

The Application of Theft Penalties in the Legal Perspective of Indonesia and Brunei Darussalam

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Abstract. *Theft is generally a crime of taking objects or assets without permission by the suspect against the victim. In the Criminal Code (KUHP) it is regulated in the second book of Chapter XXII regarding crimes against property from articles 362 to 367 of the Criminal Code with penalties depending on the type of theft crime committed. Each country has its own rules and different ways of enforcing the crime of theft. To study this, it is necessary to conduct research on comparative legal systems. Comparison of legal systems is comparing two or more legal systems. Comparing the legal system allows us to see another perspective from the law of a country, because each country has its own norms and values. The law in Brunei Darussalam is the object of this research because it has different characteristics from the law that has developed in Indonesia. The application of theft punishment in Brunei Darussalam is closely related to Malay culture and Islamic religious culture. Therefore, the application of criminal execution for theft refers to the legal system.*

Keywords: Penalty; Crime; Religious.

1. Introduction

Living in the early decades of the 21st century is often identified with the uncertainty of law enforcement and the rapid changes in law along with the rapid development of crime. Because of this uncertainty, calls to reintroduce religious theories, values and practices have gained immense force, both in Muslim and non-Muslim countries. The reintroduction and revitalization of these

religious teachings, especially Islam, in certain areas creates a strong clash between secular and religious tendencies. It is on this plane that the examination of the relevance of Islamic legal doctrines to the modern world and the explanation of these doctrines becomes significant.

Recent issues related to the statement above can be seen in the formalization of Islamic law in Brunei Darussalam. Brunei Darussalam is the only Islamic country that implements Islamic law as a whole in its social and state life at the Southeast Asian level. The enactment of this Islamic law by Sultan Hassanal Bolkiah is considered a great achievement for obeying Allah's commands.

It seems that Brunei Darussalam has succeeded in creating peace and tranquility through the implementation of its *Kanun Jinayah*. This is of course contrary to the assumptions and predictions made by its critics, especially human rights activists. That is why this study wants to reveal more deeply the facts on the ground and draw academic lessons from the ongoing process of law enforcement. The choice of the state of Brunei Darussalam is of course not only because this country is the newest country to enforce Islamic law, but also based on considerations of cultural similarity (Malay), plurality of people, geographical proximity, and similarity of schools of thought that many people adhere to⁵, but also because of the gap between facts and criticisms found by researchers.

One form of crime listed in the second book of the Criminal Code is the crime of theft which is specifically regulated in CHAPTER XXII Articles 362-367 of the Criminal Code. The law of theft in the State of Brunei Darussalam is regulated in the Penal Code, Laws of Brunei which is in Chapter Against Property Theft, Section 378-382.

2. Research Methods

This research is normative juridical in nature, because this research is a library research or document study that is carried out or aimed only at written regulations or other legal materials, which includes research on legal sources, laws and regulations related to the concept of theft in The Criminal Code (KUHP) and Islamic criminal law.

3. Results and Discussion

3.1. Application of the *Jinayah Kanun* Theft Penalty in Brunei Darussalam

The effectiveness of law enforcement in a society is influenced by various factors, both internal factors related to the substance of the rule of law, as well as external factors that are outside the substance of the rule of law. One theory that is widely used in studying law enforcement is the theory put forward by Lawrence M. Friedman. According to Friedman, law as a system will be able to play a role and run well in society if its implementing instruments are equipped with authorities in the field of law enforcement or rules in a place are implemented according to their role. To carry out law enforcement, there are three components that must be met in order to run effectively, namely:

1. Legal substance. Legal substance, namely the content of the law itself which must describe and create justice so that it can be applied in society.
2. Legal structure (legal structure). The legal structure is a legal institution that supports the legal system, which consists of legal institutions, law enforcement officials, facilities and infrastructure that cumulatively determine their work processes and performance.
3. Legal culture. Legal culture is related to public awareness in obeying the law. Public awareness is determined by the community's knowledge and understanding of the law. People who have knowledge of the law will have an understanding of the applicable laws and will then have the awareness to obey the laws that apply in that place.

