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Sharī‘ah Criminal Law Enforcement in *Hisbah* Framework: Practice In Malaysia

Alias Azhar*

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Abstract: Hisbah is the most important institution in a society and nation. Enforcement parties are those who are directly involved in executing this. In carrying out their duties, they bear heavy responsibility because it involves the rights of Allah (SWT) and the rights of human. Hisbah implies the implementation of al-amr bi-l-ma‘rūf (command the good) when it is clear that it is abandoned, and wa-n-nahy ‘ani-l-munkar (prevention of the bad) when it is clear that it is done. This study is based on the concept of Hisbah in Sharī‘ah Law which is of a general and widespread aspect of enjoining good and preventing evil. Literature reviews and library searches have been conducted intensively to clarify the principles of hisbah. Additionally, descriptive and content analysis of textual content was done on the provisions of laws and regulations as well as guidelines on the prevention of sharī‘ah crime parameters in Malaysia. In general, our country has implemented the concept of hisbah in its own form without the branding of an institution specifically as “the institution of hisbah”. The roles and functions of hisbah are given to the Sharī‘ah Enforcement Division, Islamic Religious Department in the states.

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The procedures and modus operandi of the authorities in preventing Shari'ah crimes meet the criteria of amar makruf nahi mungkar in the framework of the Hisbah. Hisbah needs to be institutionalised in a realistic and systematic manner as a body that carries out responsibilities in parallel with the concept of real hisbah and can be an alternative reference as the best approach that is more effective.

Keywords: Shari'ah Criminal Law, Islamic state, Hisbah framework, Shari'ah Enforcement, Immoral prevention.

Abstrak: Hisbah adalah institusi yang paling penting dalam masyarakat dan negara. Pihak Penguatkuasa adalah mereka yang terlibat secara langsung dalam melaksanakan perkara ini. Dalam menjalankan tugas mereka, mereka menanggung tanggungjawab yang berat kerana ia melibatkan hak Allah dan hak manusia. Hisbah membayangkan pelaksanaan Al-Amr bi Al-Ma'ruf (menyuruh yang baik) apabila jelas bahawa ia diabaikan, dan Al-Nahy 'an Al-Munkar (pencegahan buruk) apabila jelas ia dilakukan. Kajian ini adalah berdasarkan konsep Hisbah dalam hukum Shari'ah yang merupakan aspek umum dan meluas menyuruh kebaikan dan mencegah kejahatan. Kajian literatur dan kepustakaan telah dijalankan secara intensif untuk menjelaskan prinsip hisbah. Di samping itu, analisis deskriptif dan kandungan teks telah dilakukan ke atas peruntukan perundangan dan peraturan serta garis panduan mengenai parameter pencegahan jenayah Shari'ah di Malaysia. Secara umum, negara kita telah melaksanakan konsep hisbah dalam bentuk tersendiri tanpa penjenamaan sebuah institusi yang khusus sebagai 'institusi hisbah'. Peranan dan fungsi hisbah diberi kepada Bahagian Penguatkuasaan Shari'ah, Jabatan Agama Islam di Negeri-negeri. Prosedur dan modus operandi pihak berkuasa dalam mencegah jenayah shari'ah memenuhi kriteria amar makruf nahi mungkar dalam kerangka Hisbah. Hisbah perlu diinstitusikan dengan cara yang realistik dan sistematik sebagai sebuah badan yang menjalankan tanggungjawab selari dengan konsep hisbah sebenar dan boleh menjadi rujukan alternatif sebagai pendekatan terbaik yang lebih berkesan.

Kata Kunci: Undang-undang jenayah Shari'ah, Negara Islam, Kerangka Hisbah, Penguatkuasaan Shari'ah, Pencegahan maksiat.

1. Introduction

Justice is the struggle of every nation and people. In striving to achieve justice, various philosophies and laws have been created, and the law is constantly reviewed and altered to suit the desired justice. In Islam, the justice required is absolute justice. It covers all mankind and all

matters. In the Qur'an, the verses that claim for justice are repeatedly mentioned and these prove that justice is greatly emphasised by Allah (SWT) *Hisbah* is the most important institution in a society and nation. Enforcement parties are those who are directly involved in executing this justice. In carrying out their duties, they shoulder heavy responsibility because it involves the rights of Allah (SWT) and the rights of human.

