ORIGINAL ARTICLES

Parameter of "Fundamentals" Determination of Criminal Penalties for Women by Islamic Criminal Law in Hudud Cases

Ahmad Bin Muhammad Husni, Abdul Basir Mohammad, Amir Husin Mohd Nor

Hayatullah Laluddin, Mohd. Al Adib Samuri, Nurhayati Binti Che Omar

ABSTRACT

Every offense committed by a man would receive appropriate punishment through the determination of Islamic law or national legislation. This sentence includes whole human beings regardless of gender. Therefore, there are no privileges granted to the male offenders than female offenders, and vice versa. Despite the clear position between the subjects in terms of ability and responsibility to bear criminal sanctions, but the fact is that the execution of offenders difference between men and women sometimes giving rise to the question of why the gap between them when all men are equal for God Almighty nor the laws of human invention? Thus the researchers tried to clarify this question and explain in detail the types of punishment and the implementation to both male and female offenders by bringing the basics felt to be a parameter in establishment and execution of the sentence against them. To produce a conclusion that can answer the problems that arise, the methodology used in this research is to use the method of documentation, textual analysis and interviews. Documentation method carried out by examining the documents related to this matter. This method used in collecting and observing all written or pictorial material with the status of documentation such as books, theses, magazines, journals, etc. Subsequently, make modification and compare between all the materials to reach the conclusion. Thus, results from this study, researchers found that the difference between the offender executions of men and women were present in both Islamic law and civil with each having its own grounds.

Key words: determination of punishment, women criminal, criminal law of Islam, hudud.

Introduction

According to classical literature, there are two terms in Islamic jurisprudence that are commonly used and have the same meaning or nearly the same. Both terms were jarimah and jinayah which means sin, acquiring something or cut. However, the term means violation of the limits prescribed by Islamic law imposes by the hadd punishment by God or taczir. (Al-Mawardi, 1996, 219)

Generally, these two terms can be translated as Allah saying:

Meaning: And when a sign comes to them, they say, "Never will we believe until we are given like that which was given to the messengers of Allah." Allah is most knowing of where He places His message. There will afflict those who committed crimes debasement before Allah and severe punishment for what they used to conspire. (Surah al-An’am 6:124).

In addition, there is also the use of words ajarim Nash Allah saying:

Meaning: Say (Muhammad): "You will not be asked about what we committed, and we will not be asked about what you do." (Surah Saba 34:25).

Jinayah is derived from the word jana, yajni, jinayah which means committing sin and evil (Abdul Azhim, 2007, 745) and jinayah is crimes committed (Abdul Halim, 2005, 1). According to the meaning of the term, jinayah is all sin and disgraceful (Abdul Latif Young, 1997, 259) as Allah saying:

Meaning: They say (about Prophet Nuh), "He invented it"? Say, "If I have invented it, then upon me is [the consequence of] my crime; but I am innocent of what [crimes] you commit." (Surah al-Hud 11:35).

Meaning of the term according to jurists, the jinayah is the name for the type of action that is prohibited in Islamic law either the actions performed on the body, property, etc. But the jurists have understood that jinayah is an evil act done on humans in the form of murder, injured and beating (Awdah, 2005, 5).

According to Awdah the crime isheact forbidden by Islamic law and prevented by the hudud, qisas and and taczir. Muhammad Salimal-Ewwa have madecomments on the meaning of the following by Awdah by saying that crime is an evil act done on humans related to human life, body, property and others (Paizah, 2004, 61).
According to Abdul Audah Qadir, crime is performing prohibited acts and will be subjected to torture or macabre for doing it. In other words, it is an act of omission which the ban and torture on him is allowed by sharia (Mahmood Zuhdi, 1992, 24).

Women as a Subject of Criminal:

Islam has determined the status of women is the same with men as the subject of crime. This is in line with the general policy of equality concept in Islam given to all men. This means that the context of the question of criminal punishment, men and women have the same positions and should not be differentiated based on gender.

