

DEFENCES UNDER BRUNEI SYARIAH PENAL CODE ORDER 2013: A MODEL FOR HARMONIZATION OF LAWS

Mohd Altaf Hussain Ahangar
Professor
Faculty of Shariah and Law
Sultan Sharif Ali Islamic University
Brunei Darussalam

Introduction

We are living in 21st century. The demands of this century are diverse and multi-dimensional. In the field of criminal law, we are dealing at the moment with such serious offences which were virtually non-existent even in the twentieth century. Such offences include terrorism, arson, drug trafficking, women trafficking, smuggling, currency counterfeiting and gang rape. In relation to internet, cybercrimes of hacking, pirating, illegal trade, fraud, scams, money laundering, stalking, defamation etc. are those crimes which have infinite negative implications for individuals, societies and nations.¹

As Muslims we have a firm belief that Islam does not guide us only in relation to religious affairs but it is a complete code of life guiding us in all spheres of life including legal, economic, commercial, social, governmental and other disciplines of our life. So the need of the time for us as Muslims is that we should have sets of laws which are Islamic and at the same time according to the demands of today.

It is possible if we try to harmonize civil law with Islamic law. I mean that we should be free to adopt all globally enacted laws on contemporary issues unless such laws cannot be harmonized with the principles and rules deduced by our great jurists from al-Quran, al-Sunnah, al-Ijma and al-Qiyas or laws goes against *maqasid Syariah*. According to Imam Shatibi, the great Spanish jurist, the law of Islam aims at protecting five things- *Din, Nafs, Aql, Mal* and *Nasl*.

The enactment of Syariah Penal Code Order 2013 [hereinafter called 'Order'] in Brunei Darussalam is in reality the result of process of harmonization of civil law with Islamic law in relation to crime. In it we find legislation on all known offences which have a basis in Syariah particularly under *Mazhab Shafi*.

It is pertinent to mention that at present a person in Brunei Darussalam is governed by two sets of laws in relation to criminal liability, namely by 'Order' and Penal Code [Chapter 22], hereinafter called 'Code'. Like Code, Order applies to both Muslims and non-Muslims in relation to offences contained therein unless otherwise provided². The punishment for every act or omission contrary to the provisions will be under the Order if a person is found guilty within Brunei Darussalam³. Even a person is liable to be tried for an offence under the Order if such offence is committed outside Brunei Darussalam⁴.

However, there are a number of offences in the Order which do not find a place in the Code. Such offences are mainly Sharia Offences such as *Zina, Liwat, Hiraba etc.* Likewise there are some offences which do not figure in Order at all. Such offences include criminal conspiracy, offences against the State, offences against the public tranquillity, offences by or relating to public servants etc. An accused, however, cannot be tried for same offence both under Order and Code. Such protection has been provided under Section 252 of the Order which reads:

¹ Mohd Altaf Hussain Ahangar, "Crime and Punishment in Modern Muslim State: A Pragmatic Approach" "Crime and Punishment in a Modern Muslim State: A Pragmatic Approach"- *American Journal of Islamic Social Sciences* [AJISS], Spring 2014, pp 51-69 at 55-56.

² Section 3(1)

³ Section 3 (2)

⁴ Section 3 (3)

When a person has been tried in any proceedings in respect of an offence against this Order, he shall not be tried and no other proceedings shall be brought against him under the Penal Code (Chapter 22) for the same or a similar offence under that Code.

This section thus excludes those proceedings under Code which are covered by Order. It implies thereby that proceedings under Code remain valid for other offences which are not dealt with in the Order.

With these introductory words, an effort is being made in this paper to focus on defences to crime under Order and to evaluate their similarities and dissimilarities with the defences to crime under the Code.

There are 31 defences to crime under Code which are contained in Sections 76-106. Order also devotes 31 sections to defences ranging from Sections 6- 36. The fact is that Islam recognises the defences of intoxication, infancy, insanity, coercion, necessity, mistake, discipline and self-defence but not in modern format. So one of the alternative for the body entrusted with the drafting of the Order was to adopt verbatim all the defences in the Code. But rightly they did not do so. Instead they decided to incorporate all the defences in the Code except defence under Section 86 but with Islamic input wherever possible. This way the Order drafters have attempted to harmonize Syariah principles with contemporary criminal jurisprudence in relation to defences. There are 3 defences⁵ which are absolutely based on Code without any alteration. Thirteen defences⁶ are almost same with some linguistic alterations in content and illustrations. The defence of insanity on account of intoxication does not *rightly* find a place in the Order but a new provision has been incorporated in the Order under Section 36 which reads:

This part shall only apply if not inconsistent with any other provisions of this Order.