Islam is a comprehensive and complete religion in all aspects of worldly matters and in the hereafter. Therefore, Allah (SWT) instructs mankind to take care of and safeguard the earth as best as they could in accordance with His teachings and His prohibitions. This shows that a nation is very important to all creatures of God in this world, especially humanity. Therefore, a country should be best administered by leaders of all aspects.

2. Definition of Islamic State

The definition of Islamic state is viewed as what has been defined by the scholars, which is quite meaningful. There is an opinion that maximises the characteristics and scope of the Islamic state and some opinions also narrow and reduce its scope. However, that does not mean that Muslims can fight and quarrel to classify their country as a pure Islamic state or vice versa. This is because Muslims through religious experts have a way to glorify any of the opinions they feel are in line with the context of their respective countries. Certainly, as the definition of Islamic state is not a consensus, it is still considered an *al-ijtihādīyah* problem.

Among previous scholars who have defined Islamic State are as follows:

Ibn Hajar (t.th: 269) divided the Islamic state of "al-Dawlah al-Islāmiyah" into three important components:

- i. The land was originally occupied by Muslims and led by a Muslim, such as what had happened in al-Madīnah al-Munawwarah.
- ii. The land was opened by Muslims through war or consensus. Originally the land was inhabited by non-Muslims, after the victory of Muslims in war, the people considered as the native inhabitants were willing and had agreed to pay *al-Jizyah* to Muslims to enable them to remain in the open ground.

- iii. The country inhabited by Muslims and then the country has been colonised by non-Muslims.

Any countries could be categorised as an Islamic state if they have any of the three components above.

Ibn Qayyim (1401H: 266) stated that most scholars, among them Abu Yusuf, have defined Islamic State as a country inhabited by the majority of Muslims and subsequently Islamic law is carried out, if Islamic law is not carried out then the country is not an Islamic state. What are meant by Islamic law are all the claims and obligations demanded by Islam such as obligations of prayer, fasting, zakat and the like.

Sa'dī (1968: 84) has concluded the definition of the Islamic state which has been stated by al-Shāfi'ī defining the Islamic state as a nation that has been dominated by Muslims such as Baghdad and Basrah, or a country whose people have embraced Islam as al-Madīnah al-Munawwarah and Egypt, or a pagan state that has been opened by Muslims as *al-Sulh* while the non-Muslims in it continue living conditionally in the country and pay *al-Jizyah*. Al-Shawkānī (1985: 575) has argued that an Islamic State can be identified if all the instructions and prohibition of Islamic law can be carried out extensively, while the non-Muslims in the country are unable to carry out their religious affairs except the matters that are not permitted by the top leaders of the country.

Al-Sharkhasi (1989: 81) has taken the opinion of Abu Hanifah who classified the Islamic state as a country whose Muslims in it feel secure to worship Allah (SWT) and perform all religious activities related to Islam. If Muslims do not feel safe to perform worship and Islamic religious activities then the country cannot be named as an Islamic state and it can even be categorised as an *al-Harbi* country. This opinion was approved by many scholars, including Muhammad Abu Zahrah, Yusuf al-Qardawi, al-Zuhayli (1998: 168).

Ibn 'Ābidīn (1966: 175) has stated that a pagan state will become an Islamic state if the laws of Islam are established within it such as the freedom to perform five-day prayers, Friday prayers, 'Eids and so forth and all these things can be exercised by Muslims freely and peacefully. A country may be defined by its influence, domination and people who

lead the country. If a country is influenced and led by Muslims, then the country is an Islamic State. A country will be recognised as an Islamic state if it is governed by Islamic law. If the country is dominated by the heathen law it cannot be recognised as a pure Islamic state (al-Maqdisī 1971: 213).

