

**INCESTUOUS RAPE UNDER THE LAWS OF  
BRUNEI DARUSSALAM AND THE SHARIAH**

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**1441H / 2020M**

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

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DARUSSALAM AND THE SHARIAH**

**NOR AZUANA BINTI ASMALEE  
17MR603**

**A THESIS SUBMITTED IN FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF  
MASTER OF LAW**

**Faculty of Shariah and Law  
Universiti Islam Sultan Sharif Ali  
Negara Brunei Darussalam**

**Syaban 1441 / April 2020**

## **SUPERVISION**

**INCESTUOUS RAPE UNDER THE LAWS OF BRUNEI DARUSSALAM AND  
THE SHARIAH**

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## ACKNOWLEDGEMENT

I am deeply grateful to Allah (سبحانه وتعالى) and His Messenger Muhammad (صلى الله عليه وسلم) for having made it possible to complete this research paper- I express sincere gratitude to the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam, who granted me a scholarship to pursue a degree of Master of Law at Sultan Sharif Ali Islamic University. I wish to express my sincere appreciation to my supervisor, Dr Ahmad Masum for his continued support and guidance during the writing of this research paper. I also take this opportunity to thank Ustazah Nooraida binti Haji Timpus and ASP Sir Mohammad Amerol bin Haji Metussin for being accommodative to my request to interview them for the purpose of my research despite their busy work schedule. Moreover, I thank my parents, husband, families and friends who had given continuous support during the two years journey as a Master of law student. Lastly, special thanks to my sons Muhammad ‘Atta Wajdi bin Haji Muhammad Azri and Muhammad ‘Imad Hamdi bin Haji Muhammad Azri who have been motivating factors pushing me to complete this research within the stipulated time frame given to me by the university. May Allah (سبحانه وتعالى) bless all of you in this world and in the Hereafter. Amin.

## **ABSTRACT**

### **INCESTUOUS RAPE UNDER THE LAWS OF BRUNEI DARUSSALAM AND THE SHARIAH**

Incestuous rape is the sexual abuse of a victim by a relative or other person in a position of trust. Compared to rape by stranger, incestuous rape crime is more painful as it hides secrets and dark experience faced by the victims. The major factor in an incest situation is that, within the power structure of the family, the child's needs for security, acceptance, and love are exploited in a sexual manner. This research revolves around a wide range of problems such as the absence of specific provision or section in our existing laws addressing the offence of incestuous rape, the problem of silent witnesses and the different views of the Muslim jurists on incestuous rape. Based on these problems, one of the main objectives of this research is to study the position of incestuous rape under the laws of Brunei Darussalam and the Shariah. In analysing this objective, a corresponding research question is asked that is, what is the position of incestuous rape under the laws of Brunei Darussalam and the Shariah. In terms of research methodology, the research adopts a doctrinal legal research and empirical approach. As to the findings, the research concludes that there is no specific legislation or separate section based on our current existing laws on incestuous rape. In addition, there is also no section in our current existing laws criminalising the act of silent witnesses such as immediate family members who are aware of the incestuous rape but decide to keep quiet. The research recommends for a new section or a separate section to specifically deal with incestuous rape. Furthermore, the research also recommends for a new section to be incorporated into our current existing laws to criminalise the act of the silent witnesses.



