

FORUM:

SYMPOSIUM ON BRUNEI'S NEW ISLAMIC CRIMINAL CODE

Abstract

In this inaugural issue of Harvard Law School's Journal in Islamic Law, we use the new Forum, designed for scholarly debate on recent developments and scholarship in the field, to feature a Symposium on the passage of a new 'Islamic Criminal Code' in Brunei. This new criminal code has generated extensive international media attention but little close analysis. In this Forum, four scholars offer scholarly essays that examine the contours of this new legislation and the extent to which it intersects with antecedents in Islamic history and with precedents in modern criminal law and procedure, comparatively. With a foreword by Intisar A. Rabb, Mansurah Izzul Mohamed, Dominik M. Müller, and Adnan A. Zulfiqar assess the history, workings, and critiques surrounding Brunei's new code. Accompanying their essays is the SHARIASource Online Companion to the Forum on Islamic Criminal Law in Brunei, which provides the text of each law, and of its antecedents, at beta.shariasource.com.

FOREWORD

CODIFICATION OF ISLAMIC CRIMINAL LAW

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This first issue of Harvard Law School's *Journal in Islamic Law Forum* focuses on a new development in Islamic legislation that has generated much international media attention but little close analysis: Brunei's new Islamic criminal code. This development follows a The *Forum* features contributions from three scholars and practitioners with expertise in Islamic criminal law, Southeast Asian history and society, and international law and foreign affairs from within Brunei: Mansurah Izzul Mohamed, Dominik M. Müller, and Adnan A. Zulfiqar. These three essays assess the history, workings, and critiques of Brunei's new Code. Accompanying their essays is the SHARIASource Online Companion to the Forum, which provides the text of each law, and of its antecedents, at beta.shariasource.com (2020).

OVERVIEW OF BRUNEI'S NEW CRIMINAL LAWS

Brunei recently passed two acts reforming the country's codes of criminal law and procedure: the Syariah (*Sharī'a*) Penal

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Code Order of 2013 (SPCO) [*Perintah Kanun Hukuman Jenayah Syariah* 2013],¹ and the Syariah Courts Criminal Procedure Code Order of 2018 (SCCPCO).² Both Codes came into effect last year, in May 2019.

The idea of reforming Brunei's criminal justice system through new Islamic criminal laws is not new. Both Codes have been six years in the making, or longer, when considering the range of Islamic legislation proposed and passed in the 1990s. Sultan Hassanal Bolkiah first announced his plan to pass Islamic criminal legislation in 2013,³ meant to bring the laws into compliance with Islamic tradition and to reduce foreign influences. But his decision dates back long before: since independence from British oversight in 1984, Brunei's legal structure has always incorporated both Islamic and "civil" law (modeled after British common law). Moreover, Brunei follows a national ideology of *Melayu Islam Beraja*⁴—a policy that gives primacy to a mix of Malay language, culture, and customs as well as the teaching and practice of Islamic laws and values—announced from the country's inception.

WHY NOW? THE INTERNATIONAL AND ISLAMIC CONTEXT

What explains, then, passage of the Codes now? In announcing the main Code, the Sultan specifically mentioned foreign powers that had "reduced the strength and effectiveness of Islamic legislation."⁵ It seems, though, that he was referring to something more than the notion that Muslim former colonies and protector-

1 Syariah Penal Code Order (SPCO) 2013 (No. S 69) (Oct. 22, 2013), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/s069.pdf [<https://perma.cc/VUL5-W8QM>].

2 Syariah Courts Criminal Procedure Code Order (SCCPCO) 2018 (No. S 9) (Mar. 5, 2018), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2018/S009.pdf [<https://perma.cc/KU9Y-RUH5>].

3 30.04.14 *Implementation of the Shari'ah Penal Code Order, 2013*, PRIME MINISTER'S OFFICE (Apr. 30, 2014), <http://www.pmo.gov.bn/Lists/Announcements/NewDispform.aspx?ID=30> [<https://perma.cc/CFL4-GWNA>].