Al-Nabahānī (1980: 216) has obliging the Islamic state two have two things: the implementation of Islamic law such as *hudud* and peace must be felt by all Muslims and *ahl al-Dhimmah*, who are in the country. If one or both of the above two things is not executed then the country cannot be named as an Islamic state. The classification of *Mu'asarah* (contemporary) 'Ulamā' towards the Islamic State is rather unique to be critically analysed. Al-Zuhaylī (1998: 168) has stated that Islamic countries are all countries under the jurisdiction of a Muslim or a Sultan, while Islamic law and *Sharī'ah Islāmiyyah* should also be implemented well and in orderly manner. All Muslims in it, especially the leaders of the state must (*al-Wajib al-Kifā'ī*) defend the state and *Sharī'ah Islāmiyyah* as best as they could. If no one dares to defend their country then all Muslims who are in has committed a sin. For example, Palestine is considered an Islamic state even though it is now trying to be colonised by the Jews. Therefore, all Muslims in Palestine and in other Muslim countries should try to free the country from the Israeli occupation and their tyranny.

An Islamic state can also be regarded as the Arab countries and countries that have been opened by Muslims before, and are inhabited by Muslims as they dutifully apply Islamic laws in their administration and life. In addition, another name synonymous to the Islamic state is *al-Dawlah al-'Ādilah* as upholding justice in the administration of a country is the most important principle in Islam (al-Zuhaylī 1998: 168). °Abd al-Karim °Ustman (1985: 228) has defined an Islamic state as a country under the auspices of a sultan or Muslim as the head of the nation. At the same time, Islamic law is implemented within the country including *hudud*. The Islamic state according to Sayyid Qutub (1994: 298) is a country which implements Islamic law in total whether the people of the country are all Muslims or in it are non-Muslims.

Abu Zahrah (1995: 88) has defined an Islamic State as a country of safety and security in favour of Muslims and the *ahl al-Dhimmah*. °Abd al-Qādir °Awdah (1402H: 421) has stated that an Islamic State is

a country governed by Muslims and Islamic law can be implemented safely and freely without distress. According to Al-Būtī (1999: 92), an Islamic State must be governed by Muslims because only then it will execute the *Sharī'ah* and spread Islam. 'Abd al-Karim Zaydān (1396H: 16) was more inclined towards the view that Islamic State must be ruled by Muslims, for which it will be possible to implement Islamic law within the country in accordance with the leaders.

From the clarification and classification made by the above scholars it can be concluded that the definition and characteristics of an Islamic state is a non-agreeable matter by the scholars either the predecessors nor the *Mu'asarah*, nor any *qat'i* scripts which specifically discussed the real Islamic state. However, the characteristics of the Islamic State expressed by *Mu'asarah* scholars and previous scholars are not very different. From the definitions presented by the above scholars, it can be concluded that the characteristics of an Islamic state are as follows:

- i. The Islamic state must carry out Islamic law peacefully and freely.
- ii. Administered by *al-Imam* or Muslims ruler.
- iii. Security and harmony stand in favour of Muslims.
- iv. Islamic law is fully implemented in the Islamic government.

The matters (i) and (ii) stated by the above scholars are the points agreeable between *Mu'asarah* scholars and former scholars. While (iii) and (iv) are the points of disagreement between the two periods of scholars, as some of scholars pointed them out and the others do not. Hence, this problem is an issue of *ijtihadiyyah* resulting from the *ijtihad* of Islamic thinkers, so Muslims have a vast space to choose the most appropriate opinions and coincide with the *maslahat* to be practised in their respective countries.

The author believes that an Islamic state is a country occupied by most Muslims or the majority is Muslims although there are non-Muslim groups under the leadership of the Islamic Head of State. The views of Muhammad Abu Zahrah, Yusuf al-Qardawi, al-Buti and al-Zuhayli are the most suitable opinions to be adopted in a multi-racial and multi-religious nation such as Malaysia. Undeniably, the Head of State is obliged to continue working towards practising Islamic law in total.

As a result of the above debates, the author considers the minimum features required in an Islamic State are as follows:

- i. The country should be inhabited by a majority of Muslims.
- ii. The Head of State and his deputies should be Muslims.
- iii. The state administration must be controlled by Muslims.
- iv. Islamic conducts are freely performed by Muslims with a sense of security.
- v. The Muslims feel secure when they are in the country.