## ABSTRAK

### ROGOL SUMBANG MAHRAM DI DALAM UNDANG-UNDANG BRUNEI DARUSSALAM DAN SHARIAH

Rogol sumbang mahram adalah penderaan seksual ke atas mangsa oleh seseorang yang mempunyai ikatan persaudaraan atau mana-mana orang yang dipercayai. Jenayah rogol sumbang mahram adalah lebih perit berbanding rogol oleh orang asing kerana ia menyembunyikan rahsia gelap yang dihadapi oleh mangsa. Faktor utama dalam situasi sumbang mahram melibatkan struktur kuasa dalam keluarga di mana keperluan seorang anak untuk keselamatan, penerimaan dan kasih sayang telah dieksploitasi secara seksual. Penyelidikan ini berkisarkan ruang lingkup permasalahan yang luas, antara lain tiadanya peruntukan atau seksyen khusus dalam undang-undang sedia ada untuk menangani kesalahan rogol sumbang mahram, isu saksi-saksi yang berdiam diri dan isu berkenaan pandangan-pandangan berbeza di kalangan pakar undang-undang Islam berkaitan rogol sumbang mahram. Berdasarkan isu-isu tersebut, salah satu objektif utama penyelidikan ini adalah untuk membuat kajian berkenaan kedudukan rogol sumbang mahram di bawah undang-undang Brunei Darussalam dan undang-undang Shariah. Dalam menganalisa objektif tersebut, soalan penyelidikan yang sepadan adalah, apakah kedudukan rogol sumbang mahram di bawah undang-undang Brunei Darussalam dan undang-undang Shariah. Kaedah penyelidikan yang digunakan adalah kajian doktrinal undang-undang (*“doctrinal legal research”*) dan pendekatan empirik (*“empirical approach”*). Manakala dapatan yang diperolehi daripada kajian ini merumuskan bahawa tiada undang-undang khusus atau seksyen yang berasingan berkaitan rogol sumbang mahram di bawah undang-undang sedia ada. Dapatan juga diperolehi bahawa tiada sebarang seksyen di bawah undang-undang sedia ada yang menjadikan satu kesalahan jenayah bagi saksi-saksi yang berdiam diri seperti ahli keluarga rapat yang mempunyai pengetahuan berkenaan rogol sumbang mahram tetapi memilih untuk berdiam diri. Kajian ini mencadangkan agar diperuntukkan seksyen baru atau undang-undang berasingan secara khusus berkenaan rogol sumbang mahram. Dapatan juga mencadangkan agar diwujudkan seksyen baru dalam undang-undang sedia ada yang memperuntukkan bahawa adalah menjadi satu kesalahan jenayah bagi saksi yang berdiam diri berkaitan rogol sumbang mahram.

## ملخص البحث

### اغتنصاب المحارم تحت قوانين بروناي دار السلام والشريعة

اغتنصاب المحارم هو الاعتداء الجنسي من عائلة قريبة أو من الذي يعطي ثقة ليعتني بالضحية. بالمقارنة مع الاغتصاب من الغرباء، فإن جريمة الاغتصاب وسفاح المحارم أكثر إيلاماً لأنها تخفي الأسرار والخبرة السيئة على الضحية. العامل الرئيسي في حالة سفاح المحارم هو حول هيكل سلطة الأسرة، احتياجات الطفل للأمان، والقبول، والحب التي تستغل بطريقة جنسية. فهذا البحث يدور حول مجموعة واسعة من المشاكل مثل عدم وجود نص أو قسم محدد في قوانيننا الحالية التي تتناول جريمة الاغتصاب وسفاح المحارم، ومشكلة الشهود الصامتين وآراء مختلفة من الفقهاء المسلمين حول اغتنصاب المحارم. بناءً على هذه المشاكل، فإن أحد الأهداف الرئيسية لهذا البحث هو دراسة موقف الاغتصاب من سفاح المحارم تحت قوانين بروناي دار السلام والشريعة. عند تحليل هذا الهدف، فيُطرح سؤال؛ ما هو موقف الاغتصاب من سفاح المحارم تحت قوانين بروناي دار السلام والشريعة. أما من حيث منهجية البحث، فيعتمد البحث على البحث القانوني الفقهي والنهج التحريبي، وبالنسبة إلى النتائج، فيخلص البحث إلى أنه لا يوجد تشريع محدد أو قسم منفصل بناء على قوانيننا الحالية عن الاغتصاب من سفاح المحارم. وبالإضافة إلى ذلك، لا يوجد أي قسم في قوانيننا الحالية الذي يجرم فعل الشهود الصامتين مثل أفراد الأسرة الأقربين الذين يعونون الاغتصاب من سفاح المحارم لكنهم قرروا الصمت. فيوصي البحث على قسم جديد أو قسم منفصل ليعالج بصفة خاصة اغتنصاب المحارم، كما يوصي كذلك على إدراج قسم جديد في قوانيننا الحالية لتجريم فعل الشهود الصامتين.

