

**THEORETICAL FRAMEWORK OF EVIDENTIARY RULES AND
PUNISHMENTS FOR SEXUAL OFFENCES IN ISLAMIC LAW: THE
EXTENT OF ITS APPLICATION IN BRUNEI DARUSSALAM**

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SUPERVISION

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ABSTRACT

THEORETICAL FRAMEWORK OF EVIDENTIARY RULES AND PUNISHMENTS FOR SEXUAL OFFENCES IN ISLAMIC LAW: THE EXTENT OF ITS APPLICATION IN BRUNEI DARUSSALAM

This research focuses on the evidentiary rules and punishments for sexual offences under Islamic law. Basically, sexual offences under Islamic law stem from the transgression of the prescribed decency and social etiquettes found in the Qur'ān and Sunnah. A mere act of gazing between the non-*mahram* without justifications is considered as sinful in Islam, and *zinā* is the most vastly elaborated sexual offence by the Muslim jurists. Sexual acts under the man-made law are also made punishable according to the enforced legislations. Nevertheless, the nature of the sexual offences, hence the evidentiary rules and punishments, may differ from those found under the Islamic law. Sexual offences in the Laws of Brunei Darussalam are dealt both by the Shari'ah and Civil courts in accordance with the prescribed jurisdictions. The limited jurisdiction of the Shari'ah courts and the significant jurisdiction of the Civil courts to try most of the sexual offence cases thus raise question as to the extent of the application of Islamic law of evidentiary rules and punishments in the existing laws. This research examines the nature of sexual offences under Islamic law, the evidentiary rules and punishments and to observe such in the existing Laws of Brunei Darussalam. The research methodology involves a library-based research, attachments at relevant agencies and interviews with the authorized officers. The researcher makes reference to classical and contemporary Islamic law literatures to trace the views and theories of evidence and punishment of sexual offences by Muslim scholars. This research finds that the evidentiary rules and punishments under Islamic law in relation to sexual offences are – for the time being- not fully observed in the laws of Brunei Darussalam. The practice of dual legal system in the administration of justice somehow affects the observation and application of Islamic evidentiary rules and punishments in the country. Therefore, this research will conclude the comparative study of evidentiary rules and punishments under both laws in order to provide an overview on the theory and practice in Brunei Darussalam which are to be considered for the prospect implementation of Islamic law in the country.

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ABBREVIATION

| | |
|-----------------|--|
| Chap. | Chapter |
| Ed. | Editor |
| ed. | Edition |
| <i>ibid</i> | ion beam induced deposition |
| n.d. | no date / no year |
| No. | Number |
| n.pl. | no publisher |
| <i>Op. cit.</i> | opere citato |
| p. | page |
| pp. | pages |
| RCKCA 1984 | Religious Council and Kadis Court Act 1984 |
| SCE Order 2001 | Shari'ah Courts Evidence Order 2001 |
| v. | verse |

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TRANSLITERATION

| Arabic | Roman / Latin |
|--------|---------------|
| ء | , |
| ب | b |
| ت | t |
| ث | th |
| ج | j |
| ح | Ḥ / ḥ |

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CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION

This research primarily examines the nature of sexual offences under Islamic law. *Zinā* (adultery) is one of the sexual offences which is found to be extensively dealt with in the Islamic literatures by the Muslim scholars. Other sexual offences such as *ikrāh ‘alā al-zinā* (adultery under duress or force), *liwāṭ* (sodomy), *musāḥaqah* (the sexual act between females), *ityān al-*

bahīmah (bestiality), *ityān al-mayyit* (sexual intercourse with dead body), *istimnāʿ* (masturbation), *khalwah* (close proximity of man with a woman other than his wife or *maḥram*¹), preliminary acts of *zinā* such as kissing or touching the non-*maḥram*, and outraging modesty of a person, are also discussed by the scholars with brief explanation.²

¹ *Maḥram* refers to a person of a prohibited degree of marriage. This is as listed in the verse 23 of sūrah al-Nisā and they are; mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters, milk-mothers, milk sisters, mothers of the wives, step-daughters whom the mother he has had sexual intercourse with, the wives of the son, and the wife's sister. There are vast elaborations by Muslim scholars concerning the framework of *maḥram*. The scholars basically agreed that, *maḥram* refers to the eternal persons forbidden to marry due to *nasab* (blood relationship), or the relationship by *radāʿ* (milking) or *muṣāharah* (marriage). See Al-Nawawī al-Dimashqī, Abu Zakariyyā Yahyā ibn Sharaf. (2000). *Minhāj al-Ṭālibīn*. Aīmad ibn ʿAbd al-ʿAzīz al-Ḥaddād. ed. Bayrūt: Dār al-Bashāʿir al-Islāmiyyah. vol. 2. pp. 444 – 451. ; Bahāʿuddīn ʿAbd al-Raḥmān ibn Ibrāhīm al-Maqdisī. (1988). *Al-Uddah Sharḥ al-Umdah*. Bayrūt: Dār al-Fikr. pp. 370 – 383. ; Ibn al-Humām al-Ḥanafī, Kamāl al-Dīn Muḥammad ibn ʿAbd Al-Wāḥid al-Sīwāsī. (1995). *Sharḥ Faṭḥ al-Qadīr*. Abd al-Razzāq Ghālīb al-Mahdī, ed. vol. 3. pp. 199 – 209. ; Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm. (n.d.) *Al-Muḥallā* Aḥmad Muḥammad Shākir. ed. Bayrūt: Dār al-Fikr. vol. 9. pp. 520 – 532. ; Al-Qairawānī, Abū Muḥammad ibn ʿabd al-Raḥmān Abū Zayd. (1999). *Al-Nawādir wa al-Ziyādāt*. Muḥammad Hajjī ed. Bayrūt: Dār al-Gharb al-Islāmī. vol. 4. pp. 503 – 521.