Furthermore, linking the relationship between *Kanun Jinayah* in Brunei Darussalam which originates from Islamic teachings with the reform of Indonesian Criminal Law is natural and logical, because Islamic law is one of the sources of law for the development of law in Indonesia. Together with Western law and customary law, Islamic law can be a source of material law as well as formal law

The same thing was also expressed by Barda Nawawi Arief who said that rethinking and exploring law in the framework of strengthening crime prevention strategies must be oriented towards a humanist, cultural and religious approach.¹² From this it can be understood that "Islamic law", whether it has been motivated (as in Brunei Darussalam), as well as those still contained in fiqh books, can be significant references and sources of law.

Kanun Jinayah Brunei Darussalam or in the Bruneian language is referred to as the 2013 Sharia *Kanun* Jenayah Punishment is a law relating to criminal acts according to sharia. This law was stipulated as an effort to prevent crimes that could arise in society. In addition, this *Kanun* is also intended to educate and recover convicts in order to protect the rights and interests of the general public and ensure the safety and welfare of the community.¹

The purpose of the Islamic *Jinayah* Law is to maintain 5 maqasid sharia, namely:

1. maintaining religion, that is maintaining the sanctity of the creeds of Muslims.
2. nourishes the soul, that is, prevents the oppression of the soul and limbs.
3. look after descendants, that is look after lineage heredity, guardianship and inheritance.
4. maintaining property, namely preventing destruction and arbitrariness of property.
5. maintain the mind, namely maintaining the purity of the human mind from things that damage.

The implementation of the 2013 Sharia *Jinayah* Penal Code is carried out in stages. The implementation of the law is made very carefully and thoroughly, especially to provide opportunities for the public to understand more deeply about the content and wisdom or benefits behind the mistakes (crimes) that have been determined.²

It is also hoped that gradual implementation will provide space for dealing with misunderstandings that may arise. With good appreciation and belief in the virtues of sharia law, it is hoped that the beauty of this order will be maintained and misunderstandings will be avoided.

Through the information and other efforts to convey news, it is hoped that the general public will better understand the purpose of the *Kanun* Command's proclamation. It is hoped that the community's understanding and appreciation of the *Kanun* Commandments can provide support for the *Kanun*

¹Oktoberrinsyah, "Death Penalty in Islam and Its Relevance to Indonesian Criminal Law", Dissertation for Postgraduate Program at UIN Sunan Kalijaga Yogyakarta, 2011, p. 38-50.

²Ibid.

Commandments based on their respective efforts. As the hope of the Sultan and the Yang Di Pertuan Negara Brunei Darussalam when announcing the announcement of the Order of the Sharia Criminal Code, 2013:

"... I hope that anyone with the status of a citizen and resident of this country, will both stand firm and go hand in hand in supporting and glorifying the birth of this historic deed. Undoubtedly, he is part of the "great history" of us and the country."³

The Canon for Criminal Punishment consists of 5 parts, namely, the Beginning, Except Am, Subbahat, Mistakes and Am. As befits a rule of law, the Preliminary Section contains general provisions regarding the definition of terms used in the Penal Penal Code.

The General Exceptions section contains special provisions that exclude certain actions that are not considered as acts/criminal acts or other laws apply. In Indonesia, this is included in the discussion of justification and forgiveness. Justifying reasons are reasons that can nullify a person's criminal responsibility because his actions (which were previously criminal acts) are justified by law. In this Canon, for example, is the act of a Syar'ie judge when acting judicially. The reason for forgiveness is a reason that can abort someone's criminal responsibility because the perpetrator is forgiven. For example, in the *Kanun* the Jenayah Punishment is the act of a child who is not yet mumayyiz and the act of someone whose mind is imperfect.

The third part, Subahat, contains the inclusion of criminal acts or what is often referred to in Arabic as al-isytirak fī al-jarīmah. This section describes plotting, aiding, instigating and keeping silent (concealing) evil plans or actions.

The fourth part, Mistakes, contains the types of criminal acts and their types and terms of punishment. This section consists of four sections (chapters) which regulate criminal acts of hudud, murder and injury, withdrawing testimony, and general criminal acts (takzir).

The last part is Am which is the concluding part containing the application of Syara' law to actions that are not regulated in the *Kanun*, and also about canceling the previous rules.

³Ibid.