4 *National Philosophy MIB Concept*, GOVERNMENT OF BRUNEI DARUS-SALAM, <https://web.archive.org/web/20000915110300/http://www.gov.bn/government/mib.htm> [<https://perma.cc/BR83-A8DZ>].

5 See *supra*, note 3.

ates like Brunei were wary (and weary) of Western domination. By 2013, the world had witnessed a rise in non-state actors in Muslim countries implementing harsh criminal punishments that seemed to be extreme perversions of classical Islamic law. Consider the rights-violating stories of medieval Islamic criminal law turned modern—that is, the criminal prosecutions by members of ISIS in Iraq,⁶ militant groups in Northern Mali,⁷ and harsh versions of criminal codes in Northern Nigeria⁸—all characterized by excessive criminalization and few procedural protections. Contrary to Brunei’s vision, many of these “foreign powers” experimented with regimes of Islamic criminal law without state authorization, legislation, or consultation on incorporating norms that would include local Islamic mores on criminal law and procedure. Furthermore, they failed to consider or incorporate evolving standards of decency and due process.

Brunei sought a different path. Through a five-year process of legislation, the Sultan designed the Code to proceed in three phases⁹: the first for small crimes and misdemeanors (which took effect in May 2014), and the last two for more severe crimes and punishments (which took effect in April 2019). He tasked decision-makers with deliberating about the legislation and incorporating all areas of the government, bench, and bar as well as the religious legal establishment. The Sultan also invited the involvement of members of the Legislative Council, the judiciary, the Attorney General’s office, and the Brunei Bar Association as well as the State Mufti and Ministry of Religious Affairs. Finally, this broader group consulted academics and *faqīhs* (religious law ex-

6 *In the News: Revkin on ISIS’s Legal System*, ISLAMIC LAW BLOG (July 11, 2018), <https://islamiclaw.blog/2018/07/11/in-the-news-revkin-on-isis-legal-system> [<https://perma.cc/76EX-X5HT>].

7 *Sharia Law Enforced in Mali*, NATIONAL (Abu Dhabi) (Aug. 1, 2012), <https://www.thenational.ae/world/africa/sharia-law-enforced-in-mali-1.441694> [<https://perma.cc/V38C-5CFH>].

8 *The Nigeria Papers: Sharī’a Implementation in Northern Nigeria*, SHARIASOURCE, <https://beta.shariasource.com/projects/3> [<https://perma.cc/8HVV-2ZF7>].

9 Constance Johnson, *Brunei: Islamic Law Adopted*, LIBRARY OF CONGRESS (May 6, 2014), <http://www.loc.gov/law/foreign-news/article/brunei-islamic-law-adopted> [<https://perma.cc/9HJ5-WNN5>].

perts and practitioners) in Brunei, in neighboring Southeast Asian countries, and worldwide on a range of questions concerning historical and modern criminal codes. As a scholar of Islamic law and author of a book on the expansive notion of reasonable doubt in classical Islamic criminal law,¹⁰ I was among the academics who visited the country for discussions about historical and comparative perspectives on Islamic criminal law.

The Code has garnered near-constant international attention and controversy from the beginning. When the Sultan made his 2013 announcement, the draft bill attracted sharp criticism for its harsh provisions.¹¹ When Phase One of the Code came into effect in 2014, activists and staff protested the Brunei-owned, iconic Beverly Hills Hotel.¹² These concerns became a potential stumbling block for the proposed 2015 Trans-Pacific Partnership Agreement (TPP)¹³—a twelve-country trade deal proposed under the Obama Administration between mostly Asian and Latin American countries plus the United States, which was designed to lower tariffs and reduce dependency on Chinese trade in favor of the U.S. market. Most countries signed in 2016, but the United States, by then under the Trump Administration, withdrew from the deal before it could take effect.¹⁴ When Phases Two and Three of Brunei's new Criminal Code came into effect in April 2019, international criticism intensified, and the Beverly Hills Hotel boycott contin-

10 INTISAR A. RABB, *DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW* (2015).

11 *Brunei Moving Forward with Islamic Penal Code*, VOICE OF AMERICA (Oct. 22, 2013), <https://www.voanews.com/east-asia/brunei-moving-forward-islamic-penal-code> [<https://perma.cc/9XLX-N6WH>].