The maximum characteristic of an Islamic State is the implementation of *hudud* law thoroughly. Even though Malaysia is not practising Islamic law as a whole, it does not necessarily mean Malaysia is not an Islamic state. This is because Malaysia has gradually changed the way people live and the Malaysian government's leadership strives towards a better and more orderly way of practising Islamic law as claimed by Islam. An Islamic method mentions:

What cannot be done as a whole, do not abandon it as a whole (Ibn Nujaym 1997: 431).

This method can also be used as an argument that Malaysia can be regarded as an Islamic state with minimal features. Malaysia is currently unable to implement Islamic law or *hudud* law completely due to colonisation and its multi-religious citizens, which necessarily require clarification on the *hudud* law. However, the Malaysian government has never completely abandoned all Islamic law and did not abandon the idea of *hudud* law in Malaysia. We only require some time to persuade Muslims and non-Muslims who have been shrouded with the colonial administration system that *hudud* law is not suitable for implementation on a diverse country like Malaysia. However, in order to convince non-Muslims of the judicial system and Islamic administration, the government has begun introducing Islamic systems in the country's administration, such as Islamic banking, Islamic pawnshops (al-Rahn), Islamic Family Law systems and more implementations based on Islamic law.

In order to realise this, some aspects of the Islamic administrative and law systems have been highlighted and subsequently implemented by the government to be introduced to Malaysians, especially non-Muslims, showing that Islamic administrative and law systems are in

practice and at the same time can lead to the progress of the people and towards a glorious nation.

3. Prevention of Crime According to Islamic Law Philosophy

Hisbah means the execution of *al-Amr bi al-Ma'ruf* (commanding the good) when it is clear that it is abandoned, and *al-Nahy 'An al-Munkar* (prevention of the bad deeds) when it is clearly done (Al-Imam al-Ghazali:1990). Procedure for preventing disobedience is “*tajassus*” or spying / peeking. The fundamental principle of prohibition in Islam is not to expose ill doings of others as long as the wrongdoing is not done openly. Similarly, righteous practices such as prayer can counter those ill-doings. In fact, Islam forbids adultery and sexual misconduct. However, Islam also prohibits the act of exposing the disgrace of other person who does not threaten public safety and the perpetrators have been trying to conceal their conduct.

The theory of retaliation of a sentence/ punishment is to counter the crime of perpetrators, because if an offense committed against society, then the society through its representative, the court, will decide such a sentence. In this regard, in Malaysia, such legislative goals can be seen in the ‘mandatory’ punishments such as the death penalty for murder.

This prevention theory is a way of punishing criminals in the hope that criminals feel remorse and will not repeat it again. This theory also hopes that new offenders who intend to be involved in criminal activities will be discouraged from doing so when they see a punishment that has been imposed on the offender. That is, the theory has two great goals of preventing the offender himself from committing the same offense at other times; it is named as a special precaution. Secondly, it aims to prevent other potential offenders from committing the same mistake; it is named as the general precaution.

Furthermore, the theory of recovery and awareness is also the most important element of law enforcement and punishment of offenders. Efforts to uphold the *sharī'ah* aspect of enforcement and rehabilitation have been continuously carried out and many changes and shifts have taken place. There is an urgent need to have a standardised instruction to be followed in implementing procedures and *modus operandi* of vice and *khalwat* prevention operations.

The law of man is based on what matters. No one is given the right to seek out the secrets of others. A person will not be acted upon except only for obvious errors and crimes. The *tajassus* or spying is clearly prohibited in Islam, no one has the power to impose punishment on acts committed out of plain sight. The reason is that we are commanded to judge based on what we see. As for the hidden things, we rely on God.

Yusof Al-Qaradawi (1984) has explained that the bad deeds done must be real and seen. If the perpetrator or *khalwat* does so out of sight of the human being and closes his door, no one can peer or record it secretly by using an electronic device or video camera or raiding his house to ascertain his disobedience.

In terms of language, *khalwat* from the Arabic word “خلا”, “خلوا” meaning alone, empty, clean, something last and more. *Khalwat* is one of the acts prohibited by Islam. Nevertheless, the Qur'an does not mention the term and there is no *qat'ie* script, which deals directly with the crime, even though there are arguments and *qat'ie* script that prohibit and forbid the act.