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## LIST OF TRANSLITERATION

**Transliteration Table**

Arabic / الحروف العربية	Roman / الكتابة بالحروف الرومانية	Example / الأمثلة	Transliteration / الكتابة الحرفية
ء	'	فقهاء	fuqahā'
ب	b	البخاري	al- Bukhārī
ت	t	الترمذي	at- Tirmidhī
ث	th	الحديث	al- hadith
ج	j	جريمة	jarīmah
ح	ḥ	الحد	al- ḥadd
خ	kh	خندق	khandaq
د	d	الدليل	ad- dalīl
ذ	dh	ذمي	dhimmī
ر	r	رسول الله	Rasūlullah
ز	z	زنا	zinā
س	s	الأسلامي	al-aslami
ش	sh	الشافعي	as-Shāfi'ī
ص	ṣ	إحصان	Ihṣān
ض	ḍ	وضوء	wuḍu
ط	ṭ	وطء	waṭ'i
ظ	ẓ	ظهار	ẓihar
ع	ʿ	تعزير	taʿzir
غ	gh	المغني	al-Mughnī
ف	f	فراق	faraq
ق	q	القصد	al- qasd
ك	k	الكاساني	al-Kāsānī
ل	l	لعان	Li'an



م	m	ميمز	Mumaiyyiz
ن	n	النكاح	an-Nikāh
ه , هـ	h	هارون / شهادة	Hārūn / shahādah
و	w	النووي	an-Nawawī
ي	y	اليمين	al-Yamīn

### Short Vowel

Arabic	Roman	Example	Transliteration
اَ	a	كَتَبَ	kataba
اِ	i	سَمِعَ	sami'a
اُ	u	رُفِعَ	rufi'a

### Long Vowel

Arabic	Roman	Example	Transliteration
اِي   اِي	ā	بَاب	bāb
اِي	ī	صِيغَة	sīghah
اُو	ū	مَجْنُون	majnūn

### Diphthong

Arab	Latin	Contoh	Transliterasi
اَو	aw	قَوْل	qawl
اَي	ay	بَيْن	bayna
اَي	iy	الْبَيْنَة	al-baiyyinah
اَو	uww	قَوَّة	quwwah

### Exemptions

Some of the Arabic term is in accordance with the provisions of the law.

## ABBREVIATION

BLR	Brunei Law Report
Chap / Cap	Chapter
CLJ	Current Law Journal (Malaysia)
Ed.	Editor
ed.	Edition
ibid	<i>ion beam induced deposition</i>
JCBD	Judgement of Brunei Darussalam
KL	Kuala Lumpur
MLJ	Malaysian Law Journal
n.d	no date / year
NBD	Negara Brunei Darussalam
No.	Number
n.pl	No publisher
Op.cit	<i>Opus citatum est</i>
p.	Pages
Sec. / S	Section
UK	United Kingdom, London
V	Verse
Vol.	Volume
... etc	<i>et cetera</i>

## LIST OF CASES

- Abdul Malek bin Atan v PP* [2002] 4 MLJ 84 (HC)
- Bree* [2007] EWCA Crim 804, [2007] 2 All ER 676, CA
- Corbett V Corbett* [1970] 2 All ER 33
- DPP v Morgan* [1976] AC 182 [House of Lords]
- Fakhrul Azman bin Awang Magani v Public Prosecutor* (Criminal Appeal No.44 of 2014, Attorney General Library's Copy)
- Federation of Pakistan v Hazoor Bakhsh* PLD 1 1983 FSC 255
- Hazoor Bakhsh v Federation of Pakistan* PLD 1981 FSC 145
- Jamaluddin bin Hashim v Public Prosecutor* [1999] 4 MLJ 1
- Jehan Mina v. State* 35 P.L.D. 1983 F.S.C. 183 (1983),
- Kuldeep K Mahato* AIR 1998 SC 2694
- Mohammad Ehsan Niezam v Public Prosecutor* (Criminal Appeal No 17 of 2016, Attorney General Library's Copy)
- Public Prosecutor v Hibatul Wafi bin Mahari* (High Court Revision No.35 of 2013, Judgements Court of Brunei Darussalam)
- Public Prosecutor v RBAHI* (High Court Revision No. 17 of 2015, Judgements Court of Brunei Darussalam)
- Public Prosecutor v JBJ* (High Court Revision No. 5 of 2014, Judgements Court of Brunei Darussalam)
- Public Prosecutor v RBAHI* (High Court Revision No. 17 of 2015, Judgement Court of Brunei Darussalam)
- Public Prosecutor v P bin Hj P* (Intermediate Court Revision No.7 of 2006, Judgements Court of Brunei Darussalam)
- Public Prosecutor v Muhamad Ratino bin Abdullah Lito* (High Court Revision No 12 of 2014, Judgements Court of Brunei Darussalam)
- Public Prosecutor v Hamran bin Bakar* (Criminal Appeal Revision No 6 of 2016, Judgements Court of Brunei Darussalam)
- PP v Abdul Rahim bin Haji Ahmad & Ors* [1998] BLR 143
- Public Prosecutor v Zainal Abidin bin Ismail* [1987] 2 MLJ 741
- PP v Suhaimi bin Nickman* [1993] BLR 139 (CA)
- Public Prosecutor v Metussin, Billy* [1993] BLR 366 (HC)