However, there are 14 defences where Islamic content has replaced, to some extent, the content in the Code. In these defences also some linguistic alterations have been made in content and illustrations. The present paper is an attempt to analyse only those defences wherein Islamic content has been incorporated.

Defence of Infancy

Section 82 [Code] and Section 12 [Order] -Difference

Section 82 [Code] reads:

Nothing is an offence which is done by a child under 7 years of age.

Section 12 [Order] reads:

Nothing is an offence which is done by a child who is not *mumaiyiz*.

The Order does not define the word ‘mumaiyiz’ but under Section 2 of the Order, we are told that this word has the same meaning as assigned to it under Section 3(1) of the Syariah Courts Evidence Order, 2001 (S 63/2001). Once, we go through Section 3(1) of the Evidence Order, 2001, it defines *mumaiyiz* as a child who has attained the age of being capable to differentiate a matter. Ordinarily, according to most Muslim jurists a child becomes *mumaiyiz* at the age of seven years. So, there is practically no clash between Islamic law and the Code. But the fact is that by adopting *mumaiyiz* concept, the drafters of the Order are not focussing on the physical age of the boy or girl; rather on his or her understanding. Such approach is laudable at present because in most cases at present, a child of five years has more mature understanding about the affairs of life which was hardly possible from a child of fifteen years few decades ago. Recently, in India a nine year boy was arrested for committing rape on a six year old girl⁷. If such case would have happened in Malaysia, the boy could not be prosecuted in view of the law that “Nothing is an offence which is done by a child under ten years of age”⁸. Globally, the age of criminal responsibility is not uniform. In America, the age varies from 6-12 years depending on a State in which a child commits the crime. Ages of 8, 9, 10, 12, 13, 14 and 15 have been prescribed in Indonesia, Bangladesh, Australia, Canada, France, China and Egypt respectively⁹. Rather than going by a yardstick of age at the time of commission of crime, Order has opted for ‘Differentiation Capability’ formula which may vary from case to case.

⁵ The sections are: Sections 93, 95, 106 [Code] and Sections 22, 24, 35 of the [Order].

⁶ The sections are: Sections 76, 77, 78, 79, 80, 81, 84, 88, 91, 92, 94, 101, 102 [Code] and Sections 6,7, 8, 9, 10, 11, 14, 17, 20, 21, 23, 30, 31 [Order].

⁷ Times of India, 3rd October, 2015.

⁸ Penal Code of Malaysia, s.82

⁹ https://en.wikipedia.org/wiki/Defense_of_infancy

Section 83 [Code] and Section 13 [Order] - Difference

Under Code, absolute protection from criminal liability is given to that child who is above 7 years and under 12 years in case of his insufficient maturity of understanding to judge the nature and consequences of his conduct on the occasion of the commission of the offence.

Order does not prescribe absolute protection to a child who is *mumaiyiz* but not *baligh*. Under Section 3(1) of the Syariah Courts Evidence Order, 2001 (S 63/2001) a *baligh* has been defined as a person who has attained the age of puberty in accordance with *Hukum Syara*. However, all Schools do not have one opinion in relation to attainment of puberty. Under Shafi law, a male or female is treated as *baligh* on the basis of physical attributes or in absence of those attributes on the completion of 15 years of age¹⁰.

Section 13 of the Order simply seems to protect a *mumaiyiz* but non-*baligh* from imposition of *hadd* or *qisas* punishment for an offence which falls under *hadd* or *qisas*. It implies that such child will be liable for punishments for offences not falling under *hadd* or *qisas*. However, the use of word 'may' two times in this provision suggests that discretion has been vested in a judge in relation to imposition of any punishment. If interpreted correctly, the judge may even impose *hadd* or *qisas* punishment on a child who is *mumaiyiz* but not *baligh*. If the legislature intended a complete protection from imposition of *hadd* or *qisas* punishments on such children, the word 'shall' should have been used instead of 'may'. From the wordings of the section, it is unclear whether a judge may decide not to impose any punishment at all.