Allah (S.W.T) says which means:

And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way. (al-Isra ' : 32)

The argument is it is a prohibited and unlawful act, it is also clear to us that it is illegal to approach adultery, while one of the disbelievers is the *khalwat* that occurs between men and women who are not mahram.

According to the dictionary, *khalwat* is defined as the act of isolating or isolating oneself in order to calm the mind and others. In addition, the word *khalwat* is also defined as being in an isolated or hidden place by men and women who are not mahram or not husbands and wives which can be regarded as an inappropriate act.

In Malaysia, *khalwat* is one of the criminal offenses provided in the Shari'ah Criminal Offenses Enactment of each state. Those convicted of the offense shall be liable to imprisonment for a term not exceeding 2 years or a fine not exceeding three thousand ringgit or both.

The jurisdiction of Shari'ah criminal enforcement against *khalwat* is subject to the enforcement division, state Islamic religious department. Generally, this jurisdiction is a general responsibility of *hisbah* without

involving any particular institutions. Procedures and modus operandi of the authorities in preventing vice and arrest of *khalwat* should meet the criteria of the actual *hisbah* concept. In the event of abuse of power and the misappropriation of the application of the *hisbah* method may result in a negative perspective of the society towards the Islamic law that encourages its ummah to enjoin the good and prevent evil. Furthermore, the purpose of Islamic law is to “*ta’dib*” (educate) and not punish solely. In short, da’wah first before prosecution.

This question arises specifically to the word of Allah which means:

O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead? You would detest it. And fear Allah; indeed, Allah is Accepting of repentance and Merciful. (Al-Hujurat: 12).

This is to ensure that the concept of *hisbah* is implemented and the *maqasid shari’ah* of Islamic criminal law can be enforced through “educating” instead of “punishing”.

Human beings as slaves and *khalifah* of Allah are accountable to enforce the *ma’ruf* and prevent the wrong. Nonetheless, humans have a tendency to neglect and forget. In the Islamic tradition, *hisbah* is a special instrument to play the role of correcting the malfunction to ensure that *ma’ruf* is enforced and negligence to be prevented. The basic purpose of *hisbah* is to supervise the community from breaking the *shari’ah*. This role is a human duty on earth.

Allah (SWT) says which means:

And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful. (Ali Imran: 104)

Society has the shared responsibility for mutual reminder of one another when there is a violation of the law. In fact, the Qur’an states that this feature is a fundamental characteristic of fulfilling the criteria of the best people. Based on what Allah (SWT) says, which means:

You are the best nation produced [as an example] for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. If only the People of the Scripture had

believed, it would have been better for them. Among them are believers, but most of them are defiantly disobedient. (Ali Imran: 110)

The need to reproach and forbid the wrongdoing is extremely critical and given profound attention in Islam. Even people are reminded that failure to implement them will bring about a severe consequence. Allah (SWT) says which means:

Cursed were those who disbelieved among the Children of Israel by the tongue of David and of Jesus, the son of Mary. That was because they disobeyed and [habitually] transgressed. They used not to prevent one another from wrongdoing that they did. How wretched was that which they were doing. (Al-Maidah: 78-79)

4. Criminal Offenses and the Implementation of *Hisbah* in Malaysia

Crime in language means sin or immorality. The term is divided into special and general meaning. Special meaning: is the prohibition of *syarak*, which is prescribed by Allah with the recompense of limit or *ta'zir* whether to do the prohibited or leave the required ones. The general meaning is an intrusion aimed at life, senses or human such as murder, injury, stroke and others. (Faizah Ismail: 1996)

According to the usual definition given by Fuqaha, "crime" is an evil act done to infringe the honour of the soul and limbs. This definition states that criminal offenses are limited to the offenses relating to the treatment of infringing the life and limbs such as killing and injuring of the body, and charged with *qisas* or *diyat*, for such offenses. Thus, all other offenses involving property, intellect and so on are not included in this narrow definition of crime. However, the definition of crime in a broader context includes all *hudud*, *qisas*, and *ta'zir* wrongdoing. (Abdul Monir Yaakob: 2000)

It can be concluded here that any form of sin or immorality from the biggest sin to the least of which is subject to *qisas*, *hudud* or *ta'zir* is thus considered a criminal offense.