In the Holy Qur'an too, it mentions about crime and punishment imposed never distinguish between men and women whether crime related to life, body, property and others. Even in some cases, the equation is emphasized in the Qur'an as qisas offense (Paizah, 2004, 70). Allah says:

Meaning: O you who have believed! Prescribed for you is retaliation concerning (the ones) killed: the freeman for the freeman, and the slave for the slave, and the female for the female. Yet whoever is offered anything in clemency by his brother, then the close following after should be with beneficence, and the payment back to him should be with fairness. This (Literally: That) is a lightening from your Lord and a mercy; then, he who transgresses after that, then he will have a painful torment. (Surah al-Baqarah 2:178).

The above verse clearly explains the concept of equality in the implementation of qisas punishment of the perpetrators of crime without regard for gender or status. Al-Sycab reported that the above verse was revealed on a group of Arabs who are not satisfied except with the vengeance of a high-ranking people more than people being killed. For example, when a slave killed in crime, the person who killed him will also be killed in return even if it's from the free people. Similarly, male murderers receive the same retaliation if he kills a woman (Ibn al-'Arabi., t.th. 61).

Imam al-Shafie in his book al-'Umm mention:

"There is no disagreement among the knowledgeable person I have found that the blood of those who kill and to be killed is the same if they are both free people and Muslim. So, when a man kills a woman on purpose, he would be killed. Similarly, a woman will be killed when he killed a man" (Al-Shafi’i, 1983, 9).

In hudud casesthere are also texts that mention women as the subject of crimes related to crimes like adultery, Allah Almighty says:

Meaning: The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment. (Surah An-Nur 24:2).

In the Sunnah of the Prophets, a.w.also contained many hadith mention about legal action imposed against a woman who commits the offense of which isthe case of women from Bani Hudail who killed their husband's second wife from whom they are pregnant, the case of a woman from Sanac who killed her stepson in conspiracy, adultery cases of wife with her husband's employees, known as asal-'Asif cases, the thefts of Fatimah al-Makhumiyah and more (Paizah, 2010, 180).

Although there are numerous cases involving hudud reported, but its implementation is subject to the conditions agreed. The existence of these conditions are the basis for the implementation of hudud against an individual. Among those conditions is matured, sound mind and have knowledge with no force, and so on. If one of the conditions or the conditions are not available in the criminal, hudud punishment can not be carried out. In fact it became an argument of defense against criminals to be dropped from the implementation of hudud because of doubt void the implementation of hudud (Hashim bin Mehat, 1977, 50). This was stated as Allah s.w.t. says:

Meaning: And most of them follow not except assumption. Indeed, assumption avails not against the truth at all. Indeed, Allah is Knowing of what they do. (Surah Yunus 36:10)

In addition, there is another hadith narrated by Abu Hurairah, the Prophet's said:

Meaning: Release hudud punishment when defense seaseable available.

(Riwayat Ibn Majah: Sunan, II, hadis no.2545, 80).

In civil law, it is stated also that there are factors that exist in the criminal, or the environment that can not be taken into account by the court, which is sentenced which are their race, group, class of offenders (Mohamad Shariff, 2008, 505). The court cannot assess the differences in the elements during the sentencing of those convicted of offenses because it can create discriminatory and contrary to the provisions of article 8 of the Constitution which says that all people are equal in law (Mohamad Shariff, 2008, 505) In 2001, amendments were made in item 8 of the Federal Constitution. The word 'sex' was included in the 8 of the Federal Constitution for the reason that makes women the same as men position on the subject of crime. However, the 8
The Federal Constitution use mandatory because there are some other provisions that distinguish between the sexes such as section 289 of the Criminal Procedure Code. This section expressly prevents whipping carried out on women and males are only allowed to the offender after getting permission from the court (Anita Abdul Rahim, 2010, 6).

