

## THE OFFENCE OF *ZINĀ* WITH SHARI'AH AND LAWS OF BRUNEI DARUSSALAM: A CRITICAL ANALYSIS

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**Abstract:** *Islam is the main official religion in Brunei Darussalam and the majority of the citizen are Muslim. Islamic studies are common in this country which includes the study of Shariah law. For the time being, Brunei has been practicing both Islamic law and civil laws. This paper aims to discuss the study of Islamic law in Brunei Darussalam with critical analysis studies of zinā. It is noted that the practice of Islamic law is not new in Brunei Darussalam as far as history is concerned. The main objectives of this paper are to analyse the topic of zinā from Islamic perspectives and its application in Brunei Darussalam. This paper will also make reference to the primary sources such as the Quran, Sunnah, and Interview. It intends to adopt library based, reviewing relevant laws, decided cases and previous literature review. The finding of this research is to provide the position of zinā crime in Shariah and Laws of Brunei Darussalam.*

**Keywords:** *Brunei Darussalam, Zinā, Islamic Law and Civil Law*

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### Introduction

Muhammad Akram Ladin (2014), argued that the religion of Islam consists of a complete system of life and it is compatible with all human beings. The main teaching is not only confined to the belief and moral system but it also includes laws that are suitable to be implemented by mankind. It had also been proven in the Quran about the completeness of its teaching which Allah mentioned in Surah Al-Ma'idah verse 3 as follows:

*“This day, I have perfected your religion for you, complete My favour upon you, and have chosen for you Islam as your religion”.*

According to Dato Seri Setia Haji Awang Yusoff Bin Haji Awang Ismail (2013), Islam is the main official religion in Brunei Darussalam and the majority of the citizen are Muslim. Meanwhile, Islamic studies are common in this country which includes the study of Shari'ah law. The main objectives of this paper are to analyse the topic of *zinā* from Islamic perspective and its application in Brunei Darussalam.

It will begin with the discussion on the history of Islamic law and further discussion on the laws of Brunei Darussalam. The focus of this paper is on the offence of zina in Shari'ah and Civil law. The negative effects of *zinā* will also be provided in this research. Since Brunei Darussalam has practised dualistic court system which refers to Islamic and Civil laws, this paper will intend to discuss the offence of *zinā* as well as *zinā* by coercion (rape).

### **History of Islamic Law in Brunei Darussalam**

Azrimah Binti Haji Abdul Rahman (2006), argued that based on the history, before the coming of the British to Brunei Darussalam, Brunei Darussalam has been governed by Islamic Law in written and codified form. There are two manuscripts which known as "Hukum Kanun Brunei" (and it is kept at the Language and Literature Bureau) and "Undang-undang dan Adat Brunei Lama" which is now kept in Sarawak.

Azrimah Binti Haji Abdul Rahman (2006) argued that Hukum Kanun manuscripts had covered a wide range of laws which include Islamic laws such as *hudud*, *qisas*, *ta'zir* as well as family matters such as marriage and divorce. It can be said that the overall content of the manuscript is in harmony with Islamic law. Hence in accordance with the history, Shari'ah Penal Code Order 2013 is considered as the re-introduction of Shari'ah Law in Brunei Darussalam.

For the time being, Brunei Darussalam practised dualistic court system. This has shown that there are two laws which are available such as Shari'ah law as well as Civil law. An example of the application in shari'ah law can be seen in the area of divorce, matrimonial property disputes, inheritance, khalwat, illegal sexual relationship and etc. All this will be heard under the jurisdiction of Shariah court. Meanwhile, civil court will hear any civil matters such as contract, rape, incestuous rape and etc. However, this paper will only focus on the topic of *zinā* under shari'ah law as well as *zinā* by coercion (rape) under civil law.

### ***Zinā in Islamic Perspectives***

Pehin Dato Seri Maharaja Dato Paduka Seri Setia Dr Ustaz Haji Awang Abdul Aziz Bin Juned (2014) defined *zinā* as sexual intercourse committed by a man and a woman who are not married to each other. This is a despicable act that has been made *harām* by Allah. All sexual intercourses made outside of marriage are called *zinā*, except in the case of "*wati shubhah*", such as a sexual intercourse between a man and a woman whom he thought was his legal wife when the woman was in fact someone else and not his wife. Similarly, *wati shubhah* occurs when a man has sexual intercourse with a woman after a marriage which he thought was valid but which was actually invalid.