Common ground rules for crime are the following three:

1. The existence of a revelation to prohibit an act and is punishable if done.
2. Wrong / Sinful act whether to do a forbidden thing or leave what is required by Islam.
3. Criminal acts committed by the *mukallaf*.

Allah (SWT) has pointed out in the Quran about two main responsibilities of man: to devote himself to Allah by obeying all the commandments and at the same time keep away from all his prohibitions. Man is also appointed as the Caliph of Allah to uphold Islamic justice and the well-being of life. The Word of God which means:

You are the best nation produced [as an example] for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. If only the People of the Scripture had believed, it would have been better for them. Among them are believers, but most of them are defiantly disobedient. (Ali 'Imran:110)

The comprehensive Islamic Sharī'ah as a guideline covers all aspects of human life and is relevant throughout the ages.

Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so, follow it and do not follow the inclinations of those who do not know. (al-Jathiyah: 18)

Islamic law has its own law of diverse commands and prohibitions, as well as encouragement. It is divided into five basic things that are closely related to human life:

- i. Protection of religion
- ii. Protection of human life
- iii. Protection of mind
- iv. Protection of progeny
- v. Protection of property

The law contained in the two main sources i.e. the Qur'an and Sunnah are characterised by God's revelation. The creator, Allah (SWT) as the lawmaker, has the nature that would be impossible to Him to do injustice to His servant. Sharī'ah-compliant law is fair and ideal to be implemented in human life. Nonetheless, it may not be overwhelming to say that every provision of a just Islamic law is certainly ideal. It may

be the case that an ideal legislation is not necessarily fair. Therefore, we will experience dilemma in evaluating Islamic legislation using a mere rational reason. It is even worse if we make passion and emotion as the primary appraiser of Islamic law.

Allah (SWT) *al-Hakim* (The Omniscient) always cares for human rights and safeguards their lives from tyranny and destruction. The Islamic Criminal Law is prescribed to safeguard and preserve the religion, the soul, the offspring, the mind and the property as *al-Dharuriyat al-Khams* (the five most important matters in human life). Any individual who violates one of these five matters is obliged to be punished by Allah (*hudud*), which is in accordance with the nature of the violation.

Today's implementation of *Hisbah* tends to focus on monitoring individuals and preventing them from doing evil. Al-Imam al-Ghazali, (1990) (died 505H) in his book *Ihya 'Ulum al-Din* has outlined the principles of *Hisbah's* implementation. The third pillar of *hisbah* concept is:

It should be obvious (clearly) to the experts of hisbah without having to do any spying. Anyone who conceals something wrong in his home, and locks the door so it does not have to be us to peek at it. Allah Ta'ala has forbidden this.

Prof. Dr. Yusof al-Qaradhawi (1984) recorded the 'Umar and 'Abd al-Rahman bin 'Auf as a general guide in explaining the concept of *hisbah*. The story is as follows:

Similarly, what is narrated that 'Umar r.a. has climbed a man's house and found it in an improper state. The man has denied 'Umar and said: If I disobey Allah in one case, you have surely wronged him in three things. 'Umar asked: What is it? *He* said: Allah Ta'ala has spoken (meaning: Do not peek for others' faults). You have done it. Allah says: (Which means: Enter the house through its doors). Surely you have climbed from the roof. Allah says: (Do not enter into any house which is not your home, until you first ask permission and salute its people). You do not salute them. So 'Umar abandoned him ... So, know that whoever locks his door and hid behind his wall, then one must not enter without permission from him just because he wants to know the act

of immorality. Unless it's clearly known to anyone outside the home.

The concept of *hisbah* clearly shows that every individual has the right not to be discriminated against his evil acts. Even the transgressors are given space and opportunity by Allah to repent of their sins and sinners. Allah (SWT) says, which means:

And establish prayer at the two ends of the day and at the approach of the night. Indeed, good deeds do away with misdeeds. That is a reminder for those who remember. (Surah Hud: 114).