The Differences In Punishment between offenders women and men in criminal law of Islam:

Punishment in Muslim Criminal Law: Stoning:

At the beginning of Islam, the punishment for women who commit adultery is sentenced to death. Other sentences imposed on a male who committing adultery is given humiliation and beatings (Paizah, 1991, 181). This is based on Allah Almighty says in Surah al-Nisa' (4:15-16) which means: And the women who commit illegal sexual intercourse (adultery), hence find evidence of four males among you as the witnesses of the actions. But if the evidence from the eyewitness confirmed the act, confine them (women who commit adultery) in houses until death takethem up, or until Allah appoints them a way (through new legislation) And (any) two of you commit that indecent act (after found guilty) then let you hurt them, then if they repent and intend to change (the bad), leave them alone, for Allah God is always accepts repentance, Most Merciful.

There are various interpretations made by the jurists that the punishments were abolished with the verse from Surah al-Nur which carries whipping a hundred times for ghairu muhsan adulterers and stoning to death for muhsan adulterers. (Abdul Monir, 2000, 93).

Stoning is stated in Islam for adultery committed by people who are muhsan (people who are already legally married). Conditions for muhsan adulterer are: puberty, intelligent, free and never has intercourse from the results of a valid marriage, and the rule of qualified wedding, such as the availability of wali of the bride and the availability of reliable witnesses. Thus, the marriage is not encouraged to be continued.

In terms of stoning execution, for male offenders, the sentence was carried in a stand condition and not planted whether the guilty convicted with witness or confession for Rasulullah s.a.w. not plant Maciz and Juhainah and two Jewish people have been convicted for adultery punishment. For women offenders, methods of execution by stoning are different according to jurists. Imam Abu Hanifa requires women adulterers should be stoned in a condition of half planted until up to the level of her chest to cover her body. While Imam Shafi’i say that female offenders should be planted if convicted guilty by witnesses. If convicted guilty with plea, the woman need not to be planted. If not planted, the clothes should be bound not to reveal her private parts. (Abdul Qadir, 2005, 395)

It is narrated that Prophet s.a.w. digging holes for women of Bani Ghamid to the chest intended to close and do not expose her body during stoning implementation. Wahbah, 1997, 53.

Hadith narrated by Abu Bakrah from his father (Sa‘id, 1996, 49): Purpose: Prophet s.a.w. hasstoned a womanand he digged a hole down to her chest. (Reported by Abu Dawud)

The status of women is also distinguished among men in the implementation of stoning when they are in a state of pregnancy. There is no conflict amongst ulama in delaying the hudud pregnant women until delivery if the pregnancy resulted from adultery otherwise. The sentence must be carried out either before or after the pregnancy is confirmed. The sentence is delayed to protect the unborn child's life as the impact of the sentence on the mother (John, 1999, 200). Delays in implementing stoning is because Islamic fetal rights to live. Fetus is regarded as God's servants and clean from sin, and also innocent (Setia, 2005, 82).

However, pregnant women are not necessarily a measure by that woman commit adultery. This is because according to the consensus opinion of jurists sign of pregnancy is not only because of adultery. Possibly, the woman were forced or the intercourse is uncertain or whatever is regarded as ambiguity. Any ambiguity will abort the execution of hudud (Abd. Latif Young, 1997, 274) as in the hadith of the Prophet says: 'You shall avoid (drop) from dropping the limit when you find obstacles or doubtful " (Reported by Ibn Majah)

While the woman who was raped and then pregnant, according to the opinions of scholars Syafi‘iyyah that intercourse by force do not require victims of rape beriddah and the unborn child is not connected with the man who raped her because the child is not a result of marriage or the intercourse is uncertain (Abd. Latif Muda, 1997, 277).

Caning/Jald:

In the hudud laws, caning punishment is mandatory and rigid. In other words, it is not an alternative and can not be changed as has been stated clearly in the Quran and Sunnah. In contrast to tā‘zir caning provided for in the crime which is an alternative sentence and can be adjusted according to the conditions and requirements as not specified in the Qur'an or Sunnah. Instead, it relies on government power to ordain (Paizah, 2010, 160).
In the hudud laws, caning is provided in three different types of offense which are adultery, qazaf and drinking wine (Paizah, 161). Caning limit is done with a shot that has no impact on the body of the offender. The person who performs the caning is not allowed to lift his arm above his head because of the concern of the above shot can be fatal or lacerate the skin (Wahbah, 1997, 55).