In other definition by Sohaib Mukhtar (2016), *zinā* is the act where a man and a woman wilfully commit adultery with sufficient penetration and without a marriage. In surah al-Isra verse 32 which is as follows:-

*"And come not near unto adultery, Lo! It is an abomination and evil way"*

Pehin Dato Seri Maharaja Dato Paduka Seri Setia Dr Ustaz Haji Awang Abdul Aziz Bin Juned (2014), argued that, this verse Allah has clearly mentioned and strongly prohibit people from going anywhere near *zinā*. It includes by whatever means or source which may lead to the commission of *zinā*.

Furthermore, the punishment of *zinā* also been explained in one of the Quranic verses in which is as follows: -

*“The Zaniyah and the zani, 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”<sup>1</sup>*

According to (Shaykh Safiur et. al 2003), the above verse contains the ruling on the law of retaliation for those who commit illegal sexual intercourse as well as its punishments. As for an unmarried person, the prescribed punishment is one hundred stripes in accordance with the verse. Meanwhile, the married person will be punished by stoning to death.

As mentioned by (Shaykh Safiur et. al 2003), the verse *“Let not pity withhold you in their case, in a punishment prescribed by Allah”* is referring to the kind of a pity that may make the judge ignore the punishment altogether. This is not permitted for the judge. In other words, if the matter has already been taken to the authority. Then, it has to be carried out and cannot be stopped. Meanwhile, the verse *“let a party of the believers witness their punishment”* requires the punishment to be carried out in public. Although it is more humiliating for the offenders, this way is more effective as a deterrent and it conveys the sense of scandal and rebuke.

### ***Rape***

There is also a case of *zinā* which is committed without consent namely *zinā* by coercion. In the English context it is known as rape.

According to Dr Azman Mohd. Noor (2009), rape is translated in Arabic as *ightisab or zinā bi al-ikrah*, which can be literally translated back to English as forcible unlawful sexual intercourse. Mick (2009), defined rape or *zinā* by coercion is defined as “a person (A) commits rape if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (B) does not consent to the penetration and (A) does not reasonably believe that (B) consents.

There is no legal punishment to be implemented upon the woman who is coerced into committing adultery. This is further explained in the hadith stated as follows:-

‘Alqamah bin Wa’li Al-Kindi narrated from his father: “A woman went out during the time of the Prophet to go Salat, but she was caught by a man and he had relations with her, so she screamed, and he left. Then a man came across her and she said : “That man has done this and this to me, then she came across a group of Emigrants (Muhajirin) and she said : “that man did this and that to me”. They went to get the man she thought had relations with her, and they brought him to her. She said : “yes that’s him”. So they brought him to the Messenger of Allah and when he ordered that he be stoned, the man who had relations with her said: “ O Messenger of Allah, I am the one who had relations with her”. So he said to her : “Go for Allah has forgiven you.” Then he said some nice words to the man (who was first brought). And he said to the man who had relations with her: “Stone him”. The he said: “He has repented a repentance that, if the inhabitants of Al-Madinah had repented with, it would have been accepted from them’. (Hasan Gharib Shahih).<sup>2</sup>

### ***Negative Effects of Zinā***

Pehin Dato Seri Maharaja Dato Paduka Seri Setia Dr Ustaz Haji Awang Abdul Aziz Bin Juned (2014) argued that *zinā* has been prohibited by Allah because it is a source of various harms

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<sup>1</sup> Surah An Nur : 2

<sup>2</sup> Imam Hafiz Abu Eisa Mohammad Ibn Eisa At-Tirmidhi. *Jami At-Tirmidhi*. Darussalam. p.239-240

and problems. There are a number of negative consequences from the crime of *zinā* such as it will spoil the lineage, lead to various dangerous diseases such as HIV, create a lot of disputes, murders and etc. According to Abdullah Yusuf Qasmi, when the commission of *zinā* had been known by other people, it caused a lack of respect and tolerance to the offender. It will further cause damage to the offender on its social and personal esteem.

Meanwhile, rape or *zinā* by coercion is a brutal invasion that is undeniably a degrading, humiliating and of a person's most intimate private space.<sup>3</sup> The serious nature of the crime upon the young victim will cause emotional and psychological trauma on the victim.<sup>4</sup>

Harvey Wallace & Cliff Roberson (2008) argued that, rape trauma syndrome is a type of posttraumatic stress disorder. It is the development of characteristic symptoms after the sexual assault that is usually beyond the range of ordinary human experience. The victim will often have recurrent painful memories of the incident or recurring dreams or nightmares in which the incident is re-experienced.

Azizah & Azelin (2004) argued that, there are also cases where some of the victims become pregnant because of being raped. Due to this, it is difficult for them to face society and feel ashamed. This further will lead to the problem of the family's status. The victim's childhood also had been robbed from her. It is undoubted that the pregnant victims and her parents need to look after the upbringing of the baby.

