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## The Needs of Special Prison for *Syariah* Offenders in Malaysia

Alizah Ali <sup>1\*</sup>, Nurulhasni Shaari <sup>2</sup>, Noraini Ismail <sup>3</sup> Siti Zarikh Sofiah Abu Bakar <sup>4</sup>

<sup>1</sup>Jabatan Undang-undang, UiTM Cawangan Johor, KM 12, Jln Muar, 85009  
Segamat, Johor, Malaysia.  
[aliza941@johor.uitm.edu.my](mailto:aliza941@johor.uitm.edu.my)

<sup>2</sup> Jabatan Undang-undang, UiTM Cawangan Johor, KM 12, Jln Muar, 85009  
Segamat, Johor, Malaysia.  
[nurul015@johor.uitm.edu.my](mailto:nurul015@johor.uitm.edu.my)

<sup>3</sup> Jabatan Undang-undang, UiTM Cawangan Johor, KM 12, Jln Muar, 85009  
Segamat, Johor, Malaysia.  
[norai257@johor.uitm.edu.my](mailto:norai257@johor.uitm.edu.my)

<sup>4</sup> Akademi Pengajian Bahasa, UiTM Cawangan Johor, KM 12, Jln Muar, 85009  
Segamat, Johor, Malaysia  
[sitiz148@johor.uitm.edu.my](mailto:sitiz148@johor.uitm.edu.my)

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### Abstract

Population density among the prison community has been a debating issue in Malaysia. This is might due to the placement of both civil and *syariah* offenders in one place. It should be highlighted that, the placement of *syariah* and civil offenders in the same cell could be the root of many problems. Therefore, this study is directed to discuss the needs of separating the placement of the civil and *syariah* offenders. In the effort of separating these two types of offenders, several aspects need to be pondered upon, which are the policies, objectives, implementations, modules and training faced by them. Other than that, the separation is important in upholding justice, as well as achieving the punishment objectives. This conceptual study involves books, articles, journals and previous literature. Based on the findings, there are a lot of differences between the punishments for civil and *syariah* offenders, even though they share the same punishment objectives, which are to give them lesson. By referring to differences established, this study strongly agreed on promoting the needs of special prison for *syariah* offenders.

**Keywords:** prison, *syariah* offenders, civil offenders, Islamic Law, Civil Law

### 1. Introduction

The sentence of imprisonment is not merely a civil court matters in Malaysia. *Syariah* courts in every state in Malaysia also has jurisdiction to punish *syariah* offenders with imprisonment. There are almost 60 *syariah* criminal offences provided for imprisonment as found in the *Syariah* Criminal Enactment, the Islamic Family Law Enactment and other laws. Among the offences are consuming

alcoholic drink, not fasting during the month of *Ramadhan*, contempt of court and others. For example, Section 3 of the Syariah Criminal Offenses Enactment of 1997 states that:

- (1) Any person who worships nature or commits any act of worship or respect to any person, beast, place or thing in any manner that violates *Hukum Syarak* shall be guilty of an offense and when be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Such a provision does not require the judge to impose a fine as a priority. Instead, a judge has a prerogative power in setting appropriate penalties for offenders based on the background of the offender and the nature of the offence committed. In reality, almost all judges are more likely to impose penalties than jails, bribes, community services and other types of penalties. The prison sentence, if any, is often appealed to the extent that the prison sentence will be dropped and replaced with the amount of the fine added (Siti Zubaidah Ismail, 2013)

In comparison to the civil court which can granted order to life imprisonment, *syariah* court is limited to a maximum period of three years only. The imprisonment in Islam seeks to provide the opportunity for the offenders to undergo rehabilitation and repentance sessions. It is not intended to punish the offenders by withdrawing their right of freedom. Therefore, it is very important for the government to set on the appropriate module.

At the moment, all offenders either *syariah* or civil offenders are placed in the same prison. It is a concern that the *syariah* offenders might be affected by civil offenders such as they may be influenced to commit other crimes. The population density in the prison also affects the *syariah* offenders. This is because, overcrowded cell may cause outbreak of fights, which could also lead to deceased.

Due to this problem, it is the time to determine, whether Malaysia needs a special prison for *syariah* criminal offenders.