*Public Prosecutor v M.S* [2005] 2 BLR 233

*Public Prosecutor v Abdullah Sani bin Kafli* (High Court Criminal Revision No. 19 of 2004, Judgements Court of Brunei Darussalam)

*Public Prosecutor v A.S bin K* (High Court Criminal Revision No. 3 of 2017, Judgements Court of Brunei Darussalam)

*Queen Empress v Gopala* [1896] Rat Un Cri C 865

*R v Flattery* (1877) 2 QBD 410

*Rafaqat Bibi v. State N.L.R.* 1984 S.D. 165 (F.S.C. 1984)

*Safia Bibi v. State* 37 P.L.D. 1985 F.S.C. 120 (1983)

*Sakina v. State* 33 P.L.D. 1981 F.S.C. 320 (1981).

*State of Maharashtra v Prakash* AIR [1992] SC 1275

*The State v Sarfaraz* S.C. 233 of 2004

*The State v Muhammad Iqbal* S.C. 414 of 2008.

*The State v Mehmood Ahmed* S.C. 399 of 2009

*Vijayan Pillai* [1990] 1 Crimes 261 (Ker)

## **LIST OF STATUTES**

### **Laws of Brunei**

Criminal Procedure Code, Cap 7

Evidence Act, Cap 108

Penal Code, Cap 22

Religious Council and Kadis Court Act, Cap 77

Shari'ah Penal Code Order 2013

### **Other laws**

Malaysia Penal Code

Singapore Penal Code

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background of the Study

Incestuous relationship is sexual intercourse between those persons who are closely related and as a result are prohibited to marry each other.<sup>1</sup>

The term incest refers to sexual contact between family members. Meanwhile, Vanderbilt, Erbilt, has defined incest as "...the sexual abuse of a child by a relative or other person in a position of trust and authority over the child. It is a violation of the child where he or she lives -- literally and metaphorically. A child molested by a stranger can run home for help and comfort. A victim of incest cannot."<sup>2</sup>

From the above definition of the term 'incest', it provides an understanding about non-consensual incestuous relationship. Those who are raped by stranger can still consider home as a safe place but not for the victim of incest who will always live in fear. Compared to rape by stranger, incest crime is more painful as it hides secrets and dark experience faced by the victim.<sup>3</sup>

There is also no separate section which specifically discussed on incestuous rape but that offence is categorized under the category of *zinā bi al-Jabr* in Brunei Darussalam Shari'ah Penal Code under section 75.

Rape or *zinā bi al-Jabr* is defined as "a person (A) commits rape if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

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<sup>1</sup> Dato' Hj Mohammad Shariff bin Haji Abu Samah, Datin Hj Asidah binti Hj Mohd Ali. (2002). *Alman Criminal Law in Malaysia*. Malaysia: Syarikat Percetakan Ihsan. p.375.

<sup>2</sup> Hamid Ibrahim and Naseer Hamid. (2008). *Rape & Incest, cases and Materials*. Petaling Jaya: Gravel Publication. p.5.

<sup>3</sup> Prof. Dr Anwarullah. (2008). *The Criminal Law of Islam*. 3<sup>rd</sup> ed. Kuala Lumpur, Malaysia. p.119.

B does not consent to the penetration and A does not reasonably believe that B consents.”<sup>4</sup> This is based on English’s law definition. However, in Brunei Darussalam the definition of rape can be seen from section 375 of the Brunei Penal Code<sup>5</sup>. The section defines the offence of rape as follows:

375. A man is said to commit “rape”, who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the 5 following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
- (d) with her consent, when the man knows that he is not he husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married;
- (e) with or without her consent when she is under 14 years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife, the wife not being under 13 years of age, is not rape.

The difference between the English’s law definition and definition under the Brunei Penal Code Order is that the former definition focuses more on penetrations that includes penetration of the victim’s mouth which is not available in the Brunei Penal Code.