In addition, the victim becomes a young mother and has to be responsible for the child. This will constantly remind her of what had happened in the past.<sup>5</sup> For example in the case of *Public Prosecutor V MA Bin MJ* where the victim was pregnant by her own brother.<sup>6</sup>

### **Research objectives**

The following objectives to be obtained in this research are:-

1. To study the concept of *zinā* in Shari'ah and *zinā* by coercion in laws of Brunei Darussalam
2. To study the position of *zinā* in Shariah Courts
3. To study the position of *zinā* by coercion (rape) in Laws of Brunei Darussalam.
4. To recommend a further research on *zinā* and *zinā* by coercion

### **Literature Review**

Sohaib Mukhtar (2016) recommended that there should be a chapter added in the existing Pakistan Penal Code of 1860 which will cover all the offences of Hudud and Punishments of Hudud which includes the offence of *zinā*. Hence, this research will further study on the concept of *zinā* as hudud offences and to provide details on *zinā* as well as to its punishment.

Syamsul Huda (2015) had recommended that section 284 of Kitab Undang-Undang Hukum Pidana (KUHP) should be amended into a new law which is more effective to prevent *zinā*. In this research, it will recommend further research on the law of *zinā* in order to reduce the crime.

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<sup>3</sup> Public Prosecutor And Hibatul Wafi bin Mahari (High Court of Brunei Darussalam) (Criminal Trial No.35 of 2013)

<sup>4</sup> Public Prosecutor And RBAHI (High Court of Brunei Darussalam) (Criminal Trial No. 17 of 2015)

<sup>5</sup> Public Prosecutor And Hibatul Wafi bin Mahari (High Court of Brunei Darussalam) (Criminal Trial No.35 of 2013)

<sup>6</sup> Public Prosecutor And MA Bin MJ (High Court of Brunei Darussalam) (Criminal Trial No. 11 of 2011)

In terms of *zinā* by coercion, Roosniza Mohd Shariff (2005) stated that rape is a serious and heinous crime and should deserve full attention and understanding from society. The nature of the crime is now commonly associated with murder, incestuous rape, child rape, gang rape and raping of disabled. When women are rape, not only physical injury is inflicted but also a deep sense of shame, fear and mental torture are experienced too.

She has also made a recommendation in her research that the punishment stated in section 376 of the Malaysian Penal Code shall be increased. Instead of general punishment for all categories of rape, separate and heavier punishment should be made in cases involving child rape, incestuous rape and gang rape. Other factors like whipping should be made mandatory. Hence, this research intends to study the position of zina under Shari'ah and Laws of Brunei Darussalam. It will further suggest the punishment to be made heavier.

Muhammad Azlan Bin Pengarah Haji Ibrahim (2012/2013) had made a recommendation that heavier punishment should be given to offenders who commit rape crimes. Although there is a provision on rape but according to him the punishment does not seem to give a big impact and does not intimidate the offender from continuing the offence. This provides a guideline to study more on the current laws and to suggest heavier punishment for the offenders in order to prevent the crime.

Muhammad 'Arif Bin Haji Kamis (2012) stated that, the number of incest in Brunei Darussalam whether with consent or lack thereof is still alarmingly high. Logically this infers that there is not enough deterrent sentence imposed by the government to reduce and effectively end such offences. The punishment imposed is far too wide. In other words, the offenders are not frightened from continuing their abysmal behaviour. Hence, there is a need for an amendment that can solve these issues.

Widad Binti Haji Abdul Aziz (2015) stated that the nature of sexual offences under the Brunei Syariah's law need further review and clarification especially on the nature of the offence and its requirements for an effective recognition and implementation of Islamic Law on sexual offences.

### **Methodology**

This research will adopt a doctrinal legal research which is mostly library based. It is in order to achieve the objectives of the research as most of the information can be found from books, articles and etc.

In the doctrinal legal research, the studies will be based on the primary sources which refer to *Quran*, *Sunnah*, relevant case law and legislation. Legislation that is used in this research such as Religious Council Kadi's Court Act, Syariah Penal Code Order 2013 and Criminal Procedure Code, Chapter 7. This is to understand more about the offence of *zinā* in Shari'ah and laws of Brunei Darussalam. The focus is mainly on offence of *zinā* either committed with the consent or by coercion. However, a comparison between *zinā* in shari'ah court and civil court of Brunei Darussalam will also be discussed in this research.