Caning punishment will only be imposed on adulterers who areghairu muhsam namely those who have not had sexual intercourse in valid marriage. The reason of lightened the punishment for ghairu muhsan adulterers is because they do not know the meaning of the intimate relationship between husband and wife (Abdul Rahman, 2011, 540).

Caning punishment can not be done in a way that could harm or destroy the offender. That's the reason canings should not be done in weather that is too hot or too cold. In fact, according to Imam Shafi and Hanbali, if the offender is sick or old, caning without stopping, the person executing the punishment should diversify the method and the materials. This is because, the caning punishment's objective is to punish and prevent crime rather than to destroy the offender (Dato'Haji Daud, 2009, 7 - 9).

In the implementation of the caning punishment, there is a view that says the female offenders are caned in a seated position and standing for male offenders (Paizah, 2010, 158). This is to ensure that women's private parts are not exposed during execution. But Imam Malik thinks the offenders can be ordered to sit with no need to be tied unless hard to carry out the caning punishment (Abdul Qadir, 2005, 398).

Offenders that will be sentenced generally must cover themselves dressed either male or female. About parts of body that are caned, the whole jurists agreed that caning imposed should not focus on any one of the body (such as the face, head, chest, stomach and genitals) or other determined parts. This is to prevent offenders from skin abrasions or tearing due to caned repeatedly in the same place (Hashim Mehat, 1991, 296).

In crime of qazaf or accused of adultery, the rate of punishment was equal among both men and women criminals with no distinction. Meanwhile in drinking crime, the caning punishment is convicted by the Prophet's hadith:

"He who drinks wine shall be lashed. " (Narrated by Ahmad Ibn Hanbal)

Banish from region/Taghrib:

Most scholars are agreed that punishment for adultery for ghairu muhsan isto caned by 100 lashes and exile for one year as an additional punishment based on the hadith of Ubada ibn-Samit r.a. (Mustofa, 2005, 1973):

Meaning: Accept from me, accept from me. Allah has decreed punishment for these women. Virgin with the young man will be caned 100 times and exile from state a year. Women with men who have been married will be caned 100 times and stoned. (Narrated by Muslim).

Umarr.a. has sentenced adultery offender of banishment to Syria. While ‘Uthman r.a. has sentenced adultery offender of banishment to Egypt. Alir.r.a. stated to draw adultery offender to Basrah. None objected to their actions, which indicated acceptable practice (inijma’). (Mustofa, 2005, 1974).

Hanafi school view that the punishment of banishment is not compulsory but should be for the government dropping the two penalties in the event of the view that there are advantages and ta’zir punishment is not as punishment limit but as taczir. (Mahfodz, 1993, 46).

Ulamaa also differed in determining whether the sentence imposed on alladulterers who are either male, female or otherwise. According to Imam Shafi e, Hanbali and Zahiri, banishment punishment limit was carried out on male female adulterers. (Mat Saad, 1993, 52). However, according to Imam Malik and Auza’a, banishment punishment limits only imposed on male adulterers who are imprisoned in isolation and not on the women adulterers. This is because women need care and control (Abdul Qadir, 2005, 337) as well as the concern if she would be slandered if banished. (Mohl. Said, 2000, 33). If women are banished, arose a question of whether she is banished accompanied by muhriin or not. Basically she should not be banished accompanied by muhriin because the Prophet himself forbade in the hadith:

Meaning: Anda womanshall not travel exceptalongs with mahram. (Narrated by IbnAbbas r.a.)