Many of the victims do not report the crime because they are afraid of the accused. In addition, they feel ashamed and have no knowledge about the law. This crime has ruined many of the victim’s life. This sexual abuse within family has been

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<sup>4</sup> Mick Woodley. (2009). *Osborn’s Concise Law Dictionary*. 11<sup>th</sup> ed. United Kingdom: Thomson Reuters (Legal) Limited. p.343.

<sup>5</sup> Negara Brunei Darussalam (1951). *Penal Code. (Revised Edition 2001)*. Chapter 22.

proven to be the root cause of other social diseases such as prostitution, homosexual, robbery, murder and etc.<sup>6</sup>

Due to the seriousness of incestuous rape crime, law plays an important role to prevent such crime. Prior to the coming of the British to Brunei Darussalam, Brunei has been governed by Islamic Law which was in a codified form. There were two manuscripts known as “*Hukum Kanun Brunei*” (which was kept at Language and Literature Bureau) and “*Undang-Undang dan Adat Brunei Lama*” (which is now kept in Sarawak).<sup>7</sup>

Based on the brief information above, this research is indeed timely as it aims to study incestuous rape under the Laws of Brunei Darussalam and the Shariah. This is because this country needs a clear interpretation and application, i.e. Brunei Penal Code and the Shari’ah Penal Code Order 2013. Research will focus on examining, the methodology of proving the offence and punishment of incestuous rape crime based on the opinions of different Muslim scholars.

As mentioned in *Public Prosecutor v RBHI*, incestuous rape has provided a lot of negative effects. It is regarded as undeniably a degrading, humiliating and a brutal invasion of a person’s most intimate private space. The serious nature of the crime upon the young victim will cause emotional and psychological trauma on the victim.<sup>8</sup> The statistic for rape and incestuous rape can be seen as follows:

Table 1.1

The statistic of Brunei Darussalam’s incestuous rape cases from 2014 to 2017

Year	Rape Cases	Incestuous Rape Cases	Relationship	No. of Cases
2014	20	7	Uncle	4
			Father	2
			Step Father	1
2015	25	6	Father	5
			Step Father	1
2016	26	8	Uncle	3

<sup>6</sup> Azizah Othman, Azelin Aziz. (n.d). Fenomena Sumbang Mahram di Kalangan Masyarakat Islam di Malaysia, Retrieved from <http://repo.uum.edu.my/1815/>. [date of access: 30/10/2017]

<sup>7</sup> Azrimah binti Haji Abdul Rahman. (n.d). Working Paper for International Day Seminar 2006. “Legal System in Brunei Darussalam After the Signing of Supplementary Agreement 1905/1906 between Brunei & Great Britain”. Retrieved from [http://www.bruneiresources.com/pdf/nd06\\_azrimah.pdf](http://www.bruneiresources.com/pdf/nd06_azrimah.pdf) [date of access: 30/10/2017]

<sup>8</sup> (High Court of Brunei Darussalam) (Criminal Trial No. 17 of 2015)



			Grandfather	2
			Father	2
			Step Father	1
2017	26	9	Father	4
			Brother	2
			Stepfather	1
			Grandfather	1
			Uncle	1

\*Source: ASP Mohammad Amerol bin Haji Metussin, Criminal Investigation Department Bandar Seri Begawan (2018, May 9<sup>th</sup>). Personal Interview.

Furthermore, Brunei Darussalam practises a dualistic court system. There are two laws available such as Islamic law as well as Civil law. This research will only focus on the statutes related to the crime of incest such as the Brunei Penal Code and the Brunei Shari'ah Penal Code Order 2013.

There are three important sections in the Brunei Darussalam Penal Code pertaining to this crime which is governed under sections 375, 376 and 377A of the Brunei Darussalam Penal Code. By virtue of section 375 of Penal Code<sup>9</sup>, it states that:

“A man is said to commit “rape”, who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
- (d) with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married;
- (e) with or without her consent when she is under the age of 14 years.

<sup>9</sup> Negara Brunei Darussalam (1951). *Penal Code. (Revised Edition 2001)*. Chapter 22.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife, the wife not being under the age of 13 years, is not rape.