In addition, the research will also involve interviews to relevant authorities such as Shari'ah courts and Criminal Investigation Department (CID). The interview will be structured and unstructured in order to extract information that could not be achieved by only reading the literatures.

Structured interviews is used in this research because it can be easily repeated to check the reliability of the data. Meanwhile, the reason for choosing unstructured interview is because it provides a spontaneous generation of questions in the natural flow of an interaction.

### ***Zinā in Shari'ah Court***

#### ***Religious Council Kadi's Court Act***

Under section 178 of the Religious Council Kadi's Court Act, the focus will be on laws related to *zinā* as far shari'ah law is concerned as the following: -

- (1) Any man who, having lawfully divorced his wife, resumes cohabitation with her without having pronounced a lawful rujuk shall be guilty an offence: penalty, imprisonment for one month or a fine of \$1000, or if his wife was not at that time of such resumption of cohabitation aware of the occurrence of the divorce, imprisonment for 2 months or a fine of \$2000.
- (2) Any woman who abets an offence punishable under subsection (1) shall be guilty of an offence : Penalty imprisonment for 7 days or a fine of \$200
- (3) "Any person who has sexual intercourse with any person whom he or she is, and who he or she knows or has reason to believe that he or she is, forbidden by Muslim law to marry, shall be guilty of an offence; penalty in the case of –
  - (a) A male person, imprisonment for 5 years; and
  - (b) A female person, imprisonment for one year"
- (4) Save in the cases referred to in subsection (1), (2) and (3), whoever shall be guilty of illicit intercourse, whether or not the other party to such illicit intercourse professes the Islamic religion, shall be guilty of an offence: Penalty, imprisonment for 6 months or a fine of \$5000.

Illicit intercourse means sexual intercourse not amount to rape between any male and any female who is not his wife or whom he is forbidden by Muslim law to marry.<sup>7</sup> Therefore, the term illicit intercourse is also refer to *zinā*.

Furthermore Prof. Madya Dr.Haji Mat Saad Abdul Rahman (2003) argued that, section 178 of the Religious Council and Kadis Court [Chap 77] is referring to illicit sexual intercourse but this provision does not involve rape although it is regarded as an offence of *zinā* in Syari'ah. In fact, this position implies that rape offences are excluded from the jurisdiction of the syariah court but it will be heard under the jurisdiction of the civil court.

In addition, according to Hajah Suriati Binti Haji Ali Yusof (2005/2006), there are no clear provision for incestuous relationship (consensual cases) offences but the Ministry of Religious Affairs will refer to section 178 (3) of the Religious Council and Kadis Court [Chap 77].

As mentioned by Ustazah Nooraida Binti Haji Timpus (2017), during interview session, section 178 (3) is referring to cases in which both parties are prohibited to marry, and it is including incestuous relationship cases. Hence, there is also no specific section for an incestuous relationship in this provision.

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<sup>7</sup> See: Section 3 of Religious Council and Kadi's Court Act [Chap 77]

### ***Syariah Penal Code Order 2013***

Brunei Darussalam implement the phase one of the Syariah Penal Code Order 2013 on 1<sup>st</sup> May 2014. Under the Code, the offence of *zinā* is also included. This can be seen as follows:-

#### *Zina.*

68. (1) A man and a woman are said to commit *zina* if they wilfully had sexual intercourse without being validly married to each other or such intercourse is not syubhah intercourse.

Explanation - Penetration by *hasyafah* or *qadar* thereof is sufficient to constitute the sexual intercourse necessary for the offence of *zina*.

(2) In this section "*syubhah intercourse*" means a sexual intercourse performed with a presumption that it is a valid marriage but in actual fact the marriage is not valid (*fasid*) or sexual intercourse occurred by mistake; "sexual intercourse occurred by mistake" means sexual intercourse between a man and a woman on the assumption that the woman is his wife and the man is her husband, when in actual fact she is not his wife and he is not her husband.

#### Illustration

At night, in the dark, A and B have sexual intercourse. A thinks B is his wife and B thinks A is her husband, when in fact B is not A's wife and A is not B's husband. A and B did not commit the offence under this section.

By virtue of section 68 of the Code, it provides a definition of *zina* and it also elaborates the term *syubhah* with an illustration. However, the punishment of *zina* is well explained under section 69 of the Syariah Penal Code Order 2013 and section 70 of the Code deals with the punishment for a not mukallaf person which states as follows:-

#### Punishment for *zinā*.

69. (1) Any Muslim who commits *zinā* and it is proved either by *ikrar* of the accused, or by *syahadah* of at least four *syahid* according to *Hukum Syara'* 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 hadd punishment as follows-

(a) if he is *muhshan*, stoning to death witnessed by a group of Muslims; or  
(b) if he is *ghairu muhshan*, whipping with 100 strokes witnessed by a group of Muslims and imprisonment for a term of one year.