In addition, the banishment from state unaccompanied by muhriin will expose her to abomination again, and if she was exiled alongby muhriin will result in involvement of people who do not commit fornication and innocent people. If there is a compulsory obligation of bearing her muhriin expenses then this would have been burden in excess from actual retaliation and is not permitted by Islamic law (Mat SaadAbd., 1993, 52) asAllah s.w.t. mention in Surah al-An'am (6:164)

Meaning: Say: "(After I bore witness and trust in Him) Do I seek another God but Allah, seeing that He is Lord of all things? And none (evil) conducted by every one except those that bear the sin, and someone who can be responsible for the sin that will not bear burden of another (even its only sin), then to your Lord is your return and will tell you what you are curious about.”
Conclusion:

In conclusion, there are various factors that distinguish between executions of men and women. Various factors and arguments given to explain the differences of punishment limit between genders. Therefore, a study in depth that the basic levels needed to explain these differences. This is because, quality research requires findings and research that starts from the basic things and thus provides satisfactory results saying "you do not love when you do not know". Based on this, in-depth research for theses has been done by the author with describing each objective of the study that starts with explaining the concept of crime and punishments well as the position of women as a crime subject. Then, specify the types of criminal punishment and its implementation on themen and women to obtain basic parameters for the determination of punishment limit for them. The basic parameters determining punishment limits presented as the result of the end of the study.

The concept of punishment has been defined by some scholars as a form of 'agubah set by Allah s.w.t. This setting is to prevent people from conduct that is prohibited by Allah or disobey the conduct encourage by Allah s.w.t. The objective of executions in the Islamic criminal law is deterrence, rehabilitation and to protect public interest. However, there are some differences in the the method of execution of men and women such as stoning, caning / jild, banishment / taghirib, qisas and diyat while whipping, imprisonment and the death penalty is seen as punishment that has its own parameters in determining the of punishment limit for female offenders. Physically, women are weak than men and this allow women to be waived by a sentence such as floggings and executions. Condition is also an important factor that influence the implementation of punishment like a pregnant women are exempted from mandatory death sentence according to civil law. Exemption based on this condition is also found in Islamic law as the banishment of punishment limit for unmarried adulterers (ghairu muhsan). This is because women are those who are always in need of care and control, and are in danger of being slandered if she is banished. The prohibition of woman banishment, by not accompanied by muhrim is also forbidden by the Prophet. This waiver argument is based on strong evidences supported by verses in the Qur'an and the Sunnah. Apart from the exceptions mentioned, the execution of a sentence also took into consideration the gender aspect as muhsan female adulterers who underwent stoning to death is different with muhsan males adulteress. Muhsan female adulterers is to be buried up to the chest to protect herself and not to open private parts. Similarly, during the implementation of caning punishment for female ghairu muhsan. They will be caned in a sitting position compared to male caned in standing position for the same reason.

In addition, there is also a form of punishment carried out based on several factors such as the qisas inequalities between men and women. The jurists have different opinions on the matter. There are only some scholars that agreed with this argument while some rejected. They can be divided into two groups. The first opinion is that female body is the same as the male body. Each entitled to receive qisas execution. Based on this view, when a male once cut off the female's hand intentionally, his hands will also be cut according to qisas and it is vice versa. For those who absolutely reject this argument, they argued that similarity is measured not only by themselves but also involved in crime and the rate of compensation for it. Based on the similarity seen from all these aspects they felt qisas punishments for injury cases can not be performed on cases involving in crime against women.

The second factor that become the basis of the determination of punishments is the gender of crime victims for diyat payment. There are jurists who argue that diyat for victims is half if male payable to male victims in all cases of injury. This situation is the same as murder case. This opinion is based on saying of the Prophet narrated by Mu’az bin Jabalthadhiy ator a womanis half of male diyat. The argument given by this that becomin the case of murder, female diyat is becomehalf of men. Therefore, the position for diyat payment that also be the same for cases involving injuries as asidenavly higher than woman and the body should be parts of body. The second class of jurists are the opinion that diyat for women are the same as man with the condition it does not exceed the limit of 100 camels. On the other hand, if the rate is more than one-third of the full diyat, then the diyat women will be half than men.

The third factor for punishment is pregnancy. Based on Islamic criminal law, the punishment for pregnant females is the same with male offenders without any changes. This is because the sentence for her is only delayed until the expiration of pregnancy.