² See Ibn Nuḡaym al-Maṣarī al-Ḥanafī, Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad. (1997). *Al-Baḥr al-Rāʿiq Sharḥ Kanz al-Daqāʿiq*. Zakariyyā Umayrāt. ed. Bayrūt: Dār al-Kutub al-ʿIlmiyyah. vol. 5. pp. 3 – 41. ; Ibn ʿAbidīn, Muḥammad Amīn. (1992). *Hāshiyat Radd al-Mukhtār*. Bayrūt: Dār al-Fikr. vol. 4. pp. 3 – 36. ; Ibn al-Humām al-Ḥanafī, Kamāl al-Dīn Muḥammad ibn ʿAbd Al-Wāḥid al-Sīwāsī. (1995). *Sharḥ Faṭḥ al-Qadīr*. ed. ʿAbd al-Razzāq Ghālīb al-Mahdī. Bayrūt: Dār al-Kutub al-ʿIlmiyyah. vol. 5. pp. 235 – 338. ; Al-Sarakhsī, Abū Bakr Muḥammad ibn Abū Sahl. (1986). *Kitāb al-Mabsūt*. ed. Khalīl Muḥyi al-Dīn al-Mays. Bayrut: Dar al-Maʿrifah. vol. 9. pp. 41 – 119. ; Al-Zaylaʿī, Fakr al-Dīn ʿUthmān ibn ʿAlī. (n.d.). *Tabyīn al-Ḥaqāʿiq Sharḥ Kanz al-Daqāʿiq*. Miṣr: Dār al-Kitāb al-Islāmī. vol. 3. pp. 163 – 195. ; Al-Khurashī, Muḥammad ibn ʿAbd Allāh Abū ʿAbd Allāh. (n.d.) *Al-Khurashī ʿalā Mukhtaṣar Saidī Khalīl*. n.pl. Dār al-Fikr. vol. 7. pp. 75 – 85. ; Mālik ibn Anas al-Aṣbaḥī. (n.d.) *Al-Mudawwanat al-Kubrā*. Bayrūt: Dar al-Fikr. vol. 4. pp. 379 – 410. ; ʿAbd al-Ḥamīd Al-Sharwānī & Aḥmad ibn al-Qāsim al-ʿAbbādī. (1997). *Ḥawāshī*. Bayrūt: Dār al-Fikr. vol. 9. pp. 119 – 139. ; Al-Sharbīnī, Shams al-Dīn Muḥammad ibn al-Khaṭīb. (1998). *Mughni al-Muḥtāj*. ed. Ṣidqī Muḥammad Jamīl al-ʿAṭṭār, Bayrūt: Dār al-Fikr. vol. 4. pp. 177 – 191. ; Al-Sharbīnī, Shams al-Dīn Muḥammad ibn Aḥmad. (1996). *Al-Iqnaʿ fī Halli Alfaz Abī Shujāʿ*. ʿAlī ʿAbd al-Majīd Abū al-Khayr & Muḥammad Wahabī Sulaymān, eds. Bayrūt: Dār al-Khayr. vol. 2. pp. 723 – 732. ; Al-Umrānī, Yahyā ibn Abu al-Khayr Sālim ibn Asʿad ibn ʿAbd Allah ibn Muḥammad ibn Mūsā ibn ʿImrān. (2002). *Al-Bayān fī al-fiqh al-Imām al-Shāfiʿī*. Bayrūt: Dār al-Kutub al-ʿIlmiyyah. vol. 12. pp. 345 – 393. ; Al-Nawawī, Abū Zakariyyā Muḥyi al-Dīn ibn Sharf. (1980). *Kitāb al-Majmū Sharḥ al-Muhazzhib li al-Shīrāzī*. Muḥammad Najīb al-Muṭīʿī. ed. Jeddah: Maktbat al-Irshād. vol. 4. pp. 292 – 345. ; Al-Nawawī al-Dimashqī, Abu Zakariyyā Yahyā ibn Sharaf. (1991). *Raudat al-Ṭālibīn wa ʿUmdat al-Muṭīn*. Bayrut: Al-Maktabat al-Islāmī. vol. 10. pp. 86 – 105. ; Al-Shīrāzī, Abū Ishāq. (1996). *Al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī*. ed. Muḥammad Zuḥaylī. Dimashq: Dār al-Qalam. vol. 5. pp. 371 – 592. ; Al-Nawawī. (2000). *Op. cit.*, vol. 3. pp. 205 – 213. ; Al-Ramlī, Shams al-Dīn Muḥammad ibn Abī al-ʿAbbās Aḥmad ibn Ḥamzah ibn Shihāb al-Dīn. (1984). *Nihāyat al-Muḥtāj Ilā Sharḥ al-Minhāj*. Bayrūt: Dār al-Fikr. vol. 7. pp. 422 – 435. ; Al-Māwardī, Abū al-Ḥasan ʿAlī ibn Muḥammad ibn Ḥabīb. (1994). *Al-Ḥāwī al-Kabīr*. Maḥmūd Ḥaṭraji. et. al. Bayrūt: Dār al-Fikr. vol. 17. pp. 3 – 100. ; Ibn Qudāmah al-Maqdisī, Abū Muḥammad ʿAbd Allāh ibn Aḥmad ibn Muḥammad. (1994). *Al-Mughnī ʿalā Mukhtaṣar al-Kharqī*. ʿAbd al-Salām Muḥammad ʿAlī Shāhīn. ed. Bayrūt: Dār al-Kutub al-ʿIlmiyyah. vol. 8. pp. 110 – 150. ; Ibn Qudāmah al-Maqdisī, Abū Muḥammad ʿAbd Allāh ibn Aḥmad ibn Muḥammad & Ibn Qudāmah al-Maqdisī, Shams al-Dīn Abī al-Faraj ʿAbd Raḥmān ibn Abī ʿUmar Muḥammad ibn Aḥmad. (1994). *Al-Mughnī wa al-Sharḥ al-Kabīr*. Bayrūt: Dār al-Fikr. vol. 10. pp. 116 – 190; Ibn Ḥazm. (n.d.) *Al-Muḥallā*. *Op. cit.*, vol. 11. pp. 118 – 188; 257 – 265; 300 – 318; 380 – 394; 401 – 404.