(2) Any Muslim who commits *zinā* and it is proved by evidence other than that provided under subsection (1) is guilty of an offence and shall be liable on conviction

(a) if he is *muhshan*, whipping with not exceeding 30 strokes and imprisonment for a term not exceeding 7 years; or

(b) if he is *ghairu muhshan*, whipping with not exceeding 15 strokes and imprisonment for a term not exceeding 3 years.

(3) Any non-Muslim who commits *zinā* with a Muslim and it is proved either by *ikrar* of the accused, or by *syahadah* of at least four *syahid* according to *Hukum*

*Syara'* 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 the same punishment as provided under subsection (1).

(4) Any non-Muslim who commits *zinā* with a Muslim and it is proved by evidence other than that provided under subsection (3) is guilty of an offence and shall be liable on conviction to the same punishment as provided in subsection (2).

Punishment for *zinā* where the offender is not *mukallaf* or has not attained the age of baligh.

70. Where any person who is not mukallaf or has not attained the age of baligh commits *zina* and -

(a) it is proved either by *ikrar* of the accused, or by syahadah of at least four *syahid* according to *Hukum Syara'* 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 whipping not exceeding 30 strokes and shall be detained in any rehabilitation centre as the Court thinks appropriate for a term not exceeding 3 years; or

(b) it is proved by evidence other than that provided under paragraph (a) is guilty of an offence and shall be liable on conviction to whipping not exceeding 15 strokes and shall be detained in any rehabilitation centre as the Court thinks appropriate for a term not exceeding 3 years.

Furthermore, *zinā* by coercion or *zinā bi al-Jābr* under this section is explained in section 75 of the Code and the punishment is provided in section 76 of the Code which is as follows:-

#### *Zina bil-jabar*

75. A person is said to commit *zina bil-jabar* if he or she has sexual intercourse with a woman or a man, as the case may be, to whom he or she is not validly married, in any of the following circumstances -

- (a) against the will of the victim;
- (b) without the consent of the victim;
- (c) with the consent of the victim, when the consent has been obtained with threat by putting the victim in fear of death or hurt;
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is validly married or the victim believes herself or himself to be validly married to the offender;

#### Illustrations

(a) A, as the *wali mujbir* to his daughter B, marries her off to C. B have never met C. D came to B and claims to be her husband. B believes that D is her husband and consents to having sexual intercourse with D. D has committed the offence under this section.

(b) E and F are identical twin sisters. G is married to E. F claims that she is G's wife and G believes that F is his wife. G consents to having sexual intercourse with F. F has committed the offence under this section.

(c) H has four wives. H married I who does not know that H already has four wives. I consents to having sexual intercourse with H because she believes that their marriage was valid. H has committed the offence under this section.

(d) J is still in her *'iddah* period. K does not know that J is still in her *'iddah* period and marries her. K consents to having sexual intercourse with j because he believes that their marriage was valid. J has committed the offence under this section.

(e) with the consent of the victim, if the consent is given by a person under a misconception of fact and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such misconception;

#### Illustration

A, a patient, asks for help from B, a bomoh (traditional healer). B told A that for medical purposes, anything is allowed to be done by any means. A, because of a misconception of fact believes B, consents to having sexual intercourse with B. B has committed the offence under this section.

(f) with the consent of the victim, if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or if the consent is given by a person who has not attained the age of *baligh*.

#### Illustrations

(a) A who is of unsound mind is persuaded by B to have sexual intercourse with him. A consents to having sexual intercourse with B. B has committed the offence under this section.

(b) C deliberately adds drugs to D's drinks to intoxicate D. C invites D to have sexual intercourse with him. D because of intoxication, consents to having sexual intercourse with C. C has committed the offence under this section.

(c) E who has not attained the age of *baligh* is persuaded by F, F by promising her gifts, to have sexual intercourse with him. E consents to having sexual intercourse with F has committed the offence under this section.

Explanation - Penetration by *hasyafah* or *qadar* thereof is sufficient to constitute the sexual intercourse necessary for the offence of *zina bil-jabar*.

#### Punishment for *zina bil-jabar*.

76. Any person who commits *zina bil-jabar* and it 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 *hadd* punishment as follows -

(a) if he is *muhshan*, stoning to death witnessed by a group of Muslims;

(b) if he is *ghairu muhshan*, whipping with 100 strokes witnessed by a group of Muslims and to imprisonment for one year.