Detailed systematics of the Sharia Jenayah *Kanun* can be seen in the table below:

Part	Chapter	Sub-chapter	Sub-Sub Chapters	Chapter
Part I	Beginnings			1-5
				6 – 24
		Right defense alone		25 – 36
Part III	Friends			37–51
				52
			Sariqah	53–61
			Hibah	62–67
			Adultery	68–74
			Zina bil-jabar	75–81
			Sodomy	82–85
			Mistakes related to adultery, adultery bil-jabar or pass	86–94
			Qazaf	95 – 103
			Drink Which intoxicating	104 – 106
			Irtidad	107–117
				118–123
			qatl	124 – 138
			Qatlu	139 – 145
			'amd syibhil-Qatlul-khata'	146–150
			Qatl with magic	151–154
			qatl with poison	155 – 157
	qatl with an abortion fetus	158 – 164		
	Suicide	165 – 166		
	injury	167 - 183		
	Interesting shahadah Come back	184–191		

	Error- Am's mistake	192–251
Part V	Am	252–253
schedule	Arabic script	
First		
schedule	Type of Injury Itlaf-al-udhw or Throne and Prison Period	
Second		
schedule	Syajjah's Type of Injury, Number of Throne and Prison Period	
Third		
schedule	Jurh Injury Type, Number of Throne and Prison Period	
Fourth		
schedule	Sayings and Sayings	
Fifth		

This Qanun regulates errors (crimes) which, when viewed from the legal subject, can be distinguished as follows:⁴

1. Mistakes imposed on Muslims:
 - a. *Irtidad*(apostate)
 - b. Worship
 - c. Not paying zakat or fitrah
 - d. Do not perform Friday prayers
2. Mistakes imposed on Muslims and non-Muslims:
 - a. *Sariqah*(theft)
 - b. *Hibah*(robbery)
 - c. *Qatl* (murder)
 - d. Causing injury (abuse)
 - e. Insulting the Prophet

⁴Islamic Legal Unit Ministry of Religious Affairs Negara Brunei Darussalam, Syariah Penal Code Order, 2013: A Brief Introduction (Brunei Darussalam: the Government Printing Department Prime Minister's Office Brunei Darussalam, tt), pp: 15-6.

- f. Playing and other verses of the Koran or hadith
 - g. Disrespect
 - h. Disrespecting the month of Ramadan
3. The blame imposed on non-Muslims is subject to circumstances:
- a. *Adultery* if done with Muslims
 - b. *Seclusion* if done with Muslims

Drinking intoxicating beverages in a public place An interesting thing about *Kanun Jenayah Syariah* is that this *Kanun* also includes examples of cases to explain the definition of regulated criminal acts. Case examples in this *Kanun* will make it easier for the public as well as law enforcers to understand *Kanun* rules, and reduce the emergence of multiple interpretations of legal rules which can lead to legal uncertainty.

Another interesting thing about the *Kanun* which consists of 254 articles is that it is stipulated in two languages, namely Malay (the official language of the state of Brunei Darussalam) and English. This *Kanun* was published on Tuesday 22 October 2013.

3.2. Relevance of the Implementation of *Kanun Jinayah* with Indonesian Criminal Law Renewal

Theft qualifications according to the Criminal Code:

1. Common Theft (362)
2. Theft with weights (363)
3. Petty theft (364)
4. Theft with violence (365)
5. Theft in the family (367)

Explanation of theft according to the Penal Code, Laws of Brunei

1. Explanation 1 — A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

2. Explanation 2 — A moving effected by the same action which effects the severity, may be a theft.

3. Explanation 3 — A person is said to cause a thing to move by removing an obstacle which prevents it from moving, or by separating it from any other thing, as well as by actually moving it.

4. Explanation 4 — A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

5. Explanation 5 — The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority, either express or implied.

Renewal of the national criminal law is one of the big agendas that has not materialized to date. Team after team has been formed, seminar after seminar has been conducted, a number of drafts of the Indonesian Criminal Law Bill have been produced, but until now these drafts have not been agreed upon and ratified. Even though the renewal of the national criminal law is very important, considering that the current Criminal Code is a legacy of the Dutch colonial.

The efforts to reform the national criminal law are in essence closely related to law enforcement policies, criminal policies and social policies. In detail it can be said as follows:

1. Renewal of criminal law is basically an attempt to renew legal substance in order to make law enforcement more effective.

2. Renewal of criminal law is also intended to eradicate or overcome crime in the framework of public protection.

3. Renewal of criminal law is part of the national policy to address social and humanitarian problems in order to achieve national goals, namely social defense and social welfare.