12 *Protestors Call for Renewed Boycott of Beverly Hills Hotel*, HOLLYWOOD REPORTER (Oct. 17, 2016), <https://www.hollywoodreporter.com/news/beverly-hills-hotel-boycott-still-938972> [<https://perma.cc/8RR2-VLBJ>].

13 *Summary of the Trans-Pacific Partnership Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Oct. 4, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> [<https://perma.cc/D8UT-XERG>].

14 Donald J. Trump, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITE HOUSE (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement> [<https://perma.cc/62R5-BLVA>].

ued, with George Clooney leading the charge. That same month, Brunei's Minister for Foreign Affairs exchanged letters with the U.N. High Commissioner for Human Rights seeking to answer the criticisms.¹⁵ In May 2019, the Sultan declared a moratorium on the death penalty—turning a *de facto* practice into a *de jure* policy.¹⁶

CONCERNS OVER BRUNEI'S NEW CRIMINAL JUSTICE REGIME

What concerns does the new legislation raise for individual defendants in Brunei's criminal justice system? Three main concerns and policy disagreements have to do with the scope, harshness, and procedural fairness of the legislation. All of them suggest that Brunei's new code is genuinely new: it has no exact Islamic historical precedent, nor does it reproduce contemporary criminal codes of peer Muslim-majority states, peer Muslim-minority states (including those of the United Kingdom, the United States, or otherwise), or Islamist non-state actors.

The first anxiety is over the *scope of criminalization*. Brunei outlaws conduct that many states no longer see as criminal acts, such as a range of sex crimes that many Muslim-majority states prohibit but that the United States and other countries have recently decriminalized (e.g., *Lawrence v. Texas*,¹⁷ decriminalizing sodomy in the United States). It also punishes acts that not only would make the international community balk at as threats to freedom of belief but that historical precedents in Islamic law also would not recognize, such as attempted apostasy. These facts raise questions about the appropriate line between state autonomy to define and deter behavior based on societal norms of morality, not to mention matters of fundamental human rights and freedoms.

Second is the *severity and proportionality of punishment*.

15 *Brunei Says Controversial Sharia Law Aimed at "Prevention,"* BBC (Apr. 12, 2019), <https://www.bbc.com/news/world-asia-47906070> [<https://perma.cc/CG2V-48AQ>].

16 *05.05.19 SPCO Clarified*, PRIME MINISTER'S OFFICE (May 5, 2019), <http://www.pmo.gov.bn/Lists/News/DispForm.aspx?ID=1188> [<https://perma.cc/9QSF-5XC8>].

17 *Lawrence v. Texas*, 539 U.S. 558 (2003).

Brunei's new Islamic criminal code adopts provisions for the whole range of notorious harsh penalties of medieval Islamic criminal law—from fines and imprisonment (Phase One crimes), to corporal punishment in the form of public whipping, hand amputation, and the death penalty (Phases Two and Three crimes). This invites questions about the nature of enforcement in Brunei: whether the new Code is designed to deter on the model of the expressive function of criminal law (as one Symposium contributor, Izzul Mohamed, claims) or whether it follows the more common models of utilitarian or retributive punishment that instead suggest a wait-and-see stance before evaluating their design or effects (as another Symposium contributor, Dominik Müller, seems to suggest).