The research also examines the evidentiary rules of establishing the above-mentioned sexual offences under Islamic law in the classical and contemporary literatures of Muslim scholars as well as the punishments of such offences under Islamic law.

The research also looks at the nature and types of sexual offences punishable under the Brunei laws. Since Brunei Darussalam is governed by the dual legal system, the categorization of sexual offences, therefore, focuses on the jurisdiction and nature of sexual offences provided under the Brunei Shari'ah laws and the Brunei Civil laws. The study also observes the application of evidentiary rules and punishments of sexual offences under Brunei laws, cases and judgments of the Shari'ah courts and the Civil courts.

The research observes the theoretical framework of evidentiary rules and punishments for sexual offences under Islamic law as elaborated by Muslim jurists and their existence and authoritative operation in the governing Laws of Brunei Darussalam in order to study the extent of its application. The extent of observing the application of such laws includes the study of the relevant provisions, the judgments of related cases and the elaboration of laws by the authorities.

1.2 STATEMENT OF PROBLEM

Brunei Darussalam practises the dual legal system to the effect in which the Islamic law is practised only by the Shari'ah courts, while the civil courts practise the laws based on the British legal system. The Islamic law is not however practiced by the Shari'ah courts in its full sense due to its limited jurisdiction. The Shari'ah courts are to exercise their jurisdiction in accordance with the Islamic law and are also bound for-the-time-being, by the Criminal Procedure Code adopted by the Civil courts. This to some extent, results in confusion as to the appropriate application of Islamic evidentiary rules and punishments in the country. There is a limited jurisdiction for the

Shari'ah courts to exercise the Islamic law as a whole, since the laws on sexual offences are mostly covered by Civil laws of Brunei, though not all Civil laws are in contradiction to the Islamic law. This research will examine the extent of the application of Islamic law in sexual offences in both of the Shari'ah and Civil courts in Brunei Darussalam.

1.3 RATIONALE OF THE RESEARCH

Although there are many studies on Islamic criminal law, based on the researcher's knowledge and study, there is no exclusive academic research on the application of evidentiary rules and punishments for sexual offences under Islamic law in the Laws of Brunei Darussalam. Therefore, it is justified to examine this topic of research in order to understand the theoretical framework of evidentiary rules and punishments for sexual offences laid down by Muslim scholars, and to observe its application in the dual legal system of Brunei Darussalam.

1.4 RESEARCH QUESTIONS

This research focuses on the following questions:

1. What are the types of sexual offences made punishable under the Islamic law?
2. What are the types of sexual offences made punishable under the Laws of Brunei Darussalam?
3. What are the evidentiary rules in establishing sexual offences under the Islamic law?
4. What are the evidentiary rules in establishing sexual offences under the Laws of Brunei Darussalam?
5. What are the punishments provided for sexual offences under the Islamic law?
6. What are the punishments provided for sexual offences under the Laws of Brunei Darussalam?
7. To what extent the sexual offences and the evidentiary rules and punishments under the Islamic law are observed in the Laws of Brunei Darussalam?
8. What are the findings and recommendations of this research?

1.5 OBJECTIVES OF RESEARCH

This research aims at the following objectives:

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