Defence of Intoxication

Section 85 [Code] and Section 15 [Order] - Differences

- i. The title of Section 85 [Code] is 'Intoxication when defence' whereas the title of Section 15 [Order] is 'Act of person intoxicated against his will or without his knowledge or caused by medication'. It seems the word '**caused**' has been unnecessarily put in the title.
- ii. Section 85 [Code] stipulates that intoxication shall not constitute a defence to any criminal charge unless the state of intoxication was caused without his consent by the malicious or negligent act of another person or the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission
Section 15 [Order] stipulates that intoxication is a complete defence if a person is intoxicated by the thing which was administered to him against his will or without his knowledge or as a result of taking medicine for the purpose of treatment.
Thus, Section 15 [Order] does away with 'malicious' or 'negligent act or omission' of another person. If A by way of joke puts wine in the glass of his friend B and B loses his senses with consequence of committing a crime, then can we hold B liable for crime because it was neither malicious nor negligent act on the part of A. The answer is 'no'. By omitting 'malicious or negligent act or omission' the Order drafters have removed ambiguity in relation to intoxication as defence.
- iii. Penal Code recognises insanity as a result of self-intoxication under sections 85 and 86 as a defence. The Order does not recognise insanity resulting from self-intoxication as a defence. In this regard, the drafters of Order are justified in excluding it as a defence. Allowing insanity resulting from self-intoxication as defence would tantamount to according protection to the concept of intoxication while intoxication is one of the Syariah offences.

Section 86 [Code] deals with effect of defence of intoxication when established in relation to self-intoxication also. It provides that if the offender has turned insane due to self-intoxication at the time of commission of the offence, he will be treated as insane person but will be governed by sections 319 and 320 of the Criminal Procedure Code (Chapter 7). However, Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

There is no parallel provision in the Order which corresponds with Section 86 of the Code.

Defence of Consent

Section 87 [Code] and Section 16 [Order] - Differences

- i. Section 87 uses words 'grievous hurt' whereas Section 16 [Order] uses word 'hurt'. Penal Code defines both hurt and grievous hurt. Comparatively, Order does not define hurt. Under Section 168 of the Order, hurts are classified in five categories for the purpose of prescribing punishment. By using word 'hurt' in Order, it seems the scope of consent as a defence has been unnecessarily limited. The question arises as to what two adults will consent under Order if they cannot consent to causing of simple hurt to each other. If the drafters of the Order were not satisfied with the concept of 'grievous hurt' in the Penal code, they should have

¹⁰ Ibn Qudamah, *al-Mughni*, Cairo, 1367, Vol. IV, PP 459-460, quoted in K.N. Ahmad, (2006), *Muslim Law of Divorce*, 3rd Ed., Kitab Bhavan, New Delhi, 913

selected few serious hurts enumerated in section 168 to which defence would not have applied and allowed defence to apply to other hurts. The main impact of 'hurt' doctrine is that under Order we cannot have wrestling and boxing matches because the participants will be definitely hurt.

- ii. In Order, we are told consent will be valid if it is not intended to cause death or hurt and which is not known by the doer to be likely to cause death or hurt. But in the appended illustration, we are told that no offence will be committed although A hurts B. So there seems some contradiction between the text and the illustration.
- iii. Section 87 allows this defence to a person above the age of 18 years whereas Order needs only 15 *qamariah* years.

Section 89 [Code] and Section 18 [Order] - Differences

- i. Section 89 [Code] uses word 'child' in the title and text of the section whereas Section 18 [Order] uses words 'who is not *baligh*' in title and text.
- ii. Section 89 [Code] uses in provisos (b) and (c) the words 'grievous hurt' and 'grievous disease' whereas Section 18 [Order] uses words 'hurt' and 'disease'.

Comment

There is some anomaly caused by simple use of words 'hurt' and 'disease'. How come law will allow a guardian to cause 'hurt' in order to prevent other 'hurt'? Likewise how causing of hurt can be allowed to prevent a simple disease. The alternative available for law drafters, as contended earlier, was to classify hurt into simple hurt and grievous hurt in the light of Syariah principles rather than in accordance with Code.

Section 90 [Code] and Section 19 [Order] - Differences

- i. Code uses the title "Consent known to be given under fear or misconception, and consent of child or person of unsound mind. The title used in Order is "Consent known to be given under fear or misconception etc. Thus, Order omits words 'and consent of child or person of unsound mind' in the title.
- ii. Code uses the words 'under 12 years of age' whereas Order uses the words 'person who is not *baligh*'.

Defence of Right of Private Defence

The defence of right of private defence of body and property is contained in sections 96 -106 of the Code whereas Sections 25 - 35 of the Order deal with this defence.

Section 96 [Code] and Section 25 [Order]

Comment

- i. There are differences in both title and content of the sections. Section 96 [Code] uses the title 'Things done in private defence' whereas Section 25 of the Order uses words 'Nothing done in private defence etc. is an offence'.
- ii. Secondly Order uses additional words 'the right of a person' in the contents of the section. However, we are not being told as to what is meant by 'the right of a person'. Explanation of this addition could have been clarified by insertion of an illustration to that effect.