## 2. Definition of Prison

Section 2 of the Prisons Act 1995 (Act 537) defines "prison" as;

*“Any house, building, enclosure or place, or any part thereof, which is declared to be a prison under Section 3 and shall include the grounds and buildings within the prison enclosure and also the airing grounds or other grounds or buildings belonging or attached thereto and used by prisoners. It can be understood as a building in which people are legally held as a punishment for a crime they have committed or while awaiting trial.”*

However, the word prison is not directly translated in the Holy *Qur'an* or *Sunnah* of the

Prophet Muhammad (P.B.U.H). The concept of prison has been continuously debated among Islamic scholars as a punishment under the category of *ta'zir* or chastisement. It literally means prohibition. This form of punishment is generally under the power of a state to imprison a person who is found guilty of committing an offence other than *hadd* and *qisas*. In Islamic Criminal Law, the sentence of imprisonment is interpreted from the *Quranic's* order for the punishment of adultery and robbery. (Abd Karim Zaidan, 1997)

In addition, the sentence of imprisonment is taken from the term "*yunfauna fil ard*". This verse is quoted from *Surah Al-Maidah: 33*. The term "*yunfauna fil ard*" means to be exiled from the land. According to Ibn Qudamah Al-Hambali, the term to be exiled from the land means to banish the offenders from their country. In contrast, Imam Malik interpreted the word "*yunfa*" as to shelter or to confine the offender in his own country. This opinion is supported by Imam Abu Hanifah and Syafie and it has been considered as the better opinion by Abu Qudamah that the concept of banishment or proscription of the offender coincides with the concept of imprisonment which is being implemented today.

### **3. The Differences between *Syariah* and Civil Prisons**

In response to the relevance of cell sharing for *syariah* offenders and civil offenders, this study leads us to ponder upon the policies, objectives, implementations, modules and training faced by both types of offenders. If all these factors are similar, then the offenders can be placed in the same cell. If the mentioned factors failed to be fulfilled, they surely need to be segregated. These factors determine the purpose of the imprisonment sentence.

This study will be discussing the differences between the imprisonment of *syariah* and civil offenders. The differences are as follows;

#### **3.1 The Method Used in Educating the Offender**

The Civil or *Syariah* Law has the similar aim in sentencing the offenders that is to protect the public interest and to educate them for not repeating the same mistakes in the future. Islamic law is not just punishing the offenders but it also maintains the noble values of society. The concept of justice and crime prevention in society is strongly emphasized as a philosophical punishment in Islamic law. For example, Islam sets the death penalty for apostates, whips and stabs for those who commit adultery and whipping for those who drink alcohol. The severe punishment imposed is not intended to punish the offender solely, but to teach and educate them to repent, to become better people and hence, not to repeat the mistakes. (Husin Ahmad.1988), (Roosfa Hashim, 2009).

In addition, the theory of prevention in Islamic law is seen to be more comprehensive and effective as this punishment is executed in the presence of the public. For example, Saudi Arabia, Aceh and some Islamic countries are implementing *hudud* sentences at the mosque grounds on Friday after dawn prayers. Anyone who witnesses the execution of the sentence will be scared and will prevent his or her family members from committing the same offence. Additionally, the

offenders and their family will be humiliated. This situation conforms to the objective of the sentence in the Islamic law which is not merely aiming on the pain, but rather the shame and deterrence of the public from committing the same offence.

This is clearly contradicting to the civil law that executes the sentence privately. The sufferings of being jailed and whipped are borne by only the prisoners, and not shared to the public. Hence, the similar offences will be repeated by the public and the concept of prevention is absolutely pointless.

The next question refers to the method of educating prisoners in prison. Are they having the same module as civil offenders? In general, there is no specific procedure in handling the prisoners of *syariah* offenders. They are categorized based on their imprisonment's period. *Syariah* offenders may be classified as 'short sentence prisoners'; prisoners imprisoned for a period of less than six months. Meanwhile, in terms of recovery program inputs, they will attend a special program called the Human Development Plan which consists of disciplinary, self-reinforcement, skill and community training. There is no specific holistic module to make them repent and live religiously.

