare and preservation of fundamental values in accordance with the Maqasid al-Syariah, that is the preservation of life, religion, lineage, intellect and property. Offenses in the SPCO serve as a fundamental safeguard for these rights. However, the discourse between Syariah law and international human rights standards remains an ongoing global debate that has been raised in the UPR recommendations. Despite that, Brunei remains steadfast in continuing its international commitments while also adhering to Islamic principles by adopting Islamic principles into its domestic legal framework.

This article proposes that in the future research should prioritize the examination of the significance attributed to the country's right to enforce its domestic legislation as a manifestation of its sovereignty. This needs an analysis of the international legal frameworks and treaties that have an impact on a country's ability to uphold its legal system and exercise its sovereignty. The examination of case studies involving states encountering problems pertaining to sovereignty and their subsequent decisions in safeguarding local legal frameworks can offer significant scholarly contributions.

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