The first clause operates, where the woman is in possession of her senses, and therefore capable of consenting but the act is done against her will. The second clause means the act is done without her consent. Meanwhile, the third, fourth and the fifth clauses provide that there is consent but it is not an excuse for the offender. Subject to third clause, consent is obtained by putting the victim or any person in whom she is interested in fear of, death, or of hurt. In the fourth clause, it is a situation where the accused had knowledge that he is not her husband and the victim consented because she believed herself to be lawfully married to the accused. The fifth clause provides that where the intercourse is with a girl so young that consent is immaterial<sup>10</sup>

The above clauses have explained the elements to be fulfilled in order to constitute the offence rape. This is applicable to both Muslims and non-Muslims for any sexual abuse. The offence of rape in this section is without consent or by force. It is rape in general without giving a specification whether it is rape done by a stranger or by the family member themselves.

The punishment for rape is provided under section 376 of the Brunei Darussalam Penal Code<sup>11</sup> and it states that:

- (1) Subject to subsections (2), (3), and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to 30 years and whipping.
- (2) Whoever -
  - (a) in order to commit or to facilitate the commission of an offence of rape against a women -
    - (i) voluntarily causes hurt to her or to any other person; or

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<sup>10</sup> Ratanlal and Dhirajlal's. (2000). *Law of Crimes*. 26<sup>th</sup> ed. New Delhi: Bharat Law House. p.1781.

<sup>11</sup> Negara Brunei Darussalam (1951). *Penal Code. (Revised Edition 2001)*. Chapter 22.

- (ii) puts her in fear of death or hurt to herself or any other person;
  - (b) commits rape against a woman under 14 years of age; or
  - (c) is in a position of trust or authority towards a woman or is a person with whom the woman is in a relationship of dependency, commits rape against a woman, Shall be punished with imprisonment for a term of not less than 10 years and not more than 30 years and whipping with not less than 12 strokes.
- (3) Whoever commits rape against a woman under 14 years of age:
- (a) voluntarily causes hurt to her or to any other person,
  - (b) puts her in fear of death or hurt to herself or any other person;
  - (c) is in a position of trust or authority towards her is a person whom she is in a relationship of dependency, shall be punished with imprisonment for a term of not less than 15 years and not more than 30 years and whipping with not less than 12 strokes.
- (4) Any person who is convicted of an offence under this section shall, in the case of a second or subsequent conviction, be punished with imprisonment for a term not less than 20 years and not more than 50 years and whipping not less than 20 strokes.
- (5) In any case in which section 258 of the Criminal Procedure Code [Chapter 7] applies, the Court shall sentence the offender, instead of whipping to imprisonment for a term which may extend to 12 months, in addition to the punishment to which he has been sentenced under this section”.

In addition, section 377A of the Penal Code<sup>12</sup> deals with the offence of incest and it states that:

“(1) Whoever -

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<sup>12</sup> Negara Brunei Darussalam (1951). *Penal Code. (Revised Edition 2001)*. Chapter 22.

(a) being a male, has sexual intercourse with a female who to his knowledge is his mother, grandmother, granddaughter, daughter, sister or half-sister; or

(b) being a female has sexual intercourse with a male who to her knowledge is her father, grandfather, grandson, son, brother or half-brother,

is said to commit “incest” and shall be punished with imprisonment for a term not exceeding 10 years and fine.

Explanation - It is immaterial whether the relationship between the persons charged is or is not traced through lawful wedlock.

(2) This section does not apply to Malays and other races indigenous to Brunei Darussalam who by their own law or custom are punishable for having sexual intercourse within prohibited degrees of relationship.

The above section provides for incestuous crime committed consensually by the non-Muslims. The accused will be held liable if they have knowledge about their blood relationship. There is no defence to say that their relationship is consensual.<sup>13</sup> However, they will not be held liable under this section if they had no knowledge about their blood relationship. In other words, it is a defence for the accused to prove that he or she did not know the relationship was of such nature.<sup>14</sup>

Moreover, subject to section 377A (2), the section does not apply to the Malay Community. The Malay Community of Brunei Darussalam is governed by section 178 (3) of the Religious Council and Kadis Court [Chap 77]<sup>15</sup> wherein the punishment for incest for a male person is imprisonment for 5 years and for a female person imprisonment for one year. This section is only applicable to consensual cases. So far, the Shari’ah court has not received any cases of incestuous relationship as there are no

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<sup>13</sup> Professor Dr Mohd Altaf Hussain Ahanger. (n.d) *Sexual Offences Lecture*. Brunei Darussalam: Universiti Islam Sultan Sharif Ali.