Section 97 [Code] and Section 26 [Order]

The differences between the two sections are as under:

- i. Section 97 [Code] uses the title 'Right of private defence of the body and of property' whereas the title of Section 26 [Order] is 'Right of private defence of body and property.

By making the changes, the drafters of Syariah Order have brought clarity to the title. The words 'of the body and of property' used in the Code do not seem making much sense.

- ii. Section 97 (a) [Code] recognises right of every person to defend his own body and the body of any other person against any offence affecting the human body.
In contrast, Section 26 recognises right of every person to defend his own body and the body of his wife and descendant against any offence affecting the human body.

Comment

The arrived conclusion is that Section 26 (1) of the Order limits the operation of right of private defence of person. Apart from one's own self, it recognises the right of private defence in relation to one's wife and descendants. It implies that if someone is attacking my mother, father, grandparents, brothers and sisters, I will have to simply watch them getting thrashed or killed because the law does not recognize my right of private defence in relation to these relations. Likewise, if an innocent person is being attacked in my presence and he calls for help, I am supposed to simply watch the scenario without any interference. This provision needs reconsideration. I favour, it is respectfully submitted, replacement of this provision by the law contained in section 97 (a) of the Code.

- iii. Section 97 (b) [Code] allows a person the right to defend the property whether movable or immovable of himself and of any other person.
Comparatively Section 26 (b) [Order] allows a person the right to defend the property, whether movable or immovable, of himself, his wife and descendants. It means a wife has no right to defend the property of her husband. Likewise a person has no right to defend the property of his parents, grandparents, brothers, sisters, nephews, nieces etc.
- iv. Section 97 (b) [Code] allows right of defence of property against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass.
Comparatively, Section 26 (b) allows such right against any act which is an offence falling under the definition of *sariqah* and *hirabah*. However, we need to have such defence against mischief and criminal trespass also. So Order 26 (b) fails to address all the issues regarding the protection of property. If a person is trying to put your house on fire, there is nothing provided in section 26 (b) by way of defence of your house. If the law is interpreted as it is, you have to simply watch your house being burnt. The other option is to justify your act under section 97 (b) of the Code implying thereby claiming defence for some offences under the Order and for some under the Code.

Section 98 [Code] and Section 27 [Order]

Comment

- i. Section 98 [Code] uses words 'by reason of youth, the want of maturity of understanding'. However, Section 27 [Order] uses the words 'by reason of not being a *mumaiyiz*'.

Section 99 [Code] and Section 28 [Order]

Comment

The contents of both sections are same except:

- i. The words used in Code in relation to title of section 99 are "Acts against which there is no right of private defence; and extent to which the right may be exercised" whereas in Section 28 of the Order the words used are "Acts against which there is no right of private defence".
- ii. Section 99 (1) and (2) uses the words 'apprehension of death or of grievous hurt' whereas in Section 28 of the Order the words used are 'apprehension of death or of hurt'.

The use of word 'hurt' in Order again creates problem. It means that you can exercise right of private defence against a police officer who is using a cane to arrest you for being a member of unlawful assembly. There is a need to classify hurts for the purpose of exercising right of private defence of person or property.

Section 100 [Code] and Section 29 [Order]

Comment

- i. The title is same except 'Code uses the words 'the right' whereas Order uses word 'right'.
- ii. Under Section 100(b), Code allows right to voluntary causing death or of any other harm if there is such an assault as may reasonably cause the apprehension that grievous hurt will be otherwise the consequence of such assault.
Under section 29 (b), Order allows right to voluntary causing death or of any other harm if there is such an assault as may reasonably cause the apprehension that hurt will otherwise be the consequence of such assault.
The issue is how a victim can be allowed to cause the death of an assailant simply for an apprehension that hurt will be caused.
- iii. Under Section 100 (c), Code allows causing of death if there is an assault with the intention of committing rape. The offence of rape can be committed only by man against a woman, not vice versa.
In contrast, Order allows the causing of death if there is an assault with the intention of committing *Zina bil-jabar*. Under Section 75 of the Order, it has been mentioned that the offence of *Zina bil-jabar* can be committed by both man and woman. Thus, the Order is more realistic than the Code in relation to sexual offences. Men are not always the initiators of sexual contact or savagery.

- iv. Under Section 100 (d), Code allows the right of causing death if there is an assault with the intention of gratifying unnatural lust. Order allows such right for an assault with the intention of committing *liwat*. *Liwat* simply stands for anal sex. The words 'gratifying unnatural lust' are of wide import and may include even use of mouth for sex purpose. Section 377 A of Malaysian Penal Code reads:

Any person who has sexual connection with another person by the introduction of penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

- v. Under section 100 (e), Code allows the voluntary causing of death if there is an assault with the intention of kidnapping or abducting. Order allows such right for an assault with the intention of abducting only.