The legal administration system in Malaysia can be divided into two administrative structures, namely the structure of the Civil Courts and the Sharī'ah Courts. Each court has a different level in terms of jurisdiction as provided in the Laws Administration Enactment in Malaysia.

The Sharī'ah Courts in the States have been established under the Administration of Islamic Law Enactment in the States, in accordance with item 1 of List II of the Ninth Schedule of the Federal Constitution. Its establishment is also accompanied by its own exclusive jurisdiction, which involves cases of *mal* and criminal cases to the extent provided in the Federal Constitution for Muslim.

In criminal jurisdiction, the Sharī'ah Courts have jurisdiction only to hear and decide on cases of criminal offenses involving offenses punishable by imprisonment for three years, a fine not exceeding RM5000, canning not exceeding six strokes or any combination.

Before the Sharī'ah Criminal Offences Enactment was formulated separately, provisions for offenses relating to Islamic law were found in the State Religious Affairs Administration Enactment. In 1985 a preliminary effort was made by the State of Kelantan to separate criminal offenses from the Administration Council Administration Enactment. Thus, the Sharī'ah Criminal Enactment No. 2, 1985 was drafted and approved by the state government in 1985. It was the first enactment to be separated from the State Islamic Religious Council Enactment, followed by the State of Kedah, which passed its criminal law in 1988, followed by the State of Perlis by approving the criminal enactment in 1991. The state-approved sharī'ah criminal Enactment in the country is generally found to be the same unless there are some

minor differences in it, including the enactment title itself such as the State of Perlis enactment titled Criminal Increment Enactment (Abdul Halim el-Muhammady:1998).

In the Federal Territories, this power is run by Parliament (Zulfikri Bin Yaso:2008). List 1 of the Ninth Schedule of paragraph 6 (e) provides for:

The administration and administration of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya includes the Islamic law therein in so far as the same as provided in item 1 of the State List and in respect of the Federal Territory of Labuan, the laws and custom of the nationals in the same manner as provided for in details 13 Addendum to State List for States of Sabah and Sarawak.

The enforcement of the Sharī'ah crimes refers to implementing the rules provided under any applicable Islamic law such as the provisions found under the Sharī'ah Criminal Offenses Enactment of the States. This sharī'ah criminal offense can be regarded as a victimless crime. The law, which is created in connection with the non-prejudicial crime, is often triggered by controversy (Siti Zubaidah Ismail:2008).

In the context of Islamic criminal law, *ḥudud* means any offense committed not on human beings that has been prescribed by Allah (SWT) in particular (Al-Bajuri:1957, Asy-Syirazi:tt). A criminal offense that is not specifically pronounced by this punishment is called *ta'zir* (al-Mawardi:1328H, al-Kasani:1328H), such as rape and damage to public property. The offense that has been fixed in this sentence but relates to human beings like killing and injuring the body is called *qisas* (Ibn 'Abidin:1966, Ibn Qudamah:1969).

Sharī'ah crimes found in the state's enactments may be defined as the offenses existing in their provisions in the enactments approved by the states whether contained in the Sharī'ah Criminal Enactments or other enactments found therein the provisions of offenses and penalties (Abdul Halim el-Muhammady:1998).

To facilitate discussion, the classification of these sharī'ah criminal offenses can be summarised as follows (Zulkifli Hasan:2007):

a) Offenses under the enactment or sharī'ah criminal act:

- i. Offenses relating to the *'aqidah*;
 - ii. Offences relating to the sanctity of the religion of Islam and its institution;
 - iii. Offenses relating to Islamic pillars, alcohol, gambling and morals;
 - iv. Sexual misconduct;
 - v. Offenses relating to the well-being of others;
 - vi. Multiple Offenses;
- b) Islamic Family Law Enactment or Act:
- i. Penalty in relation to marriage and marriage registration; and
 - ii. General penalty.

Khalwat is the main offences in sharī'ah criminal law. This can be proven through cases reported either in the mass media or in academic journals. For example, refer to the statistics of *khalwat* cases that occurred in Selangor in 2006 according to the age of citizen of Selangor in the Selangor Islamic Religious Council (Zulkifli Hasan:2007).