Third is the extent of *procedural protections* necessary for seeing to defendants' rights. Brunei incorporates what I have called elsewhere the "jurisprudence of doubt" in reference to historical Islamic norms that sought to mitigate the harsh effects of Islam's fixed criminal punishment with heightened evidentiary and other procedural requirements before securing a conviction.¹⁸ Brunei's new laws require a "no doubt at all" standard, install parallel Islamic and "civil" jurisdictions and prosecutors, and otherwise require state prosecutors of crime to default to the "civil" courts that do not feature the harshest of the new Code's punishments. But the Code also removes or relaxes some of classical Islamic law's procedural protections for offenders who are minors or who are otherwise not legally competent or culpable, and it relaxes evidentiary standards for crimes like rape. These features of the Code raise questions about whether and how the laws follow the jurisprudence of doubt across the board to indeed mitigate the harshest of penalties and procedural traps of criminal law systems rife with injustice. A close look at the Code makes clear how it could raise concerns about over-criminalization, over-punishment, and thinner-than-needed procedural protections.

To be sure, the new Brunei Code follows the basic tripartite division of classical Islamic criminal law: *ḥudūd* fixed crimes

18 RABB, *supra* note 10.

and punishments, *qiṣāṣ* “eye-for-an-eye” rules of retaliation for murder and personal injury (commutable by financial compensation), and *taʿzīr* discretionary crimes and punishments. But it diverges from historical treatment of Islamic criminal law for better and for worse. For the better, with discretionary penalties, Brunei paints a picture different from the medieval landscape of criminal law enforcement—such as in Umayyad, ʿAbbāsīd, and Mam-lūk practice, to take a few of the more notable dynasties. Whereas those states more often than not *elevated* discretionary penalties to capital punishment and torture for a wide range of unspecified crimes, the new code in Brunei reduces *taʿzīr* penalties to fines and imprisonment for a statutory list of misdemeanors. It also instituted an initially *de facto* and eventually *de jure* moratorium on implementation of the death penalty. For the worse, when it comes to capital punishment, Brunei charts a path far from the early modern trajectory of legislative fixes to the over-criminalization and over-punishment of medieval laws—such as the Ottoman rulers’ issuance of a criminal code that *reduced* provisions for corporal punishment and death-eligible crimes and replaced those punishments with fines and imprisonment. Brunei’s new Code seems not to have pursued the path of converting the principles behind the substantive criminal law into legislative fixes, or to apply the most expansive notion of doubt jurisprudence, which would bar criminal procedures that permit prosecutions against classes of offenders and offenses typically out of reach of criminal punishment.

Instead, Brunei amalgamates legislative harshness with an attempt at procedural savings meant to recognize the public and symbolic appeal of *sharīʿa*, but not yield to excessive punishments far beyond the culture and history of moderation in Brunei. For both Mohamed and Müller, the Code’s emphasis on procedure, when placed against its history, indeed suggests that Brunei’s harshest new provisions are more bark than bite and will tilt in the direction of moderation. Reading Adnan Zulfiqar’s examination of several problematic points of procedure, we must wonder: are procedural savings enough? If not, Brunei may consider re-

examining its legislation and procedure to better square with its desire to respect traditional Islamic principles and promote sophisticated forms of engagement with its past and present, in a way that could model legislation for the region and the world.

A CLOSE LOOK AT THE NEW CODES: THREE ESSAYS

In her essay, **Mansurah Izzul Mohamed** focuses on the legislative and operational aspects of Brunei's new criminal laws: What are their most significant provisions? Where do the new laws intersect with the new laws of criminal procedure? How do the "civil" criminal courts (on the model of common law courts) operate in parallel to the expanded jurisdiction of the *sharī'a* courts charged with implementing the new laws? In answering these questions, she looks at the numbers. Mohamed outlines the punishments in the new SPCO as comprising about 74% minor crimes, the "general offenses" or *ta'zīr* offenses defined as acts against society; 10% serious crimes, called *ḥudūd* offenses and defined as acts against God; and 5% violations of rules against murder and personal injury, called *qiṣāṣ* offenses and defined as acts against individuals. The remainder—also acts against individuals—are offenses that carry a penalty of financial compensation in lieu of corporal punishment or imprisonment. As noted, these divisions follow the basic tripartite division of classical Islamic criminal law. But to understand how they operate in Brunei requires examining the new laws alongside existing "civil" (or secular) laws—which continue to be in force—and modifications to criminal procedure. Two features guide and potentially mitigate the harshness of the new laws. First, the choice of forum tilts in the direction of the civil courts as the default forum. Second, relatedly, the new procedures entail high evidentiary bars before a prosecutor can pursue the new Islamic charges or punishments—a fact that will result in civil court prosecution or Phase One-type punishment of lighter penalties (with lower evidentiary bars) for small offenses. The most prominent of these is a requirement of four eyewitnesses for death-eligible sex crimes (a standard designed to be virtually im-