<sup>14</sup> Stanley Yeo, Neil Morgan, *at el.* (2010). *Criminal law in Malaysia and Singapore*. 2<sup>nd</sup> edition. Singapore: C.O.S Printers Pte. Ltd. p.366.

<sup>15</sup> Negara Brunei Darussalam (1984). *Religious Council and Kadis Court. (Revised 1984)* Chapter 77.

reports have been lodged or made. According to Ustazah Hajah Noraida, this is because they only work on reported cases.<sup>16</sup>

It is important to note that although section 377A of the Brunei Penal Code deals with incestuous relationship, the application is only limited to the non-Muslims. Hence, this research is to study the position of incestuous rape under laws of Brunei Darussalam and Shariah. It is further to identify a separate legislation specifically on incestuous rape under the Brunei Penal Code for addressing incestuous rape which is committed by Muslim community.

Regardless of the discussion above i.e. on section 377A of the Brunei Darussalam Penal Code regarding its scope, section 76 of the Brunei Darussalam Shari'ah Penal Code Order 2013<sup>17</sup> deals with *zinā bi al-Jabr* (known as rape in English context) which this includes incestuous rape. Hence, Muslims who commit incestuous rape can be punished under the Order. The punishment is stated under section 76 of the Order which is as follows:

76. (1) Any person who commits *zinā bi al-Jabr* and is proved either by *ikrar* of the accused, or by *syahadah* of at least four *syahid* according to Hukum Syara' other than the evidence of the victim 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 had punishment as follows:
- (a) if he is *muhsan*, stoning to death witnessed by a group of Muslims;
  - (b) if he is *ghairu muhsan*, whipping with 100 strokes witnessed by a group of Muslim and to imprisonment for one year.
- (2) Any person who commits *zinā bi al-Jabr* and it is proved by evidence other than that provided under subsection (1) is guilty of an offence and shall be liable on conviction -

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<sup>16</sup> Ustazah Nooraida binti Haji Timpus, Bahagian Penyelidikan. Mahkamah Syariah Bandar Seri Begawan. (2017, September 16). Personal Interview.

<sup>17</sup> Negara Brunei Darussalam (2013). *Syariah Penal Code Order 2013. (Revised Edition 2013)*.

- (a) if he is *muhsan*, to imprisonment for a term not exceeding 30 years and whipping with not exceeding 40 strokes;
- (b) if he is *ghairu muhsan*, to imprisonment for a term not exceeding 15 years and whipping with not exceeding 20 strokes.

The above section refers to the punishment for rape which also includes incestuous rape. Even under the Order there is no section which discusses specifically on incestuous rape. The law refers to *hadd*<sup>18</sup> punishment as well as *ta'zir*<sup>19</sup> punishment for rape in general.

Due to the different views put forward by Muslim scholars pertaining to rape crime, this research has to study the position of incestuous rape under the laws of Brunei and the Shariah. It further identifies a separate legislation pertaining to incestuous rape based on the opinion of different Muslim scholars. This includes the methodology of proving the offence as well as its punishment.

## 1.2 Statement of the problem

Prior to the full implementation of Shari'ah law in Brunei Darussalam, penal offences such as rape, robbery etc. are heard under the jurisdiction of the civil courts by making reference to penal provisions of the Brunei Darussalam Penal Code, which we have inherited from the British. However, following the full implementation of Brunei Darussalam Shari'ah Penal Code Order 2013 on 3<sup>rd</sup> April 2019, provisions under the Brunei Darussalam Penal Code Order can be used now as *ta'zir* punishment for a case where the evidence is not sufficient. Hence, provision for incestuous rape in which the evidence is not sufficient will be heard under the jurisdiction of civil court. Since there is no specific provision on incestuous rape, it means that rape by a stranger or rape committed by a family member will still face the same type of punishment.

Moreover, an amendment was made to section 376 which now provides for an increased minimum punishment of 10 years' imprisonment and 12 whipping where an

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<sup>18</sup> It is an Arabic word meaning "borders, boundaries, limits. In the religion of Islam it refers to punishments that under Islamic law (shari'ah) are mandated and fixed by Allah.

<sup>19</sup> In Islamic Law, tazir (or ta'zir, Arabic تعزير) refers to punishment for offenses at the discretion of the judge (Qadi) or ruler of the state.

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