The fourth factor for punishment is willingness of perpetrator. According to Islamic criminal law, intentionally or voluntarily element is one of the offenses allowed by law. The punishment of crime such as adultery. Therefore, women who commit adultery with intent to avoid death penalty for adultery conviction and will be sentenced. However, if it is forced against their will, it is considered a criminal act of adultery by force or known to be rape. In such circumstances, there is no hadd punishment to be imposed. However, incivil criminal laws, clear that onltya man can be convicted of committing the offense of rape despite the willingness of women. It can be seen from the example that Can be derived from a phrase that is “contrary to the will of the woman.” For example, when woman asked a man wearing a condom before intercourse be man refuses, with the condition it...
does not doing so, the man can be prosecuted for rape because it is against the woman's will even though they were clearly willingly of the women.

The final factors are the availability of legal provisions which protect women offenders from civil whipping exempt implementation. The establishment of Women, Family and Community is one of the incorporated rights of women interest, families and communities in a fair and non-discriminatory. Besides, the existence of a number of international conventions that have been signed by Malaysia to contribute to the reason for the exception weak group such as women in the implementation of the civil caning, as reflected in Article 5 of the Universal Declaration of Human Rights 1948 (UDHR), which insists that no one should be punished in abusive, cruel, inhuman and humiliating. Hence, the National Women Policy 2009 also supports the principle of gender-based discriminational enshrined in the Federal Constitution and otherwise.

Regardless the results obtained through this study, once again we have to understand that all the differences that have been set not to punish with the punishment that is deemed unfair (biased). However, such differences are appropriate to its implementation. Despite the similarity is an important foundation to the justice of a sentence, but not all the justice is subject to similarity in the sense that rigid.

Suggestion:

Implementation of Shariawhipping:

In the view of the researcher, the gentleness nature of a woman is not a reason to exclude the implementation of whipping on this group. If the civil caning punishment is said to be a cruel and impossible to implement on female offenders, then Malaysia should have to apply the Sharia whipping that felt more women friendly.

In making caning punishment listed under enactment or Syariah Criminal Procedure Act states effective in reducing a variety of criminal cases, it is necessary to implement the sentence in accordance with Islamic principles. Corporal punishment under Sharia law is not just to punish, but also to convince and educate offenders. In fact, it is also able to create a feeling among members of the community to realize after witnessing the sentence. This will serve as a catalyst to prevent and control crime rates in the country.

At the same time, the researcher view that all guidelines and procedures to enforce and implement corporal punishment according to Islamic principles as a whole that has been explained in detail through various enactments or syariah criminal procedures act states. Nevertheless, there are some aspects such as the rod, whipping location and code of dress worn by offender during caning, that need to be analyzed and made more clear. In relation to the rod, the enactment should detail what the rod that will be used throughout the country for whipping syariah criminal offenses under the enactment or the Syariah Criminal Offences Act states. A guideline should be made whether the rod is made of leather or other kind of rod.

Meanwhile, on the description of a location where corporal punishment is to be carried out, the enactment shall specify locations where a caning would be carried out. Although it was mentioned that the location chosen by the authorities is a public place, it is not clear whether the selected public locations is also a place visited by the public or not. It should be noted that it is necessary that selected public locations is also a location visited by the public. It aims to meet its public caning. Corporal punishment must be carried out in the presence of a group of people who were watching from far and close in accordance with the verse of Allah in Surah al-Nur, verse 2:

Meaning: For those woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment. (This punishment is for unmarried persons guilty of the above crime but if married persons commit it, the punishment is to stone them to death, according to Allah's Law).

Meanwhile the clothing worn by the offender while serving a sentence, the law should clarify the meaning of the expression "dressed according to Islamic law." Enactment should explain that the offender must dress according to the dress code covering their aurat or Muslim men and women. This is different with caning under the Criminal Procedure Code adopted by the country in which the offender only wore pieces to cover private parts without any clothes. This situation is something that should not be adopted because it can tarnish their reputation of male offenders especially to women of offender that their obligation to keep private parts because it is a symbol of the dignity of a Muslim woman. At the same time, it must be explained that the clothing worn is not too transparent or also not too thick. The clothes worn should also be based on clothing. It was also suggested that the type of clothing for men and women are of the same pattern made from the same fabric materials should be made available to all Sharia courts across the country to ensure consistency and fairness in the enforcement of the punishment.
References