(2) Any person who commits *zina bil-jabar* and it is proved by evidence other than that provided under subsection (1) is guilty of an offence and shall be liable on conviction -

(a) if he is *muhshan*, to imprisonment for a term not exceeding 30 years and whipping with not exceeding 40 strokes;

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

## *Zinā By Coercion In Laws of Brunei*

### *Penal Code [Chap 22].*

For rape cases, it is subject to section 375 of Penal Code which states as follows: -

“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.

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.

Ratanlal & Dhirajlal’s (2009) explains that, 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 fifth clauses provide that there is consent but it is not an excuse for the offender. Subject to the third clause, consent is obtained by putting the victim or any person in whom she is interested in fear, death, and 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 to be lawfully married to the accused.

Meanwhile, the Fifth clause explains that consent is given by reason of unsoundness of mind or intoxication or the administration by him personally through another of any stupefying or wholesome substance, she is unable to understand the nature and consequence of that to which she gives consent. The sixth clause provided that where the intercourse is with a girl so young that consent is immaterial.

The punishment of rape is subject under section 376 of Penal Code which is stated as follows:-

376. (1) Subject to subsection (2), whoever commits rape shall be punished with imprisonment for a term not exceeding 30 years and whipping.

(2) Whoever —

(a) in order to commit or to facilitate the commission of an offence of rape against any woman —

- (i) voluntarily causes hurt to her or to any other person; or
- (ii) puts her in fear of death or hurt to herself or any other person; and
- (b) commits rape by having sexual intercourse with a woman under the age of 14 years without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 30 years and whipping with not less than 12 strokes.

The above clauses have explained the elements to be fulfilled in order to constitute the offence of rape and it is applicable to Muslims and Non-Muslims. However, incestuous rape is also included in this section.

### *Incest*

An Incestuous relationship defined by Dato' Hj Mohammad Shariff Bin Haji Abu Samah & Datin Hj Asidah Binti Hj Mohd Ali. (2012) is sexual intercourse between those persons who are closely related and as a result are prohibited to marry. It is frowned and looked down in Islam. Incest can be committed either by consent or with force.

Meanwhile, Vanderbilt, Erbilt, (1992), 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.” (cited by Hamid Ibrahim & Naseer Hamis, 2008).

The findings of research made by Mohammad Azlan Bin Pengarah Haji Ibrahim (2012/2013), it is found that the most common rape committed by perpetrators in Brunei Darussalam is incestuous rape.

In a particularly serious and disturbing case namely *Public Prosecutor and Hamran Bin Bakar* (Court of Appeal of Brunei Darussalam) (Criminal Appeal No 6 of 2016). The defendant is the father of the 3 victims in the 9 charges. He raped his 3 daughters (Miss X, Miss Y and Miss Z) both when they were of the tender year (aged 13 to 16) and, in the case of Miss X when she was of mature aged 26. An attempted of rape was made to Miss Y when she was 15 but as she shouted and screamed as a result intercourse did not take place. In 2015, Miss Z was raped twice by the defendant.

The rape, in this case contains a number of aggravating features including incest, gross breach of trust, multiple offences, the use of force, violence and deceptions, and causing fear to the young victims.

The order for this case is where all the sentences imposed in the court below shall be served concurrently save that 2 years of the sentence on additional charge 9 shall be served consecutively, making a total of 16 years and no whipping. The absent of whipping is due to the reason that, the defendant was over 50 years old.

Furthermore, section 377A of the Penal Code deals with the offence of incestuous relationship within the non-Muslim community. The sections stated as follows:-

“(1) Whoever —

(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 an incestuous crime that is committed consensually and only applicable to non-Muslims. In this case, both of the accused will be held liable if they know about their blood relationship.

In addition, Muhammad Azlan Bin Pengarah Haji Ibrahim (2012/2013) had made a recommendation that heavier punishment should be given to offenders who commit rape crimes. Although there is a provision on rape, but the punishment provided does not seem to give a big impact and does not intimidate the offender from continuing the offence.

### ***Penal Code (Amendment) Order, 2017***

However, there are new amendments in regard to section 376 of Penal Code in the Penal Code (Amendment) order, 2017 which is as follows: -

376. (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 woman –

(i) voluntarily causes hurt to her or to any other person; or

(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”.