By deleting the word 'kidnapping', the drafters of Syariah Order have a point to make. Assault implies use of force by the assailant. It is worth to mention that both words have been defined in the Code. The main difference is that kidnapping within country involves taking or enticing of a male under 14 years of age or a female under 16 years of age out of the keeping of lawful guardian. Practically the element of force in taking and enticing is missing. When a person by force compels or by any deceitful means induces any person to go with him, he commits the offence of abduction. So the only word 'abducting' has been rightly used in Order. Penal Code [Chapter 22] needs deletion of the word 'kidnapping' in relation to section 100 (e).

Section 103 [Code] and Section 32 [Order]

Comment

There are following differences in these two sections:

1. Code allows the right of private defence of property to the extent of the voluntary causing of death or any other harm to the wrong doer, if the offence involved is
 - (a) robbery;
 - (b) house-breaking by night;
 - (c) mischief by fire committed on any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or as a place for the custody of property
 - (d) theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Section 32 [Order] allows the right of private defence of property to the extent of the voluntary causing of death or of any other harm to the wrong doer if the offence involved *hirabah* or *sariqah*. However, in relation to *sariqah*, the circumstances are such as may reasonably cause apprehension that death or hurt will be the consequence, if such right of private defence is not exercised.

Here again Order uses the word 'hurt' instead of grievous hurt. The question is how come we can kill a thief when there is danger of simple hurt to our body. Besides, Order fails to provide any defence in case there is mischief or house-trespass

Section 104[Code] and Section 34 [Order]

Section 104 [Code] reads:

If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrongdoer of any harm other than death.

Comparatively Section 33 of the Order reads:

If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be *sariqah* that is not of any of the descriptions enumerated in section 32, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 28, to the voluntary causing to the wrongdoer of any harm other than death.

Both sections in essence are same except the Code deals with right of private defence against theft, mischief or criminal trespass whereas Order deals with offence of *sariqah* only.

Section 105 [Code] and Section 34 [Order]

- i. Section 105 (b) deals with the period of private defence of property against theft whereas section 34 (b) deals with the period of private defence against *sariqah*.
- ii. Section 105 (c) deals with the period of private defence of property against robbery whereas section 34 (b) deals with the period of private defence against *hirabah*.
- iii. Section 105 (d) and section 105 (e) deal with the period of private defence of property against criminal trespass and house-breaking respectively. Section 34 of the Order does not provide any guideline in relation to period of private defence against criminal trespass and house-breaking.

It means that there is no right of private defence against criminal trespass and house-breaking. However, the need of the hour is that right of private defence should be even extended against such offences.

Conclusion

It is evident from the above details and discussion that Syariah has a potential to deal with all the existing and future legal issues through the process of harmonization of laws. Iqbal, the great twentieth century philosopher of East, is of the view that Muslims should reinterpret foundational principles of Islam in the light of altered conditions of the present day society. He identifies himself *Tawhid* as one of those principles. To him *Tawhid* means equality, solidarity and freedom. So if we reinterpret these three words in the light of the demands of our times, there is a possibility of finding acceptable solutions to each and every contemporary problems confronting us today¹¹. The enactment of Brunei Syariah Penal Code Order 2013 should be seen in this context. The focus on defences to crime under the Order is because almost all defences outlined in the Code find a place in the Order but without compromising on the fundamentals of Syariah. The Brunei Order can thus serve a model for harmonization of Sharia law with contemporary civil law operating at global level. In other words it can serve as a beacon light for those Muslim legislatures which are still in a dilemma in relation to enactment of Syariah-oriented laws.

¹¹ For full details, See Muhammad Altaf Hussain Ahangar, "Iqbal and Qur'an: A Legal Perspective," *Iqbal Review* 35, no. 3 (October 1994): 1-22; Mohd Altaf Hussain Ahangar, "Jurisprudential Basis for Islam Hadhari," *Shariah Law Reports* 4 (2005): 26-27; Mohd Altaf Hussain Ahangar, "Iqbal's Approach to Legislation in Islam: An Analysis" *Insight Islamicus*, 2 (2002): 45-66, 2002; Mohd Altaf Hussain Ahangar, "Iqbal's Theory of Ijma: Perspectives and Prospects," *Iqbal Review* 38, no. 1 (April 1997): 17-38; Mohd Altaf Hussain Ahangar, "Iqbal's Views on Ijma: Legislative and Judicial Trends," *Islamic and Comparative Law Review* 15 and 16 (1995-1996): 95-110.