Based on observations, the civil and *syariah* offenders are still stationed in the same prison although civil offences are considered to be heavier than *syariah* offences. For example, a *syariah* offender who was jailed for 3 months for not fasting is placed in the same cell with armed robbers and rapists. The 3-month period together, day and night, may negatively affects the *syariah* offender. It is feared that the *syariah* offenders tend to commit other civil offences once they get out of prison. In addition, the shared cell could also lead to other critical issues such as bullying and sodomy.

Apart from that, prison's segregation is seen as a solution to the problem of prison's high density. Through segregation, educating process will also be enhanced with greater focus and integration.

### **3.2 Types of Civil and *Syariah* Offences**

Civil Law in Malaysia mostly rooted from Western countries. For example, the Penal Code (Act 574) which is taken from the Indian Penal Code. This law is adapted from the rules of England Common Law collected and written in the form of an act. In addition to the Penal Code, criminal law is also available in certain Acts such as the Dangerous Drugs Act, the Customs Act 1967, the Anti-Corruption Act 1997, the Internal Security Act 1957, the Official Secrets Act 1983 and others. (Farhah Rusyda, 2002). Conventional criminal offences can be classified into several categories such as (a) offence against the state, (b) offence against individual bodies such as murder, invasion, (c) offence against property such as theft, robbery, (d) ) offence relating to government officer, health and public interest and (f) breach of contract.

*Syariah* or Islamic law in Malaysia is limited to only a few matters, especially family matters, marriage and any matters related to family and marriage. *Syariah* offences are within the exclusive jurisdiction of *Syariah* Courts (Latest information from the Sabah *Syariah* Judiciary Department, Classification of Criminal Cases) which are

divided into two main types.

The first type is *Mal* (Civil) matters such as (a) engagement, marriage and divorce or annulment of marriage, (b) Claim on property or property award arising from the above matter, (c) maintenance of wife and children, custody and guardianship (d) gift Inter-vivos, joint property , *waqf* or veto, (e) Other matters authorized by the law to him by any statutory law.

The second type is Syariah Criminal Matters which include (a) Matrimonial offences such as wives abuse, disobedience to husbands, (b) Offences relating to illegitimate relationships such as illegal intercourse, incest, prostitution and *khalwat*, (c) ) Offences relating to worship and faith such as not attending Friday prayers, not fasting during *Ramadhan*, non-payment of *zakat* (d) Offences of selling and buying alcoholic beverages, (e) Offences relating to religious conversion for example not reporting, checking of apostasy , offences relating to adoption and (f) Other types of offences which are not specifically mentioned in the above categories.

### 3.3 Differences in the Objectives of Sentencing / Penalty.

Basically the objective of sentencing in Islamic Law can be divided into two parts, namely general objective and specific objectives. The general objective refers to the purpose or impact of the revelation itself. It is known as the *maqasid syari'e* which is principally guarding the religion (*addeen*), life, intellect, dignity and wealth. These five policies should be prioritized in ensuring that *syariah* law is upheld. (Amir Abd Aziz, 1999).

Specific objectives refer to retaliation, prevention and recovery elements. For example, Islam introduces *Qisas* punishment for criminal offenders. The execution of the offence is also expected to result in fear that the public may not commit the same offence. This highlights the very precise element of prevention. Punishment also serves as an element of recovery. The effects of the regrets and hardships received by the offenders will inspire the future offenders' consideration. In this context, the offenders are obliged to repent with real repentance. This recovery is also regarded as the preparation of the offender to return to society (Paizah Binti Ismail, 2002)

Referring to the case of *Reg vs Davis* (1978) (K67 CrApp R 207: 2) the judge decided that the objective of the sentence in civil law is to refer to the theory of prevention, recovery, abolition of capacity and retaliation. Dr Mohd Al-Adib, *Syariah* Department Lecturer of Universiti Kebangsaan Malaysia recognizes that the objective of punishment from preventive measures is similar between civil and *syariah* offences. However, the theory of 'capacity-removers' is debated. Dr. Abu Maati Hafiz Abu Al-Fatah states that, in the Islamic Law, the punishment imposed is not the real goal as the ultimate goal is as a reminder from God so that the human being is able to prevent themselves from evil. This objective is seen more holistic in addition to inviting offenders to return to the path of Allah. (Paizah Binti Ismail, 2002)

Since the objective of imprisonment in Islam is to provide opportunity for the offenders to undergo rehabilitation and repentance sessions, aspects of faith, morals and *syariah* will be emphasized throughout the term of imprisonment. Furthermore,

this detention is acknowledged as not only intended to torture and restrict the freedom of the offender, thus different requirements and approaches and services for *syariah* offenders are needed, compared to civil offenders.