4. Criminal law reform is an effort to review and reassess the main ideas, basic ideas, or socio-philosophical, socio-political, and socio-cultural values that

underlie criminal policy and law enforcement policies.) so far. Therefore, the renewal of criminal law must be oriented towards national values and leave the old criminal law values inherited from the colonialists.⁵

Criminal law reform should be motivated and oriented towards the basic ideas of Pancasila which contain a balance of religious moral values, humanity, nationality, democracy and social justice.⁶The religious moral values can be taken from the values of Islam, which is the religion professed by the majority of Indonesia's population. It is from this aspect that a study of Brunei Darussalam's *jinayat* law finds its point of relevance. One of these relevance is the rules relating to religious offenses, moreover these religious offenses have been enforced as positive law in Brunei Darussalam.

Religious offenses themselves in the Criminal Code are not regulated in a special chapter, but actually there are a number of offenses that can be categorized as religious offenses. In this case religious offenses can contain several meanings, namely:

1. Delict according to religion
2. Delict against religion
3. Delicts related to religion⁷

Religious offenses in the first sense are actually widely spread in the Criminal Code, such as murder, theft, fraudulent acts, insults, slander, and decency offenses, but not all of them are exactly what is conceptualized by religion, both in terms of its elements or in terms of punishment. Likewise, not all offenses regulated by religion are also regulated in the Criminal Code.⁸

Religious offenses in the second sense are also regulated in the Criminal Code, for example articles relating to blasphemy against religion and committing acts so that people do not adhere to religion (article 156a). As for religious offenses in the third sense, examples are acts of obstructing religious ceremonial meetings

⁵Barda Nawawi Arief, *Criminal Law Reform in the Perspective of Comparative Studies*, (Bandung: PT Citra Aditya Bakti, 2005), p. 3.

⁶*Ibid.*, p. 4

⁷Barda Nawawi Arief, *Anthology of Criminal Law Policy*, cet. II, (Bandung: PT. Citra Aditya Bakti, 2002), p. 302.

⁸*Ibid*

and burial ceremonies (Article 175), insulting objects for worship (Article 177 2nd), and making noise near buildings for worship or when worship is being performed (Article 2nd 503).³⁶

If we examine in more detail the articles contained in Qanun Jinayat Brunei Darussalam, there are a number of things that could be considered for inclusion in the new Draft Criminal Code, especially those relating to religious offenses, namely:

1. It turns out that religious offenses can be applied to some citizens (only Muslims) and can also be applied to all citizens (both Muslims and non-Muslims). This model of law enforcement actually happened during the Prophet's time in Medina. Even though there has been a collective agreement that must be obeyed by all residents of Medina consisting of Muslims, Jews and Christians, for offenses (according to) religion, the Prophet imposed laws according to the provisions of their respective religions. For example, at that time it was reported to the Prophet about cases of adultery committed by Jews, then the Prophet sentenced them according to what was contained in their holy book, namely the Torah.

2. If point one above is acceptable, then there are several offenses (according to) religion that can be included in the Draft Criminal Code, including:

- a. Seclusion

- b. Leaving fasting

- c. Leaving Friday prayers

3. For offenses against religion, several offenses can be included or emphasized, such as:

- a. Humiliation of the Prophet

- b. Contempt of the Koran

Of course, the concept of offense proposed above can be adapted to the values of nationality, humanity and social justice so that the substance of the law stipulated can be applied properly. reasonable if Islamic religious values contribute to the renewal of the Indonesian Criminal Code, because apart from being in line with the state philosophy of Pancasila, these values are also part of the beliefs that are guided by the majority of the Indonesian population. The

facts of life show that religious values have proven to be effective in fortifying human beings from bad influences, both internal and external. Running away from globalization is something impossible, however, wading through globalization with a sturdy big dipper will save its passengers from being hit by strong waves.

4. Conclusion

After collecting and analyzing data obtained in the field and from written and electronic sources, the following can be concluded: Community legal awareness is quite high due to adequate socialization, and the Malay culture is still firmly rooted, as well as Islamic religious practices that are still strong in Brunei Darussalam, so that it greatly influences the acceptance and implementation of *Kanun Jinayat Syariah*. One of the relevance of the study of *Kanun Jinayat Syariah* with the renewal of Indonesian Criminal Law lies in the study of religious offenses. A number of religious offenses-both had and takzir-which have not been regulated in the current Criminal Code can be included in the new Criminal Code Bill, of course with contextualization.

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