possible to meet) and an elevation of the typical reasonable doubt standard to a “no doubt at all” standard of proof—again, following classical Islamic law. Mohamed suggests additional reasons to expect moderation in Brunei’s criminal law enforcement, not least of which is Brunei’s public rejection of torture, with the country’s accompanying announcement of joining the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and its commitment to international law as a member state of the United Nations and other organizations attentive to universal human rights. To wit: in response to several countries’ insistence that Brunei review its capital punishment legislation, the Sultan convened a committee to do so, resulting in the addition of life imprisonment as an alternative to capital punishment. Separately, Mohamed writes, was his official recognition of a moratorium on the death penalty. If correct, the future looks promising, but as Phases Two and Three are newly launched, more research is required on applications in this arena as well.

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In his essay, **Dominik M. Müller** takes an historical approach. He traces Brunei’s new Islamic criminal code back to the country’s independence in 1984, and, even further, to the so-called Anglo-Mohammadan law established by the British protectorate earlier in the twentieth century, and to the *Hukum Kanun Brunei* before that—some version of which may have stretched all the way back to Islam’s arrival to Borneo in the fifteenth century. Müller is the first to assess the Code based on the evidence, albeit from Phase One. From 2014 to 2019, Phase One saw some application of the new Islamic Code to misdemeanors, but the extent of application was narrow in comparison with applications of the existing state Code. Looking at a twelve-month period from 2015 to 2016, Müller counts a total of 247 prosecutions under the new Code, all including fines (with the corporal punishments of the new Code from Phases Two and Three not yet in effect). He puzzles over the expressions of surprise among the international media outlets at the new Code, given the centuries-long history

that preceded it as well as the legislative history that followed the phased introduction of the new law announced in 2013, and the minor penalties since. Müller then contrasts the international criticism with the local response: feeling under attack, an educated elite and other social media influencers in Brunei closed ranks in support of the new Code under the banner #BruneiUnited. For Müller, while none of these developments should have surprised the world, the fact that they did likely follows from the fact that Brunei is both historically insular and the “academically most understudied Southeast Asian country.” If true, his observation underscores the extent to which more research is required.

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In a short essay, **Adnan A. Zulfiqar** takes a more critical approach to aspects of Brunei’s criminal laws that have garnered less attention but that he finds troubling. The international community has, rightly in his view, protested against and condemned the law’s potential violations of human rights norms against torture and individual freedom. Most condemnations have focused on provisions for capital punishment, whipping, and amputation for the new Code’s crimes of *liwāṭ* (sodomy), *zinā* (unlawful sexual intercourse between heterosexuals), and theft. But little attention has been paid to the Code’s departures from “classical Islamic law’s substantive and procedural constraints” that allow legislators and prosecutors to “criminalize more conduct.” For example, the Code permits punishment of offenders who lack legal capacity, requires four eyewitnesses to prove rape, and prosecutes beliefs through punishing *attempted* apostasy—that is, where resolving to renounce Islam is made equivalent to renouncing it at a time when renunciation of religion, unlike during medieval regimes, does not carry the threat of treason. For these reasons, despite the procedural protections and heightened standards of doubt jurisprudence to which Mohamed and Müller point, he concludes that the new Code entails many provisions that signal the need for greater caution and perhaps further modification. Zulfiqar argues that Brunei codified Islamic criminal law in a way that creates new

crimes and disregards defendant rights, and thus diverges from norms of fairness and cultural relevance in the historical precedents and mores of the very Islamic system which it seeks to reinterpret for its society today.