The goal of sentence for civil offenders is to be general, liberal and neutral. This is evidenced by the Prison Client's Charter specifically specifying that the objective of setting up a prison is to provide a secure detention area and humane service to prisoners based on the provisions of the law. The law regulating prison affairs are the Prisons Act 1995, Prisons Regulations 1953 (amendment 2000) and Prison Directors' General Instructions. This objective does not touch spiritual interests and is secular in nature.

### **3.4 Distinction of procedure to arrest, remand and trial.**

It is undeniable that offenders, either *Syariah* or Civil have several rights which guaranteed by Federal Constitution. At the same time, Section 28 of Criminal Procedures Code 1935 list down the rights, among others;

- a) Right to know the reason of arrest
- b) Right to communicate with representative/lawyers appointed by himself within 24 hours of arrest.
- c) Right to communicate with relatives or friends and to inform his conditions, within 24 hours of arrest.
- d) Right to have a consultation from appointed representative/lawyers. Such representative/lawyers is allowed to meet the suspect in the place where he is confined before the police officers conduct investigation upon him.

Section 117 of Criminal Procedure Codes 1935 states the right of the suspect to be heard before the magistrate within 24 hours of the arrest as to get the order of remand with minimum 3 days and subject to further extension. Within the time of remand, the suspect has to undergo investigation conducted by police officers.

Unfortunately, this remand procedure is not happened to the *Syariah* criminal offenders. Section 22 of *Syariah* Criminal Procedure (State of Selangor) Enactment 2003 states the procedure on how the person arrested should be treated;

- a) The suspect shall be brought to the magistrate within 24 hours of arrest to be charged.
- b) No detention shall be made after that particular 24 hours.

In other words, there is no investigation procedure practised in *syariah* criminal case.

### **4. Recommendation and Conclusion**

Malaysian Government is yet to separate the prison for *Syariah* and Civil offenders though this issue is quite critical. The offences for *Syariah* and Civil offenders are clearly different. *Syariah* offences mostly are offences between human being and God. For example, if someone commits an offence for not fasting during the month of

*Ramadhan*, this offence is only committed between he himself and God. There is nothing to do with the society at large. While Civil offences are offence toward the public. For instance, robbery, rape, murder and other crimes. Since the physical of the crimes are different, the offenders must be punished with different methods of punishment. It is understood that punishments are sentenced as to give lesson to the offenders. Therefore, to achieve the objective of the punishment, the methods of punishment must be parallel to the types of the offences. Thus, the best method should be applied such as by inserting Holistic modules in the punishment module for *Syariah* offences.

It is recommended that *Jabatan Penjara Malaysia* to collaborate with *Jabatan Kehakiman Syariah Malaysia* (JKSM) in setting up the specific module to the *syariah* offenders. The module shall be made by the committee who have the capacity to draft the module. Those committee must have knowledge and academic qualification on *syariah* criminal together with their expertise in prison module maker so that the approaches can be different from Civil prison module. The module should include personal, religious activities and community services activities.

It is understood that to construct a new building for prison with all facilities and officers may be a burdening cost to the government. Thus, it is recommended that the *Syariah* offenders to be confined in the temporary cell in the premise of the court or even in the temporary cell in the police station. This may not cause harm to the court or police officers since the period of confinement is not more than 5 month (maximum). In practical view, the judge only gives four to five days imprisonment.

In the effort of resolving this matter, *Jabatan Penjara Malaysia*, *Jabatan Kehakiman Syariah Malaysia* (JKSM), police department and law makers should play their roles in the effort of separating the *Syariah* and Civil prisoners. The affairs of the prisoners should be concerned so that the goal of the punishment can be achieved successfully.

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