### ***Criminal Procedure Code, Chapter 7***

Whipping is among one of the punishments provided under the Criminal Procedure Code, Chapter 7, but there is an exception to this form of punishment. This is based on section 258 which states as follows:-

“no sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping-

(a) Females;

(b) Males sentenced to death;

(c) Males whom the Court considers to be more than 50 years of age”

In terms of whipping as a form of punishment, reference can be made to the case of *Public Prosecutor V A.S Bin K*.<sup>8</sup> In this case, the defendant pleaded guilty to six counts of rape of his daughter namely as “N”. This is contrary to section 376 (2) of the Penal Code. The defendant rape N in a watchman’s office at his place of work (1<sup>st</sup> and 2<sup>nd</sup> charge), at Pulau Batu (3<sup>rd</sup> charge), on his boat (4<sup>th</sup> and 5<sup>th</sup> charge) and in a bedroom where they lived (6<sup>th</sup> charge). N was only 11 years old when she was raped and 13 years old when she was last rape.

She was threatened to be beat until death if she told her mother about the incident. The defendant also threatened to leave her behind if she refused to have sexual intercourse with him and she was strangled on her neck, is hitting on her back and was thrown a bottle at her.

The offences were known when N ran away from home and went to her aunt’s house. She revealed that she had been repeatedly raped by the defendant and a police report was made. The sentence is 24 years imprisonment on each charge to run concurrently from the date of remand. As the defendant is above 50 years old no sentence of whipping is imposed.

**Comparison between the concept of Zina in Syariah Court and Civil Court**

	<b>Shariah Court</b>	<b>Civil Court</b>
Illegal sexual intercourse is committed	With consent	Without consent from other party
Legislation governed	Section 178 of the Religious Council Kadi’s Court Act	Brunei Penal Code Act
Incestuous relationship	No specific legislation but Section 178 (3) is applicable for this offence.	New amendment Penal Code (Amendment) Order, 2017 has include punishment for incestuous rape
Shariah Penal Code Order 2013	Under jurisdiction of Shariah court. It also has provision on <i>Zina</i> and <i>Zina bil-jabar</i>	

**Conclusion and recommendation**

In conclusion, the prohibition of committing *zinā* has been mention in the *quran* and it provides the punishment to those who commit it. Therefore, Islamic studies which includes the Islamic law is vital, so that people are aware of it and will not commit anything which is prohibited.

Furthermore, the offence of *zinā* can be committed either by consent or without consent. The element of consent here is important to justify whether the offence is to be heard under jurisdiction of shari’ah court or in civil court. The application of *zinā* which is committed consensually are within the jurisdiction of shari’ah courts.

Meanwhile *zina* by coercion (non-consensually) is within the jurisdiction of civil courts. *Zinā* by coercion is known as rape in English context. This research has provides the study of *zinā* in both area of laws in *Shari’ah* and law of Brunei Darussalam.

<sup>8</sup> Public Prosecutor And A.S Bin K (High Court of Brunei Darussalam) (Criminal Trial No.3 of 2016)

In addition, there is also provision that discussed about *zinā* and *zinā bil-jabar* under the Shariah Penal Code Order 2013 pertaining to the offence of *zinā*. The researcher would like to recommends a further research to be conducted on this offence as it is one of serious crime.

The researcher would also want to highlight that, laws that enforce and every individual in this society play an important role in reducing offence of *zinā*. For example, Muslim parents should always monitor the activities of their children and prioritize the teaching of Islamic studies.

## References

### Books

- Muhammad Akram Ladin. (2014) *Islamic Law an Introduction*. (5<sup>th</sup> ed) Kuala Lumpur: Malaysia
- Pehin Dato Seri Maharaja Dato Paduka Seri Setia Dr Ustaz Haji Awang Abdul Aziz Bin Juned.(2014). *The Shari'ah Penal Code an Introduction*. Brunei Darussalam: State Mufit's Office.
- Abridged by A group of Scholars under the supervision of Shaykh Safiur Rahman Al-Mubarakpuri. (2003). *Tafsir Ibnu KAthir*. Darussalam.
- Mick Woodley (2009). *Osborn's Concise Law Dictionary*. (11<sup>th</sup> ed). England.
- Imam Hafiz Abu Eisa Mohammad Ibn Eisa At-Tirmidhi. (2007) *Jami At-Tirmidhi*. (Abu Khaliyi (English Translation). Riyadh: Maktaba Dar-us-Salam.
- Harvey Wallace & Cliff Roberson. (2008) *Principles of Criminal Law*. (4th ed). United States of America
- Muhammad Azlan Bin Pengarah Haji Ibrahim (2012/2013). *Jenayah rogol di Negara Brunei Darussalam*. Brunei Darussalam: Universiti Brunei Darussalam.
- Hajah Suriati Binti Haji Ali Yusof (2005/2006). *Rogol: Kes Kajian di Negara Brunei Darussalam*. Brunei Darussalam: Universiti Brunei Darussalam
- Ratanlal & Dhirajlal's (2009). *Law of Crimes*. (26<sup>th</sup> ed). New Delhi: Bharat Law House.
- Dato' Hj Mohammad Shariff Bin Haji Abu Samah & Datin Hjh Asidah Binti Hj Mohd Ali. (2012). *Alman Criminal Law in Malaysia*. (1<sup>st</sup> ed). Malaysia: Syarikat Percetakan Ihsan.
- Hamid Ibrahim & Naseer Hamid. (2008). *Rape & Incest, cases and Materials*. Petaling Jaya: Gravel Publication
- Muhammad 'Arif Bin Haji Kamis (2012). *The legal concept of incest in Brunei Darussalam: An Analytical Study*. Brunei Darussalam: University Islam Sultan Sharif Ali.
- Widad Binti Haji Abdul Aziz. (2015). *Theoretical framework of evidentiary rules and punishments for sexual offences in islamic law: the extent of its application in Brunei Darussalam*. Brunei Darussalam: University Islam Sultan Sharif Ali.