Malaysia has long been implementing Islamic law, namely the Administration of Islamic Law. This can be proven from a historical perspective. This law has been practised in Terengganu Inscription dated 14 Rejab 702H equivalent 22 February 1303M (Syed Naquib al-Attas 1970: 24). In the inscription it is also provided several rules relating to criminal, transactional and administrative law (Abd Samad Ahmad 1957: 36). Among other things is the Malacca Code of Laws written between 1446-1456M by Hang Sidi Ahmad, the Law of the Sea of Melaka (RO Winstedt; Josselin de Jong 1956: 29), Pahang Code of Law 1596 (RO Winstedt; JE Kampe 1948: 1), Kedah Law 1078H, Law of Qanun Dato, Star (tt), Kedah 1199H / 1784M (RO Winstedt 1928: 1-44), Johor Kanun 1789 (RO Winstedt 1977: 171) and many other Islamic laws, which has been practised in the previous states of Malaya although not entirely (Abd Rahim, Rahimin Affandi 2003: 13).

Ahmad bin Ibrahim in his paper entitled: *Prinsip-Prinsip Perlembagaan Islam dalam Perlembagaan Malaysia (The principles of Islamic Constitution in the Malaysian Constitution)* (1995: 6) stated that:

The better way is to look to the Malaysian Constitution positively and to accept it and to work it out to uphold the principles of the Islamic government. The constitution was the result of negotiations and tolerance among the races in Malaya and then in Malaysia. We must respect the agreement that is based on the consideration and the friendship between the races. At the same time, we must try to think and act positively and use the Constitution to uphold the principles of the Islamic government and at the same time take into account the interests of all races and Malaysians.

He also pointed out that Islamic law should be restored to its original place as the basic law and state law in Malaysia as it is the official religion of Malaysia. Therefore, we no longer need to refer to an outdated English law because it does not coincide with Islamic law. Nevertheless, it is undeniable that laws that do not conflict with Islam can be adopted (Ahmad bin Ibrahim 1995: 7).

In the context of Malaysia's constitution, though there are still many things that contradict the law passed since the colonial period, however, efforts can be taken to amend it in accordance with the requirements of Islamic law. Scholars, Islamic scholars and Muslims must think positively about the drafting and interpretation of the Constitution so that it is closer to the will of Islam (Mohd Rumaizuddin 2005: 24).

That is why efforts to coordinate and develop Islamic law in Sharī'ah Courts throughout the country need to be more comprehensive and harmonious. The concept and direction of Islamic law need to be applied and strengthened. The concept is then explained to the multiracial and multi-religious people in the nation. Without a proper understanding of the legal requirements, there will certainly be problems in terms of interpretation and application (Siti Zubaidah Ismail:2009). This will further enhance the understanding of Malaysians on the greatness of the Islamic legal system with a harmonious approach without inviting greater harm.

5. Conclusion

The concept of *hisbah* in *Sharī'ah Islamiyah* is a general and widespread aspect of promoting good and preventing evil. *Hisbah* needs to be institutionalised systematically as a body that carries the responsibility in parallel with the real concept of *hisbah*. In general, our country has

implemented the concept of *hisbah* in its own form without the branding of an institution specifically as “the *hisbah* institution”. The roles and functions of *hisbah* currently are given to the enforcement department, for an example, the Shari‘ah Enforcement Division and the Islamic Religious Department in the states.

Enforcement and prevention issues are a major problem in the realisation of the true nature of *hisbah*. Often, the efforts and officials performing the task of preventing wrongdoing and arresting offenders are considered to be encroaching on the rights and denying the freedom of the individual or the public. Ironically, the law enforcers are deemed to obliterate the right of the perpetrators arrested in the operation to prevent adulteries and shari‘ah crime.

In the context of the Shari‘ah Criminal Law and its justice system, enforcement and prosecution are based on the Shari‘ah Criminal Procedure Code, which clearly contains all aspects of the procedural matters dealing with the actions of the offenses committed. With the existing provisions, the enforcement authorities and the prosecution will not err in discharging their duties. Since the just administration of shari‘ah crimes needs to be seen upholding justice and to be effective in its implementation, its officers must also be well trained and well-versed in law.

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