### Articles Journal

- Dato Seri Setia Haji Awang Yusoff Bin Haji Awang Ismail. *Pendidikan Melayu Islam Beraja: Kearah Melahirkan Belia Brunei Cemerlang*
- Roosniza Mohd Shariff. *Penalties and attitudes in preventing rape* [2005] 1 MLJ
- Prof. Madya Dr.Haji Mat Saad Abdul Rahman (2003).*Jurnal undang-undang syariah Brunei*.

### Website

- Azrimah Binti Haji Abdul Rahman. *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) [accessed on 22/10/ 2017]

- Sohaib Mukhtar. *In defense of the codification of the Islamic law of Hudud into the law of Pakistan*. Retrieved from <http://www.qscience.com/doi/pdf/10.5339/irl.2016.11> [accessed on 4/10/2018]
- Dr Azman Mohd Noor. *Punishment for rape in Islamic Law [2009] 5 MLJ cxiv*. Retrieved from [http://irep.iium.edu.my/16877/1/PUNISHMENT\\_FOR\\_RAPE\\_IN\\_ISLAMIC\\_LAW.pdf](http://irep.iium.edu.my/16877/1/PUNISHMENT_FOR_RAPE_IN_ISLAMIC_LAW.pdf) [accessed on 22/10/ 2017]
- (Maulana) Abdullah Yusuf Qasmi. *Zina (Adultery) & Islam*. Retrieved from [http://www.deoband.net/uploads/2/1/0/4/2104435/zina\\_in\\_islam.pdf](http://www.deoband.net/uploads/2/1/0/4/2104435/zina_in_islam.pdf) [accessed on 4/10/2018]
- Azizah Othman. *Fenomena Sumbang Mahram di kalangan masyarakat Islam di Malaysia*. Retrieved from <http://repo.uum.edu.my/1815/1/11.pdf> [accessed on 20/10/2017]
- Syamsul Huda. *Zina dalam Perspektif Hukum Islam dan Kitab Undang-undang Hukum Pidana*. Retrieved from <http://oaji.net/articles/2016/1163-1458782805.pdf> [accessed on 4/10/2018]
- Newsletter. Retrieved from <http://www.information.gov.bn/Brunei%20Today%20PDF%20Library/2014/BD%20MEI.pdf> [accessed on 20/10/2017]

### **Interview**

- Ustazah Nooraida Binti Haji Timpus, Research department. Bandar Seri Begawan Syariah Court.
- ASP Mohammad Amerol Bin Haji Metussin, Criminal Investigation Department. Bandar Seri Begawan.

### **Legislation**

- Religious Council Kadi's Court Act, [Chap 77]
- Shariah Penal Code Order 2013
- Penal Code [Chap 22]
- Penal Code (Amendment) order, 2017
- Criminal Procedure Code [chap 7]

### **Cases**

- Public Prosecutor and Hibatul Wafi bin Mahari* (High Court of Brunei Darussalam) (Criminal Trial No.35 of 2013)
- Public Prosecutor and RBAHI* (High Court of Brunei Darussalam) (Criminal Trial No. 17 of 2015)
- Public Prosecutor and Hamran Bin Bakar (Court of Appeal of Brunei Darussalam) (Criminal Appeal No 6 of 2016).
- Public Prosecutor and MA Bin MJ* (High Court of Brunei Darussalam) (Criminal Trial No. 11 of 2011)
- Public Prosecutor And A.S Bin K* (High Court of Brunei Darussalam) (Criminal Trial No.3 of 2016)